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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’
POST-HEARING BRIEF**

Hearing Officer: Duff McKee
Hearing Dates: April 25-May 11,
2011

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INTRODUCTION

The contested case hearing evidence proved that DMV Administrator Alan Frew's February 14, 2011 Memorandum of Decision (Exh. 1), approving the 200+ Exxon/Imperial mega-loads up Highway 12, is deeply flawed and erroneous in multiple respects, including in the following key ways:

- Frew determined 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* Exh. 1, p. 2 (emphasis added). Yet Mammoet's lead witness Darren Bland stated that the mega-load convoys would travel more than 15 minutes without stopping, and hence would not meet that requirement, *see* Bland Test., May 6, 2011 pp. 191-92 & 199. Either Mr. Frew wholly misunderstood Mammoet's proposed travel plan, or Mammoet is unwilling to adhere to ITD's travel requirements – either way, the Hearing Officer must reverse based on this fundamental dispute between the agency and permittee.

- The Memorandum of Decision approved the mega-loads on grounds that the “transports have been carefully planned . . . in order to ensure safe, environmentally responsible movements with minimal disruption to Idaho citizens,” “utility service interruptions for Idaho customers are not expected,” and “[n]o impact to the Idaho environment or scenery will occur,” *see* Exh. 1, pp. 2-4. Yet the so-called “Test Validation Module” (TVM) proved all of these assumptions to be false. Despite the “careful planning,” the TVM knocked off a large branch leaving Lewiston, then struck a guy wire that knocked out power to 1300 Idaho customers and blocked Highway 12 for nearly an hour – which led to more utility line relocations that caused further traffic

delays, and extensive tree cutting that has damaged scenic values of the Highway 12 Wild and Scenic corridor. Again, because Frew's Memorandum of Decision thus erred in its basic assumptions in approving the mega-loads, the Hearing Officer must reverse.

- The Memorandum of Decision also explicitly engaged in "balancing competing concerns" to approve the mega-loads, *id.*, pp. 7-8, in which Frew dismissed the public's opposition as being "subjective" or "hypothetical" while accepting without question Exxon/Imperial's asserted need to transport the mega-loads from Korea to the Alberta Kearl tar sands via Highway 12 through Idaho. The Memorandum of Decision thus confirms that ITD did not place a primary concern on public safety, convenience, and preservation of the highway system, as required by the over-legal permit regulations, IDAPA 39.03.09.100.01.

These and other defects in the Memorandum of Decision, discussed below, thus require the Hearing Officer to recommend to the ITD Director that the Memorandum of Decision be withdrawn because it is arbitrary, capricious, an abuse of discretion and contrary to law under the ITD over-legal permit regulations.

In addition, the hearing record demonstrates that ITD's approval of the Exxon/Imperial mega-loads violates specific requirements of the ITD regulations, including the following claims raised by Petitioners:

Preservation Of The Highway System: The hearing record – including numerous written analyses and memos by ITD bridge engineers, and the testimony of Shannon Murgoitio and Kathleen Slinger – demonstrated that ITD performed extensive analysis to determine that Highway 12 bridges could handle – just barely – the Exxon/Imperial mega-loads. Petitioners do not challenge the bridge engineers' conclusions.

Standing in stark contrast to the Bridge Section's careful analysis, however, is ITD's failure to conduct any comparable review of mega-load impacts on the highway pavement. As the hearing showed, ITD did not prepare any written reports or memos addressing impacts of mega-loads on the highway surface before approving the Exxon/Imperial shipments. And while ITD's materials engineer Jeff Miles later calculated the "equivalent single axle loads" (ESALs) associated with the Exxon/Imperial mega-loads for his testimony at the hearing, neither Miles nor any other ITD witness disputed the showing by Petitioner's transportation engineer, Pat Dobie, that ITD will only recover a fraction of the costs of the highway damage from mega-load fees, even using Miles' ESAL calculations.

Approving such unprecedented shipments without recovering the costs they will impose on the State thus demonstrates that ITD has not met its duty to place a primary concern on "preservation of the highway system" under the over-legal permit regulations.

Public Safety and Convenience: ITD also failed its related duty under the regulations to place a primary concern on public safety and convenience. Although ITD justified approving the mega-loads to travel Highway 12 at night as serving public convenience and safety, the hearing record demonstrates numerous errors and omissions in ITD's approval, including:

- Since 2000, all over-legal loads on Highway 12 have been required to travel during daytime because night-time travel increases hazards to the travelling public due to poor visibility, driver fatigue, and other factors. ITD never addressed these facts, nor did it consider that Highway 12 has an above-average crash record and many areas of poor pavement already.

- ITD never investigated emergency room visits that require travel on Highway 12, and no witness at hearing refuted Dr. Caldwell’s expert testimony that the mega-loads would increase safety risks to the public from delayed emergency medical care.

- ITD’s determination that vehicles travelling on Highway 12 would experience at most 15-minute delays is inherently flawed, because ITD only considered delays while vehicles are stopped at flagger stations and not other traffic delays associated with the mega-loads – including vehicles that may have to stop repeatedly on Highway 12 if there are multiple mega-loads using the highway; time lost when vehicles slow down as they approach or follow the convoy; and the delays caused by tree trimming and utility line relocations necessary to clear the “high and wide” route for the mega-loads to travel up Highway 12.

- Neither District 2 nor other ITD staff could explain how Mammoet developed its 15-minute delay projections, which the hearing showed are unreasonable because they do not account for the entire convoy’s travel time to clear turnouts, they wrongly assume that vehicles will pass the mega-loads at posted speed limits, and they fail to account for actual traffic volumes that exist on Highway 12.

- District 2 maintenance engineer Doral Hoff testified that he followed ITD’s requirements for highway construction traffic control plans in approving the Mammoet plan with 15-minute delays. Yet the Mammoet plan was marked “preliminary” and was not submitted by any registered Idaho engineer, in violation of the ITD construction travel plan requirements. And the travel plan has changed substantially since it was approved by Mr. Hoff and ITD, even after the hearing started – as demonstrated by Mammoet’s decision during the hearing to add a fourth flagger team after Petitioner’s

expert Mr. Dobie demonstrated that the three-flagger system proposed in the travel plan and approved by ITD would not work.

In short, if public safety and convenience were ITD's primary concern, the agency would not have followed such a sloppy, informal process here – a process which would not be allowed for highway construction projects.

Traffic delays: Finally, the testimony presented at hearing confirms that ITD has authorized the Exxon/Imperial loads to delay traffic for periods of longer than ten or even fifteen minutes, in violation of the “frequent passing” and “10-minute delay” rules of Chapters 11 and 16 of the ITD regulations, IDAPA 39.03.11.100.05 & 39.03.16.100.01.

On a purely legal level, ITD is reading Chapters 11 and 16 incorrectly. Chapter 16 establishes 10 minutes as the maximum amount of time for which a non-reducible over-legal load can delay the traveling public. ITD's contrary interpretation conflicts with the plain language of the regulations, was premised on misunderstandings and ignorance by ITD staff of the applicable regulations, and accordingly must be rejected by the Hearing Officer without deference.

But even if the Hearing Officer adopts ITD's reading that 15-minute traffic delays are the maximum allowed, the hearing evidence demonstrated that the Exxon/Imperial mega-loads will cause longer traffic delays than this. Again, the 15-minute delay calculations by Mammoet are based on unrealistic assumptions about traffic volumes and travel times for both the mega-load convoys and vehicle traffic on Highway 12; and do not adequately account for the demanding conditions on the narrow, winding curves and cliffs along the Clearwater and Lochsa Rivers. Just because Mammoet has come up with 15-minute delay projections on paper, the hearing record demonstrated that conditions in

the real world are far more complicated – and hence it is unrealistic to assume that Mammoet can comply with the closely calibrated travel plan and projected traffic delays set forth in the approved transportation plan (Exh. 2).

For these and other reasons set forth below, Petitioners respectfully request that the Hearing Officer recommend that ITD’s February 14, 2011 Memorandum of Decision be withdrawn; and that no further over-legal permits for Exxon/Imperial’s mega-loads be approved for Highway 12.

STATEMENT OF FACTS

This section presents a brief review of some of the key facts elicited from the various witnesses at hearing. The Argument section then presents a detailed discussion of how the hearing evidence confirms Petitioners’ legal challenges:

I. ITD AND ISP WITNESSES.

A. Testimony of Alan Frew.

ITD’s Motor Vehicles Administrator, Alan Frew, is the head of ITD’s Division of Motor Vehicles. In this capacity, Mr. Frew oversees the Motor Carrier Services Department and the issuance of over-legal permits. Frew Test., April 27, 2011 pp. 205-206. Overlegal permits, like drivers licenses, are a privilege, not a right. Frew Test., April 28, 2011 p. 108-109.

Although Mr. Frew does not usually have direct involvement in the over-legal permitting process, he wrote and signed the February 14, 2011 Memorandum of Decision (Exh. 1) that authorizes Exxon/Imperial to transport “200 plus” over-legal loads up U.S. Highway 12. Frew Test., April 27, 2011, pp. 206, 208, 246. Mr. Frew stated that he reviewed the Mammoet transportation plan prior to issuing the Memorandum of

Decision, but relied on two subordinates, Doral Hoff and Dave Couch, to do the “full, in-depth analysis” of the plan and traffic clearing locations. Frew Test., April 28, 2011 pp. 15, 35, 37-38. Consequently, as Mr. Frew admitted, any errors in the subordinates’ analysis or assumptions would have tainted Mr. Frew’s approval of the plan. *Id.* p. 38.

Mr. Frew acknowledged that all over-legal loads that ITD has permitted on Highway 12 in the last decade, aside from the Conoco and Exxon/Imperial mega-loads, were required to travel during daylight hours, due to safety concerns. *Id.*, pp. 55-59; *see also* Exh. 459 (summary listing of prior permits) & Exhs. 203-04 (copies of permits). Mr. Frew also admitted that ITD has never denied a permit on public convenience grounds before; and that never before has ITD seen such public concern about over-legal permits as the proposed Highway 12 mega-loads. Frew Test., April 27, 2011, pp. 273.

Under the Memorandum of Decision, as Mr. Frew testified, one Exxon/Imperial mega-load would be allowed to travel on each stage of the three-night transit from Lewiston to the Montana border, meaning that three mega-loads could be on Highway 12 on any particular night.

The Memorandum of Decision further stated that ITD would require a “bond” from Exxon/Imperial in the amount of \$10 million to indemnify ITD from potential damage to highway bridges or public property (Exh. 1, pp. 8-9); but the ITD-approved permit actually was based on an insurance policy instead of a bond (Exh. 5, pp. 7-10). Despite stating in the Memorandum of Decision that a bond would be required, Mr. Frew confessed he did not understand the difference between a bond and insurance policy. *Id.*, pp. 87-90. Mr. Frew conceded that the bond/insurance requirement was imposed because

Exxon/Imperial mega-loads present an “extraordinary hazard” to the travelling public on Highway 12. *Id.*, p. 87-88.

B. Testimony of Reymundo Rodriguez.

Mr. Rodriguez is the manager of ITD’s Motor Carrier Services Department. In that capacity, he oversees the issuance of over-legal permits. His office issues between 64,000 and 69,000 over-legal permits a year, slightly less than half of which are for “non-reducible” loads. Rodriguez Test., April 25, 2011 p. 122. Mr. Rodriguez is not an engineer and has no responsibility for addressing engineering issues. *Id.* p. 170.

Although Mr. Rodriguez testified about ITD’s consideration of safety and public convenience, he relied extensively on the analysis of other ITD employees. Specifically, Mr. Rodriguez relied on the District 2 office to ensure that the Exxon/Imperial over-legal permits comply with the safety and convenience requirements of IDAPA 39.03.01.09; and on the Bridge Section to ensure that issuing particular permits is consistent with the preservation of the highway system. *Id.* at 139-140, 170-171.

Mr. Rodriguez reviewed the Mammoet transportation plan “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.” *Id.* p. 177. *See also id.* p. 224 (reiterating that it is District 2’s responsibility to review the transportation plan).

Mr. Rodriguez also admitted that the extensive tree trimming done along Highway 12 during April 2011 within the Wild and Scenic corridor to allow passage of the TVM has had an adverse environmental impact on scenic values. *Id.*, pp. 212.

C. Testimony of Regina Phipps.

Ms. Phipps is the vehicle size and weight specialist at ITD's headquarters in Boise. Phipps Test., April 25, 2011, p. 271. Her duties include overseeing the permitting of over-legal loads, training other ITD staff about the permitting process, and developing the policies that ITD follows in issuing over-legal permits. She is not an engineer and has no engineering responsibilities. *Id.* p. 272.

As ITD's size and weight specialist, Ms. Phipps was charged with evaluating the necessity and feasibility of Exxon/Imperial's proposed shipments. Phipps Test., April 25, 2011, p. 299. She testified that ITD did not consider any routes outside of Idaho in evaluating the necessity of moving the Exxon/Imperial loads on Highway 12. *Id.* pp. 289-290. Ms. Phipps admitted Highway 12 was not a feasible route for the Exxon/Imperial loads at the time the applicant first contacted ITD in 2008 because Highway 12 had many overhead obstructions at that time. Only after Exxon/Imperial had raised and buried numerous utility lines did it become possible to ship the modules on Highway 12. *Id.* pp. 290-291.

Ms. Phipps admitted that Mammoet or Exxon/Imperial referred to creating a "high and wide corridor" up Highway 12 in early meetings with ITD, as reflected in the Validation Module Route Study Execution Plan discussed at the hearing. Phipps Test., April 26, 2011, pp. 295-296; Exh. 200. Mr. Phipps also conceded that at her very first meeting over the Exxon/Imperial loads, the applicant described the Highway 12 route as saving "1,430 miles of highway travel and 7,000 miles of nautical travel" that would be required for another route; yet ITD never analyzed that route. *See* Exh. 179.

D. Testimony of Shannon Murgoitio.

Shannon Murgoitio, ITD's bridge load rating engineer, is responsible for creating and maintaining the computer models that ITD's Bridge Section uses to "to evaluate a structure's ability to carry vehicular traffic." Murgoitio Test., April 26, 2011 p. 590. In evaluating a bridge's ability to support a particular load, the Bridge Section uses the Manual for Bridge Evaluation published by the American Association of State Highway and Transportation Officials ("AASHTO"), which develops national standards for transportation engineering principals. *Id.* p. 594. The Bridge Section uses software developed by AASHTO called Virtis to analyze the majority of its bridges. *Id.* pp. 601, 610-611. ITD continually reevaluates the load ratings of its bridges, *id.* p. 618, and most bridges are inspected every two years.

Ms. Murgoitio analyzed dozens of proposed load configurations submitted by Exxon/Imperial since 2008. Ms. Murgoitio described the thorough, careful analysis that ITD's bridge section conducted to enable the Exxon/Imperial loads to travel over ITD's bridges safely. *See* Murgoitio Test., April 26, 2011, pp. 596-600 (describing the process Ms. Murgoitio used to review Exxon/Imperial's application for overlegal permits); *id.* pp. 632-633 (describing Ms. Murgoitio's process used to "make sure that any change in bridge condition or any updated load rating was taken into account when permits need to be reissued). Numerous written memos and other documents in the record reflect this careful analysis. *See* Exhs. 14, 15, 20-22, 27-29, 60.

Ms. Murgoitio's analysis, however, did not consider the impact of the Exxon/Imperial mega-load on highway pavement, nor did ITD's bridge section attempt to

calculate EASLs for the mega-loads' impacts on pavement. *See* Murguito Test., April 26, 2011, p. 645.

E. Testimony of Kathleen Slinger.

Ms. Slinger is ITD's bridge inspection engineer who manages the bridge inspection program. She has been involved in reviewing the Exxon/Imperial over-legal loads applications "on a cursory level," but primarily relied on Ms. Murguito to conduct the appropriate analysis. *Slinger Test.*, April 26, 2011 p. 688. Ms. Slinger described the process ITD uses to inspect its bridges. *Id.* pp. 689-691.

Ms. Slinger stated that each one of Exxon/Imperial's loads will be weighed before it travels on Highway 12, but admitted that this requirement is not included in the permit. *Slinger Test.*, April 26, 2011 pp. 702-703. She agreed that impacts to highway infrastructure such as bridges can take years to become evident. *Id.* p. 706. She further admitted that Exxon/Imperial's mega-loads are "heavy loads" that are close to the threshold of not being able to go over Highway 12's bridges. *Id.* p. 712.

F. Testimony of Doral Hoff.

Doral Hoff is ITD's maintenance engineer for District 2. His responsibilities include evaluating and reviewing traffic control plans. Although Mr. Hoff is trained as an engineer, his job involves very little engineering analysis. *Hoff Test.*, April 27, 2011 pp. 7, 41-42.

Mr. Hoff has been involved in ITD's approval of the mega-loads since ITD's first meeting with Imperial Oil in September 2008. He was aware of the 2009 Imperial "Validation Module Group Study Execution Plan" (Exh. 200), which was in his files and discussed turning Highway 12 into a "high load" corridor for shipment of equipment

manufactured overseas to the Alberta tar sands. *Id.*, pp. 52-57. Mr. Hoff sits on the District 2 permit committee, which approved permits for tree trimming and utility line relocations within the Highway 12 right-of-way, which were necessary to allow the mega-loads to be transported up Highway 12. *Id.*, pp. 66-76 & Exhs. 41-42. He admitted that ITD did not assess impacts on scenic values in approving these permits. *Id.*, p. 76.

Mr. Hoff worked with the District 2 traffic engineer, Dave Couch, to review Mammoet's transportation plan, but it is Mr. Hoff who "bears the responsibility for approving the transportation plan." Hoff Test., April 27, 2011 pp. 47-48.

Neither Mr. Hoff nor Mr. Couch performed independent analysis of the transportation plan, other than to review it and a video log of Highway 12 turnouts to determine whether they are spaced "4, 5, 6 miles apart," which is the distance they thought necessary to meet a 15-minute traffic delay requirement. *Id.*, pp. 18-19, 32-33. Mr. Hoff did not participate in ITD's consideration of necessity or preservation of the highway system. *Id.* pp. 120-121.

Mr. Hoff testified that the "purpose of the transportation plan is to provide details on how the transporter is going to meet the 15-minute delay" requirement. *Id.*, p. 6. He described how, under the approved transportation plan, Mammoet will use three teams of flaggers which will "leap frog" in order to limit traffic delays to 15-minutes. *Id.*, pp. 6, 15-16. Mr. Hoff also described how the Mammoet transportation plan provides for the mega-loads to follow a three-stage sequence in travelling up Highway 12, going from Lewiston to Kooskia the first night; from Kooskia to milepost 139 the second night; and then to the Montana border on the third night of travel. *Id.*, pp. 13-14; *see also* Exh. 2 (Mammoet Transportation Plan), pp. 7-64 (detailed description of the three-stage travel

plan) & pp. 117-21 (15-minute delay spreadsheet).

Mr. Hoff testified that the 15-minute delay limit is derived from ITD's standard specification manual for construction, *id.*, pp. 17 & 34; *see also* Exhs. Mr. Hoff testified that it was appropriate to use the 15-minute construction delay since the mega-loads are like construction projects in interrupting and delaying traffic. *Id.*, pp. 34, 116. Mr. Hoff admitted that he was not familiar with the ten-minute delay provision under Chapter 16 of the ITD IDAPA regulations, and first learned of it after Petitioners challenged the Conoco mega-shipments in August 2010. *Id.*, pp. 17-18, 116-21 & Exhs. 152, 167-68.

Mr. Hoff confessed that he had little familiarity with how the 15-minute delay spreadsheet of the Mammoet travel plan was calculated; and that he needed Mammoet to explain it. *Id.*, pp. 100-03. Mr. Hoff did not check Mammoet's travel delay calculations, nor did he verify the traffic volume counts that Mammoet used to prepare its travel and calculate the delays. *Id.*, pp. 92-93. Mr. Hoff conceded that the 15-minute delay spreadsheet only accounts for vehicles that are stopped at flagger stations, even though the actual delays experienced by the public can be longer because of having to slow down when approaching or following the mega-loads. *Id.*, pp. 104-05, 109-11, 115.

Mr. Hoff described how, despite Mammoet's assurances that Highway 12 was ready for the transport of Exxon/Imperial's megaloads, the TVM clipped a guy wire attached to a power pole during its very first night of travel. The load immediately stopped at a nearby turnout while ITD and ISP contacted the power company. Traffic on Highway 12 was stopped for 40-50 minutes until ITD and ISP determined it was safe to begin moving traffic again. The TVM did not complete its intended route that night. *Id.* pp. 20-21. At ITD's request, Mammoet prepared a explaining how this guy wire incident

occurred. *Id.* p. 24. Since then, numerous powerlines has been raised and Imperial's contractor Asplundh has conducted extensive tree trimming. *Id.* p. 60-62, 66.

Mr. Hoff further testified that ITD's materials team had **not** reviewed the transportation plan, although Hoff himself had conferred with the Materials Department in Boise about how close to the fogline the Exxon/Imperial loads can travel. *Id.* pp. 50-51. Mr. Hoff admitted that District 2 staff did not attempt to calculate ESAL loadings for the Exxon/Imperial shipments, although he is familiar with the concept. *Id.*, pp. 51-52.

G. Testimony of Dave Couch.

Mr. Couch is a traffic engineer employed by ITD's District 2. He worked with Doral Hoff to review the Mammoet transportation plan, but testified that Mr. Hoff had primary responsibility for approving the plan. Mr. Couch explained how a transportation plan should work. Couch Test., April 28, 2011 p. 126.

Mr. Couch confirmed Mr. Hoff's testimony that ITD District 2 received the 2009 "validation module route study execution plan" (Exh. 200) which discusses establishing Highway 12 as a "high load" corridor for oil sands equipment. *Id.*, pp. 128-30. He agreed with Mr. Hoff that District 2's analysis of the Mammoet traffic control plan was based on highway construction traffic control principles. *Id.*, p. 129. Also like Mr. Hoff, Mr. Couch reviewed the transportation plan generally, but did not independently assess the traffic volumes or 15-minute delay projections made by Mammoet. *Id.*, pp. 130-34.

Mr. Couch also confirmed Mr. Hoff's testimony that ITD calculated traffic delays based on time that vehicles are stopped at a flagger station, and not other delays that vehicles encountering mega-loads on Highway 12 would actually experience. *Id.*, pp. 154-55. Mr. Couch also admitted that the prior Conoco mega-loads on Highway 12

caused several delays of traffic exceeding the 15-minute requirement. *Id.*, pp. 160-72.

H. Testimony of Adam Rush.

Mr. Rush is the Public Involvement Coordinator for ITD's office of communications. His responsibilities include organizing public meetings and responding to public inquiries. Rush Test., April 27, 2011 p. 133. Mr. Rush was assigned to work on the Exxon/Imperial project after ITD began receiving a large number of comments from the public in spring of 2010. Rush Test., April 27, 2011 p. 134.

Mr. Rush testified that ITD has received approximately 1,000 comments concerning Exxon/Imperial's proposal to ship "200 plus" mega-loads up Highway 12. *Id.* p. 136. Through these comments, the public brought a number of potential, alternate routes to ITD's attention and expressed concern about the impacts that the mega-loads will have on public safety and convenience. *Id.* p. 149-152. ITD relied on Exxon/Imperial to draft responses to the public comments. *Id.* p. 160.

In response to the outpouring of public sentiment, ITD held three public meetings in the summer of 2010 where Exxon/Imperial was given an opportunity to present information about the project to the public. *Id.* p. 134. ITD has not conducted any public comment period since July 2010 on the Exxon/Imperial proposal. *Id.*

I. Testimony of Jeff Miles.

As ITD's state materials engineer, Mr. Miles oversees pavement design and management for ITD. Miles Test., April 28, 2011 p. 193. Mr. Miles testified that his office did not prepare any written report or analysis of impacts on Highway 12 pavement from the Exxon/Imperial mega-loads, although he recalled having some brief conversations with District 2 engineer Jim Carpenter about the mega-loads in the past.

Id., pp. 215-16, 222-23.

Mr. Miles explained the concept of “equivalent single axle loads” (ESALs) that engineers use to calculate impacts that vehicles will have upon highway pavement. In his initial testimony, Mr. Miles asserted that he had calculated – for purposes of the hearing – that the TVM tallies 19.5 ESALs based on use of the last segment of Highway 12 (up to the top of Lolo Pass). *Id.*, pp. 199-204, 222-23. In his rebuttal testimony, however, Miles stated that he re-calculated the TVM as 16.2 EASLs. *See Miles Test.*, May 3, 2011, 2011, pp. 136-37, 146-50. Mr. Miles admitted that the latter calculation did not include the second push truck to be used up Lolo Pass, which would add another 4.5 ESALs to the equation. *Id.*

Mr. Miles’s rebuttal testimony disputed the ESAL calculations by Petitioners’ expert, Mr. Dobie, who (as noted below) determined that the TVM totals 28 ESALs. *Id.* Notably, however, Mr. Miles did not even attempt to dispute – or even address – Mr. Dobie’s testimony that the costs of the damage done to Highway 12 pavement by the TVM and other Exxon/Imperial mega-loads would exceed the net revenues received by ITD from the mega-load fees by a factor of several times; and hence even if Mr. Miles’ ESAL calculations are correct, the damage done by the mega-loads to the highway pavement still exceeds the revenues paid by the mega-loads.

J. Testimony of Lonnie Richardson.

Captain Richardson is captain of the Idaho State Police (“ISP”) for five counties in north central Idaho: Latah, Lewis, Nez Perce, Idaho and Clearwater. *Richardson Test.*, April 29, 2011 p. 57. Captain Richardson oversees 17 officers; however two of those positions are currently vacant and one officer is away on leave. *Id.* p. 57.

Captain Richardson testified that, under an agreement ISP has entered into with ITD, ISP provided escort service for the TVM but no comparable agreement has been signed for the rest of the 200-plus loads authorized by Mr. Frew's Memorandum of Decision. ITD is not required to accompany mega-loads by state law; they are free to decline escort duty if sufficient resources are not available. *Id.* pp. 66-67.

The presence of ISP among the entourage serves as an important safety function by providing communication. *Id.* at 48-49. However, Captain Richardson testified that if ITD allows more than one mega-load to travel on Highway 12 on any given night, ISP would have to reduce the number of officers that accompany each load because ISP does not have the staff to provide four officers per load for more than one load. *Id.* pp. 58-59.

K. Testimony of Allen Oswald.

Lieutenant Oswald is Captain Richardson's lieutenant in charge of patrol operations. Lieutenant Oswald escorted the Conoco shipments on six nights of travel and escorted the TVM on its first night of travel. Oswald Test., April 29, 2011 p. 70-71.

Lieutenant Oswald testified about ISP's role in escorting the Exxon/Imperial mega-loads, and stated that one of ISP's duties is to "assist the megaload in reaching its destination." *Id.* p. 79. He further testified that ISP will not remove vehicles from turnouts in order to enable the mega-loads to comply with the 15-minute rule:

The temporary clearing [turnout], if there's a car in there, they can't clear there. They're just going to have to continue on and move to the next opportunity. We're not going to go and tow someone's vehicle out of a turnout because they camping just because we need a megaload to pull over and make a 15-minute clear. That's something that we wouldn't normally do. Based on our procedures and state law, if a vehicle is parked in ITD right-of-way, that is not on the pavement, we can tag it and remove it after 48 hours or under extreme emergency.

Id. pp. 80-81.

II. PETITIONERS' WITNESSES.

A. Testimony of Ruth May.

Mrs. May and her husband, Jim, own and operate the Reflections Inn, a bed and breakfast located on Highway 12 upriver from Kooskia that caters to travelers seeking a quiet getaway. May Test., April 25, 2011 pp. 12-14. Mrs. May testified that Highway 12 is the only way that she or her husband have to access their home or for her husband to commute to work; and that they use Highway 12 on a daily basis (including at night). Guests at the Reflections Inn use Highway 12 as early as 4:30 in the morning to access hiking and fishing locations; and guests also travel back to the Inn at night after eating dinner or exploring surrounding areas. *Id.* p. 15.

The Mays chose to invest in the Reflections Inn because of its location as a scenic tourist destination within the Highway 12 federally-designated Wild and Scenic corridor, which they believe protects the value of their property. Guests are attracted to stay at their inn because of the scenic and tourism values of the area. *Id.*, p. 23. These scenic values are threatened by mega-loads turning Highway 12 into a “high and wide” industrial corridor. *Id.* pp. 33-34, 40.

Both the Mays and their guests have experienced medical emergencies that have required them to use Highway 12 to get to the emergency room in Orofino quickly, sometimes at night. *Id.* pp. 16-17. The Mays are concerned that the mega-loads on Highway 12 will obstruct or delay them or guests from getting access to emergency medical care, which requires them to travel down Highway 12. *Id.*

The two Conoco mega-loads that had travelled up Highway 12 past Reflections Inn at the time of the hearing caused noises and bright lights that disturbed Mrs. May, and

she is concerned that the 200+ Exxon/Imperial mega-loads will cause similar impacts. In addition, Mrs. May observed that there was little or no commercial truck traffic on Highway 12 during the nights of the mega-load shipments, indicating to her that commercial traffic was asked not to be on the highway during the mega-load moves, and underscoring that if the Exxon/Imperial mega-loads similarly discourage commercial truck traffic from using Highway 12 at night, it will increase commercial traffic on the highway during daytime – thus increasing traffic volumes during the day and increasing safety hazards. *Id.*, pp. 29-30.

Mrs. May has witnessed the extensive tree trimming along Highway 12 within the Wild and Scenic corridor that Exxon/Imperial conducted after the TVM hit a tree and guy wire on its first night travel from Lewiston. *Id.*, pp. 33-35 & Exh. 514. The tree trimming has impaired scenic values already, and would not be allowed to be done by private parties even on their own properties. *Id.*

B. Testimony of Peter Grubb.

Mr. Grubb is a licensed river outfitter who operates ROW Adventures, a business that takes tourists on rafting, fishing, biking, and hiking excursions under permit from the U.S. Forest Service. Grubb Test., April 25, 2011 pp. 72-73. Mr. Grubb and his wife also own and operate the River Dance Lodge, which is located at Syringa on Highway 12, and includes cabins and a restaurant; this Lodge represents “the largest investment in tourism infrastructure in Idaho County 25 in at least 20 years.” *Id.* p. 75.

Mr. Grubb and his wife use Highway 12 repeatedly for personal and business reasons, including getting to and from the River Dance Lodge. *Id.*, pp. 82. They also use Highway 12 to drop off, escort, and pick up guests running the Lochsa and Middle

Fork Clearwater Rivers. *Id.*, p. 83. River runners, including ROW Adventures, regularly use turnouts along Highway 12 to access the river and provide safety for river runners; and use of the turnouts by mega-loads, as planned by Mammoet, will impair the public's use and access of the highway, river, and public lands. *Id.*, pp. 84-85.

Mr. Grubb testified that recent construction on the Syringa-to-Tumble Creek stretch of Highway 12 caused noises and traffic delays that his customers complained about; and that use of Highway 12 for Exxon/Imperial and other mega-loads would threaten his business by destroying or damaging the tourism appeal of the area. *Id.*, pp. 97-99, 106-08.

C. Testimony of Vicki Garcia.

Vickie Garcia is a long time resident of the Highway 12 corridor, residing near Kooskia. She and her husband use Highway 12 daily to access employment and rental properties, as well as essential goods and services such as the grocery store because "where we are positioned, Highway 12 is the only way we can go anywhere." Garcia Test., April 28, 2011 p. 230.

Ms. Garcia testified about her video-taped experience encountering a mega-load on Highway 12 at night, *id.* pp. 237-254, which caused much confusion and extensive delays beyond the 15-minutes approved by ITD. *Id.*, pp. 237-42 & Exhs. 386-87. Ms. Garcia also described how the substantial amount of tree trimming during April 2011 impacted her ability to travel on Highway 12 and injured her by diminishing the natural beauty of the area. *Id.* p. 267-268. Ms. Garcia also explained that authorization of the Exxon/Imperial mega-loads would inconvenience her by impeding her ability to reach family members in Lewiston in the even of an emergency. *Id.* pp. 266.

D. Testimony of Janice Inghram.

Janice Inghram is a life-long resident of Grangeville, Idaho who regularly uses Highway 12 for business and recreation. Ms. Inghram and her husband operate a photography business, Images by Inghrams, and they rely on Highway 12 to access the locations where they take most of their photographs. Inghram Test., April 29, 2011 pp. 5-7. They also use Highway 12 in connection with their volunteer work. Both their volunteer work and photography frequently require them to use Highway 12 late at night or early in the morning. *Id.* p. 8.

Ms. Inghram testified about her experiences observing and encountering both the Conoco mega-loads and Exxon/Imperial's test validation module. She explained that being inconvenienced by a mega-load is categorically different from being inconvenienced by other types of vehicles. *Id.* p. 21.

E. Testimony of Linwood Laughy.

Mr. Laughy and his wife live on Highway 12 just up from the Maggie Creek bridge, within the Wild and Scenic corridor. Laughy Test., May 2, 2011, pp. 2-10. Mr. Laughy grew up in the Lewiston area, and has lived or returned to the Clearwater valley ever since. *Id.* He and his wife have researched and published a tourist mile-by-mile guide to Highway 12; and he leads tours exploring the historical, scenic and other values of the area. *Id.*, pp. 6-12. Based on his lengthy personal experience, Mr. Laughy is very familiar with conditions on Highway 12, including turnouts to be used as part of the Mammoet travel plan. *Id.*

Mr. Laughy and his wife make numerous trips on Highway 12 in and around the Kooskia area, which are not registered on the ITD automatic traffic recorders located

west of Kamiah and east of Lowell. *Id.*, pp. 10-32, 39-40, 47-48. Mr. Laughy estimated that he takes 40 trips on Highway 12 that do not pass these counters, for every one trip that does. *Id.* Traffic volumes in this area are much higher than the ITD traffic counters report. *Id.* Indeed, Mr. Laughy counted 14 vehicles at the intersection of Highways 12 and 13, near Kooskia, within twenty minutes one recent morning at about 4 am. *Id.*

Mr. Laughy testified that he and many other local residents conducted monitoring of the first two mega-loads allowed up Highway 12 (the Conoco shipments), which violated their approved travel plan in many ways, including by causing repeated traffic delays longer than 15 minutes and took far longer to reach the Montana border than was projected. *Id.*, pp. 30-43, 99-111 & Exh. 385 (monitoring emails). Mr. Laughy has also experienced power outages and tree trimming for the mega-loads on trees located on his property within the Highway 12 right-of-way. *Id.* These same problems can be expected with the Exxon/Imperial mega-loads. *Id.*

Mr. Laughy further testified about the lack of public notice and communication from ITD and the applicants for the mega-load shipments that have been approved for Highway 12, including Conoco and Exxon/Imperial. *Id.*, pp. 44-56. Because of the many problems experienced by mega-loads – which caused them to be parked along Highway 12 for days and even weeks at a time – the public has been unable to determine whether a mega-load will be travelling on a specific night or not. *Id.* (p. 48: “it is literally impossible to try to keep up with then this thing is going or not going”). The lack of timely and accurate public notice causes many kinds of inconvenience to Mr. Laughy and others; and parking the mega-loads in turnouts interferes with the public’s access to boat launches and other facilities. *Id.*

Mr. Laughy testified that the mega-loads pose numerous impacts to public safety and convenience, including because they may interfere with access to emergency medical care, have a more difficult time than anticipated in negotiating the narrow curves and steep bluffs of Highway 12, cause confusion to travelling motorists, and interfere with the public's use of turnouts and access to public lands – particularly during the high use rafting and tourist summer seasons. *Id.*, pp. 55-92 & Exhs. 424, 425, 427, 431, 432 (photos of Highway 12). Mr. Laughy himself has experienced numerous delays over 15 minutes and confusion as a result of encountering mega-loads on Highway 12. *Id.*, pp. 80-87. Winter shipments, which are authorized under the Mammoet transportation plan, pose particular logistical difficulties, as already seen with the Conoco mega-loads and TVM. *Id.*, pp. 86-90.

F. Testimony of Dr. Bill Caldwell.

Dr. Caldwell is an emergency room physician at the Clearwater Valley Hospital, which is located in Orofino, Idaho. Caldwell Test., May 3, 2011, p. 63. He is also the director of emergency medical services in Kamiah and co-director of the Clearwater County ambulance service. *Id.* pp. 64-65.

Dr. Caldwell explained that the Orofino emergency room serves the area within approximately a 30-mile radius of the hospital. Patients also come from communities farther east along Highway 12 such as Lowell. *Id.* p. 69. Approximately 95% of the patients who come to the emergency room in Orofino arrive by way of Highway 12, and 80 percent of those patients arrive by private car rather than ambulance. *Id.* p. 71.

Dr. Caldwell testified that ITD's decision to authorize 200-plus mega-loads on Highway 12 will have a significant impact on public safety, because having a rolling

roadblock on Highway 12 is inherently inconsistent with public safety. *See* Caldwell Test., May 3, 2011 pp. 104-106. Dr. Caldwell further testified that ITD did not consult with either the Clearwater Valley hospital or the local ambulance service about how authorizing the mega-loads would impact public safety. *Id.* pp. 74-75.

G. Testimony of Dr. Steve Seninger.

Dr. Seninger is a professional economist from the University of Montana, specializing in economic development and impact analysis. Seninger Test., April 26, 2011 p. 507-08 & Exh. 484 (Seninger CV). In his over 40 years of experience as a professional economist, he has conducted economic impact studies, worked and consulted on projects dealing with unemployed workers, and prepared economic projections about the impacts that a particular activity or event will have upon the economy of a certain area. *Id.* pp. 555-56.

Dr. Seninger testified that tourism accounts for a significant percentage of jobs in north central Idaho: 3600-4000 jobs in Nez Perce, Latah, Clearwater, Lewis, and Idaho counties. *Id.* pp. 515-516. Based on studies conducted and published by the Idaho Department of Tourism, spending on tourism in the north central Idaho region amounts to \$3.5 billion annually, which “translates into approximately \$84 million annually in annual payroll from travel and tourism.” *Id.* pp. 522-523.

In economic terms, the main “attractive forces” for the north central Idaho tourism economy are “the scenic views, the natural resources, wildlife viewing, mountains and rivers.” *Id.* pp. 524-525. The authorization of “200 plus” mega-loads to travel on Highway 12 will negatively impact the tourism industry because the industrialized nature of the transport contradicts the values that bring tourists to the

Highway 12 corridor. Seninger Test., April 26, 2011, p. 558. The negative impacts on the tourism industry will far outweigh the positive economic impacts generated by the project. *Id.* pp. 558-559.

Dr. Seninger further testified that Exxon/Imperial's projects about the economic benefits of the project do not conform to accepted protocols for calculating economic benefits. *Id.* pp. 543, 581, 586-587.

H. Testimony of Pat Dobie.

Mr. Dobie is a licensed professional engineer in Idaho and other states, with substantial experience managing travel plans and other highway matters. *See Dobie Testimony*, May 2, 2011 pp. 152-55; Exh. 414 (Dobie resume).

Mr. Dobie prepared a summary of his testimony which was distributed at the hearing to facilitate the Hearing Officer's understanding of his testimony. *Dobie Testimony*, May 2, 2011 pp. 155. Mr. Dobie evaluated three principal issues under the ITD over-legal permit regulations: public safety, convenience, and highway preservation. *Id.*

With respect to safety issues, Mr. Dobie referenced ITD crash data showing that Highway 12 has an above-average crash rate for rural highways, which is a factor that ITD did not consider. *Id.*, pp. 155-60. Moreover, mega-loads travelling at night up Highway 12 add safety risks to travelling public, because of poor visibility and higher driver impairment rates. The moving traffic control zone required to manage the mega-load turnout operations also presents sudden changed conditions to motorists, which is a major contributor to vehicle crashes. *Id.* However, ITD's analysis did not consider the Highway 12 crash data, the safety risks of nighttime travel, or the risks associated with

the “changed conditions” presented by the mega-loads on the highway. *Id.*, pp. 184-85.

With respect to public convenience, Mr. Dobie testified that the Mammoet travel plan would not work in practice the way it was set forth in the Transportation Plan (Exh. 2), because the plan relies on three flagger crews, which are inadequate to clear traffic under the “leapfrog” system proposed by Mammoet; more time will be required to set up flagger stations and clear traffic than projected; and the 15-minute delay calculations do not account for passage of the entire mega-load convoy. *Id.*, pp. 160-83.

Mr. Dobie explained that Highway 12 is classified as a principal arterial and is mostly a rural two lane highway, which is a scenic byway and wild and scenic highway corridor. The ITD automatic traffic counters show that average daily traffic in July-August is greater than 2400 vehicle trips at counter number 19 (MP 19, west of Kamiah) and about 1000 at the Powell counter (MP 84); versus less than 250 in December and January. Mammoet will be travelling during peak traffic months and has underestimated the volume of traffic that will be present at those times. *Id.*, pp. 184-207 & Exh. 412 (ITD traffic counter data). Even though Imperial and Mammoet claim that they used “peak” hourly traffic volumes for the travel plan, in fact that is untrue – for example, Mammoet used data from 2008 to calculate traffic volumes between Kooskia and Lowell, which is the lowest traffic volume shown at the Lowell counter in the last twenty years. *Id.*

Moreover, the Mammoet travel plan projects speeds for the mega-loads that are unlikely to be achieved because of the hills and the distances needed to accelerate and decelerate; and traffic will be delayed beyond the Mammoet projections. *Id.*, pp. 208-10, 234-38. The assumption in the Mammoet travel plan that vehicles will pass the module

at posted highway speeds is also unrealistic, because cars typically slow down when they see state police vehicles or the mega-loads; and vehicles cannot be expected to immediately travel at posted highway speeds when they leave turnouts to pass the mega-loads. *Id.*

Mr. Dobie further noted that ITD has used an incorrect definition of traffic “delay” in only calculating time that vehicles are stopped at flagger stations, when ITD uses a definition of “delay” that includes time lost to the travelling vehicle as it slows down before a flagger station or follows the mega-load; and that the Federal Highway Administration uses the same definition. ,Dobie Test., May 2, 2011, pp. 210-30 & Exh. 420.

Mr. Dobie also noted that the traffic control plan submitted by Mammoet and approved by ITD was not submitted by any registered Idaho professional engineer, and that diagrams in the plan are marked “preliminary,” in violation of ITD’s requirements for traffic control plans in highway construction zones. *See* Dobie Test., May 11, 2011, pp. 3014-19.

Regarding preservation of the highway system, Mr. Dobie noted first that ITD data report conditions of the Highway 12 roadway as having 80 out of 174 miles in poor to fair conditions, assessed according to cracking and roughness indices, which has a backlog of \$44 million in needed repairs already. *See* Dobie Test., May 2, 2011 Trans., pp. 238-51 & Exh. 408. Mr. Dobie calculated the TMV as weighing 28 ESALs, and that Mr. Miles’ calculation of 19.5 ESALs improperly discounted the tandem axles of the mega-load trailer upon thin pavements of Highway 12. Mr. Dobie cited federal research studies to support this analysis. *Id.*

Based on his 28 ESAL calculation and the \$986 fee charged by ITD for the TVM (Exh. 5, p. 1) – of which ITD only receives 57% because of Idaho’s highway revenue sharing requirements – Mr. Dobie calculated that the net fees ITD would receive from the 200+ Exxon/Imperial shipments would only cover approximately 21% of the estimated cost to repair damage done by the mega-loads to the highway pavement. *Id.*, pp. 250-53. Even if Mr. Miles’ lesser ESAL calculation is used, still ITD would recover less than half the costs of the damage to the highway pavement. Dobie Test., May 11, 2011 pp. 3006-09.

III. IMPERIAL/MAMMOET WITNESSES.

A. Testimony of Ken Johnson.

Mr. Johnson is Imperial’s lead representative to secure trip permits from Idaho and Montana for the proposed 200+ mega-loads. *See* Johnson Test., May 3, 2011, pp. 188.

Mr. Johnson testified that Exxon/Imperial are currently reducing the size of 33 modules that were delivered to the Port of Lewiston in October 2010, so that their height can be reduced for transport up Highway 95 to the Interstate. Johnson Test., May 6, 2011, p. 25. He also admitted that approximately 13 of 60 other modules delivered to the Port of Vancouver have already been transported via the Interstate Highway system. *Id.*, pp. 69-70. Mr. Johnson conceded that any costs associated with reducing the modules or shipping them via other routes than Highway 12 would not be material to the Kearl Project. *Id.*, pp. 68-69.

Mr. Johnson confirmed that Exxon/Imperial drafted the responses to public comments that ITD used to respond to the many adverse comments received from the public in summer 2010. Johnson Test., May 3, 2011 p.199.

Mr. Johnson stated that the travel plan was based on hourly traffic “calls” for the specific locations and times identified on page 121 of the Transportation Plan (Exh. 2), for the three stages of travel. May 3, 2011 Trans., p. 211, May 6, 2011 Trans., p. 49. These estimates were based on 2009 traffic data from ITD’s traffic counters west of Kamiah and near Powell; but on 2008 data for the traffic counter east of Lowell. Johnson Test., May 6, 2011, pp. 56-57. Although Mr. Johnson repeatedly insisted that “peak” hourly traffic volumes were used, the ITD data show that actual peak traffic was higher and that the 2008 Lowell data was the lowest traffic volumes reported in the last 10 years at that location. *Id.*, pp. 57-58 & Exhs. 31, 206, 517.

Mr. Johnson also conceded that traffic volumes in the Kooskia area up to Lowell were based on the Lowell traffic data, not Kamiah data, because of Mr. Johnson’s assertion that all traffic coming down Highway 13 turns west toward Kamiah instead of east toward Lowell. May 11, 2011 Trans. pp. 50-51.

Mr. Johnson admitted that the diagram entitled “traffic control plan between two clear turnouts” in the approved transportation plan (Exh. 2, p. 123) is inaccurate in how it depicts the “leap frogging” of the rear flagging crew ahead of the module; and that the travel plan’s diagrams do not account for the size of the entire convoy. *Id.*, p. 114.

Mr. Johnson stated that no engineer prepared or supervised the preparation of the traffic control plan and supporting drawings and diagrams. *Id.*, p. 108.

B. Testimony of Darren Bland.

Mr. Bland is Mammoet's top manager for the Kearn transportation project, and he claimed to be thoroughly knowledgeable about the Mammoet travel plan. *See* Bland Test., May 6, 2011 Trans., p. 129. Contradicting Imperial's Mr. Johnson, Mr. Bland testified that the Mammoet travel plan was prepared by or under the supervision of an engineer, although he did not know who. *Id.*, pp. 184-185.

Mr. Bland introduced Exhibits 519 and 520 to describe the travel plan, which are new documents prepared for the hearing and were not included in the ITD-approved transportation plan (Exh. 2). Exhibit 520 depicts a four-flagger traffic management plan, which Mr. Bland admitted was not the same as the three flagger plan depicted in the approved plan. *Id.*, pp. 185-186.

Mr. Bland further testified that the flagger crews would be stationed using hand-held or truck-mounted signs, in contradiction to the fixed signing specified in the approved travel plan (Exh. 2, p. 136). *Id.*, pp. 215-219.

When confronted with the statement on page 2 of the February 14, 2011 Memorandum of Decision – which states that 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* Exh. 1, p. 2 (emphasis added) – Mr. Bland testified that Mammoet would not and could not abide by that requirement. *Id.*, pp. 191-192, 194.

Mr. Bland pronounced that Mammoet executed the Transportation Plan “flawlessly” with the TVM, but admitted that he did not have first-hand knowledge about the TVM's second and third nights of travel; and did not include in his assessment the

facts that the TVM knocked off a large limb and hit the guy wire, causing power outages and traffic delays, on its first night of travel. *Id.*, pp. 204-206.

C. Testimony of Blair Purdy.

Mr. Purdy testified very briefly for Mammoet, and contradicted the testimony of Mr. Bland about how flagger crews and signing would be conducted. *See Purdy Test.*, May 6, 2011 Trans., pp. 256-63.

ARGUMENT

I. THE TVM SHOWS THAT THE APPROVED TRANSPORTATION PLAN IS NOT WORKABLE AND NOT VALID.

The Hearing Officer was appointed to “conduct a hearing, take evidence, and submit findings of fact, conclusions of law and recommended order” in the matter of Exxon/Imperial Overlegal Permit. *See* Letter from Brian W. Ness, Director, Idaho Transportation Department, to Judge D. Duff McKee (March 8, 2011); IDAPA 4.11.01.410. The Petitioners’ challenges to the Exxon/Imperial Overlegal Permits are stated in the Amended Petition to Intervene; and are described in more detail in their Prehearing Brief.

As reflected in those documents, Petitioners understood going into the contested case hearing that the Hearing Officer would review Mr. Frew’s February 14, 2011 Memorandum of Decision to determine if it is arbitrary, capricious, an abuse of discretion, or contrary to law pursuant to the standards of the Idaho Administrative Procedure Act, I.C. § 67-5279(3), particularly in violating requirements of the ITD over-legal permit regulations discussed below.

However, through the course of the hearing, it became apparent that neither the parties nor the Hearing Officer are clear on what the scope of the contested case hearing is, and what issues the Hearing Officer should resolve.

In particular, the Hearing Officer suggested during the hearing that his role is to determine whether the Test Validation Module (TVM) shows that the approved transportation plan is valid. Yet the Hearing Officer cannot possibly fulfill that duty, since ITD did not prepare any kind of report on the TVM; presented virtually no information about how it went at hearing; and ITD did not carry out monitoring and other evaluation necessary to determine if the TVM transport reflects conditions that the other 200+ mega-loads could encounter.

What we do know is that the TVM did not follow the approved transportation plan – it hit the branch and then guy wire the first night out, causing unanticipated power outages and highway obstruction; and then it was 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 the Lolo Pass for several more days before finally completing its journey to Montana.

To the extent that it may be relevant to the Hearing Officer's inquiry, then, the experience of the TVM demonstrates that ITD erred in approving the "200+" over-legal permits – with the exact number still uncertain – for the proposed Exxon/Imperial mega-loads based on the transportation plan approved in the Memorandum of Decision, since that plan has been discarded, modified, or otherwise is not being followed.

II. ITD DID NOT PLACE A PRIMARY CONCERN ON PUBLIC SAFETY, PUBLIC CONVENIENCE, AND THE PRESERVATION OF THE HIGHWAY SYSTEM.

The Hearing Officer should also recommend that the February 14th Memorandum of Decision be withdrawn, because the hearing evidence demonstrated that ITD failed to make the safety of the public, the convenience of the public, and the preservation of the highway system its “primary concern” as required by the ITD over-legal permit regulations, found in IDAPA 39.03.01 *et seq.*

Chapter 9 of the ITD regulations is entitled “Rules Governing Overlegal Permits – General Conditions and Requirements.” *See* IDAPA 39.03.09. Section 100 of Chapter 9 provides:

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).

This language thus requires ITD to prioritize public safety, public convenience, and preservation of the highway system above all other concerns or issues, such as the economic needs of a permit applicant or the convenience to the applicant of a desired transportation route. Moreover, as Mr. Frew acknowledged at hearing, ITD has the discretion to deny over-legal permits based on public safety, public convenience, or the preservation of the Highway system. Frew Test., April 27, 2011 p. 273.

Here, however, ITD assumed -- and acted on that assumption from the beginning -- that the Exxon/Imperial loads should and would be allowed to use Highway 12. ITD consequently focused its analysis on **how** the movement up Highway 12 could be

accomplished, instead of asking whether the proposed movement itself was consistent with public safety, convenience, and the preservation of the Highway system in the first instance. *See* Frew Test., April 28, 2011 pp. 83-84 (when Mr. Frew was asked whether he assumed the loads should go up Highway 12, Mr. Frew cited the perceived “necessity” of the movement).

This conclusion is supported by the following detailed analysis of the hearing evidence regarding each of the regulatory factors identified in IDAPA 39.03.09.100.01, i.e., public safety, public convenience, and preservation of the highway system.

A. ITD Failed to Place a Primary Concern on the Public Safety.

ITD violated IDAPA 39.03.09.100.01, first, by failing to place a primary concern on public safety. ITD neither investigated nor ultimately addressed the inherent threat to public safety associated with putting a rolling roadblock on the public’s primary route to the major hospital serving the Clearwater Valley area, *i.e.*, the Orofino hospital accesses via Highway 12. ITD has also failed to consider the threat to public safety from authorizing more loads than ISP has the manpower to escort. And implementation of the Transportation Plan will make the road less safe for travelers by obstructing the highway at night, confusing motorists, blocking turnouts, and degrading the road itself.

1. Access to Health Care

ITD’s decision to authorize the mega-loads unavoidably threatens public safety by allowing Exxon/Imperial to delay the public’s access to emergency health care. The evidence presented at hearing confirms the public’s concerns that the transport of 200+ mega-loads up Highway 12 poses a significant risk for public health. While ITD claims that “concerns about access to health care were adequately addressed,” Frew Test., April

28, 2011 p. 84, ITD itself did nothing to address these concerns. On the contrary, ITD failed to even investigate how the transport of the mega-loads would affect access to health care.

Expert testimony confirms that the transport of 200+ mega-loads up Highway 12 “would have a significant impact on public safety.” Caldwell Test., May 3, 2011 p. 104. Delaying access to emergency medical services increases the chances of a bad outcome, particularly in cases involving trauma and certain conditions, such as heart attacks and strokes. In the trauma context, this principle is known as “the golden hour.” *Id.*, pp. 76-77. In the Highway 12 corridor, it often takes the better part of an hour to get to the emergency room. *Id.*, p. 78; May Test., April 25, 2011 pp. 16-17. This means that even small delays can have a significant impact on the patient’s chances of bad outcome.

ITD received many public comments expressing concern about the public’s ability to access emergency services, including health care, while the mega-loads are on the road. *See, inter alia*, Ex. 3 pp. 26, 44, 48. Ambulance services along the Highway 12 corridor are staffed almost entirely by volunteers. May Test., April 25, 2011 at 16; Caldwell Test., May 3, 2011 p. 75. Volunteers must first travel from their homes to the ambulance shed when a call for an ambulance comes in. *Id.*, at 75-76. Due to the time and distances involved, most people faced with a medical emergency travel to the emergency room in a private vehicle rather than call an ambulance. May Test. April 25, 2011 at 16-17; Caldwell Test., May 3, 2011 p. 71.

In response to the public’s concerns, Exxon/Imperial hired an ambulance to accompany the loads and identified secondary turnouts where vehicles responding to an emergency could get around the load. *See* Ex. 3 p. 3. However, neither of these

measures removes the danger to public health posed by mega-loads.

The presence of an ambulance on the highway will not greatly reduce the risks associated with putting a rolling roadblock between the public and emergency medical care. Caldwell Test., May 3, 2011 pp. 97-98. As Dr. Caldwell explained, “in general, you can’t take care of a seriously ill patient in an ambulance. An ambulance is to move them from one point to another. And the level of care you have there doesn't really help.” Caldwell Test., May 3, 2011 pp. 82-83. In addition, transferring a patient from a private vehicle to the ambulance is “fraught with problems,” including the risk of dropping the patient or damaging the spinal cord after a neck injury. Caldwell Test., May 2, 2011 p. 82, 95.

Nor do the availability of secondary turnouts and Exxon/Imperial’s Emergency Response plan resolve the public safety issues. As Dr. Caldwell explained, the plan may work most of the time, but the critical issue arises when it does not work as projected:

I don't know how many loads would go smoothly and how many loads wouldn't go smoothly and how many emergency patients there would be on the non-smooth one, but if we run 200 or whatever, we're talking about I think the likelihood of some bad outcome or disaster is very great.

Caldwell Test., May 3, 2011 p. 91. From the standpoint of public safety, “It’s better not to have the road blocked.” *Id.* p. 100.

ITD may argue that Dr. Caldwell’s opinion should be disregarded because it is just the opinion of a single individual. However, Dr. Caldwell is an emergency room physician with considerable experience both in providing emergency medical care in the Highway 12 corridor and in administering health care for large groups of people. *See* Caldwell Test., May 3, 2011 p. 64 (describing Dr. Caldwell’s experience ensuring that deployed troops received adequate health care). No contrary witness with a similar

background was offered. To brush Dr. Caldwell's opinions aside as "one person's opinion" would be arbitrary and capricious.

Regardless of the level of risk to public health that Exxon/Imperial loads may pose, the fact remains that ITD did not place a high enough priority on public safety to even investigate or consider the impacts that running 200+ mega-loads up Highway 12 in the middle of the night will pose for public safety. ITD did not contact the local hospital prior to issuing the Memorandum of Decision to investigate the risks associated with delaying access to medical care. Caldwell Test., May 3, 2011 p. 74. ITD likewise failed to consult with either Dr. Caldwell or the head of the emergency medical system in Clearwater County. *Id.* p. 75. *See also* Rodriguez Test., April 25, 2011 p. 232 (admitting ignorance as to whether ITD, Exxon/Imperial, or Mammoet had done any investigation into the emergency services available in the Highway 12 corridor).

ITD's failure to investigate how the mega-loads would impact access to emergency medical care thus underscores that ITD did not place a primary concern on public safety; and requires reversal of the Memorandum of Decision.

2. Police Unavailable

ITD argues that it has prioritized public safety by requiring ISP to escort the mega-loads. However, ISP admitted at hearing that it does not have the staffing resources to escort the number of loads that the Memorandum Decision authorizes.

The participation of ISP is an important safety component of the Transportation Plan because ISP can provide communication in the event of an emergency. Hoff Test., April 27, 2011 p. 10. As Captain Richardson explained, "They wouldn't have the capabilities on their own to realize that there were emergency services needed to get past

them until it showed up, and then there would be a delay. So we were the link between that.” Richardson Test., April 29, 2011 pp. 48-49.

As written, the Transportation Plan allows up to one load per travel segment, or three loads total on Highway 12 at any one time. Frew Test., April 27, 2011 pp. 125-127. The “Cadillac version” of the ISP escort requires four officers to accompany each load. Oswald Test., April 29, 2011 p. 75. ISP only has fourteen officers total in north central Idaho. Richardson Test., April 29, 2011, p. 57. Consequently, if more than one load is on Highway 12 at one time, ISP will be forced to reduce the number of officers accompanying the loads. *Id.* pp. 58-59. ITD did not consider how a reduced escort would affect the safety of the transport. At a minimum, the Memorandum of Decision and the approved transportation plan must be reevaluated in light of this fact before any further mega-loads are permitted on Highway 12.

3. Traffic safety

The hearing evidence also shows that ITD failed to consider the many ways in which the transport of 200+ mega-loads up Highway 12 will make an already dangerous road even more hazardous for the travelling public.

ITD’s witnesses cited to various components of the Transportation Plan as evidence that safety was a primary concern. *See* Frew Test., April 27, 2011 p. 224 (claiming, “everything [in the Transportation Plan] speaks to the safety and convenience of the traveling public,”); Rodriguez Test., April 25, 2011 p. 122, 163-164 (testifying that ITD addressed safety by requiring the loads to travel at night, equipped with lights, signs, two-way radios and be accompanied by a variety of escort vehicles). None of the components of the Transportation Plan, however, address the fact that nighttime travel is

dangerous, blocking turnouts is dangerous, and degraded roads are dangerous.

Highway 12 is high-risk road to begin with. While the average crash rate for all rural highways in Idaho is 1.066 accidents per million vehicle miles, Highway 12 has an average crash rate of 1.43 accidents per million vehicle miles. Dobie Test., May 2, 2011 pp. 157-158. Although ITD's materials engineer Mr. Miles took issue with Mr. Dobie's notion of what can be considered a "rural highway" in Idaho, Mr. Miles did not refute the essential point: Highway 12 has more fatal accidents than many roads in Idaho. The dangerous nature of Highway 12 was confirmed by the witnesses who live up there and know the road. *See* Laughy Test., May 2, 2011 p. 17 (explaining, "there's a lot of activity on Highway 12 and a lot of accidents").

Implementing the Transportation Plan poses safety risks. As Mr. Dobie explained, "nighttime travel is problematic. The visibility is poor. There's driver fatigue issues. And there's impairment issues at night that don't exist during the day. So of all the times to travel, from a safety standpoint, moving these loads at night is – complicates the safety considerations." Dobie Test., May 2, 2011 p. 159. Although ITD claims that requiring the loads to travel at night is safer than letting them travel during the day, no ITD witness could point to any studies or other empirical data to support this assumption. *See* Frew Test., April 28, 2011 p. 58-59. Nor does Mr. Frew's Memorandum of Decision address these issues. *See* Exh. 1; Dobie Test., May 2, 2011 p. 184.

In fact, ITD's own prior practices in permitting overlegal vehicles on Highway 12 underscores that there is no safety benefit to traveling at night. Of the approximately 200 over-legal loads previously approved for Highway 12, all of them required daylight travel. Rodriguez Test., April 25, 2011; Exhs. 203-04 & 459. Prior to the Memorandum

of Decision, the only other loads to travel on Highway 12 that were restricted to nighttime travel were the Conoco loads. Couch Test., April 28, 2011 p. 158.

Having the mega-loads travel at night creates further safety concerns because driver who encounter the loads experience confusion and don't know where, or when, they are supposed to move or stop. As multiple witnesses explained, encountering a mega-load with its entourage and numerous flashing lights is confusing. *See Garcia Test.*, April 28, 2011 pp. 249-250 (describing confusion caused by the convoy with its mass of lights); *Inghram Test.*, April 29, 2011 pp. 16-17 (explaining how, when she encountered the test validation module, it was unclear what she was supposed to do or where she was supposed to move due to “the magnitude of the convoy, the flashing lights, the strobing lights.”); *Laughy Test.*, May 2, 2011 pp. 84-87 (describing his experience of confusion when encountering the loads).

The mega-loads impacts on public safety are not limited to travelers who are on the highway at night. During the daytime, the mega-loads will decrease public safety by blocking turnouts. Professional outfitters and recreational boaters alike use turnouts to oversee rafting trips. This is a safety precaution. *Grubb Test.*, April 25, 2011, pp. 84-85. This concern was has never been addressed by ITD. Neither Mr. Frew's Memorandum of Decision nor ITD's response to public comments addresses this concern. *See Exh. 1 (Memorandum of Decision); Exh. 3 (ITD responses to public comments).*

Finally, in the longer term, the mega-loads will also threaten public safety by degrading the condition of the road. Poor road conditions aggravate existing safety risks. *See Garcia Test.*, April 28, 2011 pp. 234-235 (describing how potholes present a safety risk). And as Mr. Dobie testified, the transport of the mega-loads will cause the road to

wear out more quickly and the permit fees paid by Exxon/Imperial will be insufficient to cover the repairs. *See* Dobie Test., May 2, 2011 pp. 247-53; May 11, 2011, pp. 3006-09.

B. ITD Failed to Place a Primary Concern on Public Convenience.

ITD further violated IDAPA 39.03.09.100.01 by failing to place a primary concern on public convenience.

As the hearing showed, ITD has defined public convenience here solely in terms of the amount of delay experienced by the travelling public when stopped by the mega-loads on Highway 12. In so doing, ITD has chosen to define “delay” in a manner that is wholly inconsistent with the public’s experience of delay and the commonly-used definition recognized in the transportation industry, including by ITD and Federal Highway Administration. Moreover, ITD limited its consideration of public convenience to delays caused by the actual movement of Exxon/Imperial’s equipment modules, and never considered other delays and public inconvenience associated with the mega-loads movements. For all these reasons, ITD’s decision was thus arbitrary, capricious, and contrary to the over-legal permit regulations.

1. ITD Defined Delay Incorrectly

The definition of delay that ITD used in the Memorandum of Decision and the approved Transportation Plan is arbitrary and capricious. ITD considered a vehicle to be “delayed” by the mega-loads only during the time that the vehicle is stopped at a flagger station. Couch Test., April 28, 2011 p. 154; Hoff Test., April 27, 2011 p. 110, 114.

This definition is not consistent with the public’s understanding of delay. *See* Garcia Test., April 28, 2011 p. 266 (explaining that, to the public, having to slow down for a mega-load feels like “delay”); Inghram Test., April 29, 2011 p. 26 (explaining, “in

my own mind, if I can't go the speed limit, or what's prudent for the condition, I'm delayed.”) Even Mr. Hoff admitted that vehicles traveling behind the convoy at a slower rate of speed than they would otherwise be traveling are being delayed in reality, even if that is not included in the transportation plan’s definition of “delay.” Hoff Test., April 27, 2011 p. 104.

ITD’s definition of delay is also inconsistent with its own practices in evaluating traffic delays for highway construction projects – in which ITD specifically defines “delay” as all the time that a traveler is delayed compared to ideal conditions. *See* Dobie Test., May 2, 2011, pp. 210-25; Exh. 420. Because ITD itself applied its highway construction requirements in identifying 15-minute delays as the maximum allowed, as both Mr. Hoff and Mr. Couch testified, it is arbitrary and capricious for ITD to ignore its own construction definition of delay in assessing mega-loads delays.

In addition, the industry standard likewise defines “delay” differently than ITD did here. The Highway Capacity Manual, a publication of the Federal Highway Administration’s Transportation Research Board, is “the most commonly used transportation engineering document in the country.” Dobie Test., May 2, 2011 pp. 219, 222. ITD has adopted it for traffic impact studies. *Id.* p. 221. And it defines delay as the entire time that a vehicle is delayed compared to travelling at the posted speed limits, not just time that a vehicle may be stopped at a flagger station. *Id.*

2. ITD Ignored Many Forms of Public Inconvenience.

ITD’s analysis of public convenience is also flawed because it did not take into consideration other travel delays caused by the mega-loads.

In particular, ITD did not consider the cumulative delays that vehicles travelling along Highway 12 may experience if there are multiple mega-loads on the road, as allowed by the Transportation Plan. Even if any particular load does not block traffic more than fifteen minutes, travelers encountering multiple mega-loads on the road will experience multiple 15-minute delays – a factor ITD admitted ignored.

Moreover, ITD did not consider delays experienced by the public as a result of dozens of utility lines being raised or buried to accommodate the mega-loads. District 2 issued “bunches” of permits authorizing the relocation of utility lines during 2009. Hoff Test., April 27, 2011 p. 59. After the guy wire incident, ITD issued additional permits allowing the utility companies to raise utility lines even more. ITD has made no attempt to keep track of the number of utility vehicles out on the highway since this second round of utility line modification began, or how this has affected the public. *Id.* pp. 60-61.

Nor did ITD consider the amount of time that the public would be delayed during the multiple rounds of tree trimming activities that have been authorized by District 2 in order to accommodate the mega-loads. ITD authorized tree trimming activities along the highway both in 2009 and in 2011 after the guy wire incident. Such trimming can block one lane of traffic and result in delays to the public. Hoff Test., April 27, 2011 pp. 68-69. *See also* Ex. 41; Ex. 42. Local residents confirmed that the public has been delayed on numerous occasions as a result of the extensive tree trimming conducted by Asplundt in April 2011. *See* Garcia Test., April 28, 2011 pp. 266-267. Yet, ITD did not consider the amount of time that the public would be delayed during tree trimming activities.

Rodriguez Test., April 25, 2011 p. 254.

ITD likewise failed to consider the impact to public convenience from the involvement of the Idaho State Police, including having their license plate numbers taken down. Rodriguez Test., April 25, 2011, p. 215.

ITD's analysis of public inconvenience is also incomplete because ITD did not account for delays the public experiences as a result of the various contingencies that can arise—and have arisen—during the transport of a mega-load. For instance, as Mr. Rodriguez admitted, although Exxon/Imperial had been in contact with ITD about the mega-loads proposal for more than two years before the TVM began moving, the TVM hit a guy wire on its first night out and knocked out power to 1300 people, after which it stayed parked in a turnout for two and a half weeks. *Id.*, pp. 202-203. *See also* Phipps Test., April 25, 2011 p. 274 (confirming that ITD had worked with Mammoet for years before issuing the permit for the TVM); Couch Test. April 28, 2011 (describing delay longer than 15-minutes that resulted when the first Conoco had trouble starting the second night).

In issuing his Memorandum of Decision, Mr. Frew relied on the assumption “during the transport of the modules, Idaho utility service interruptions for Idaho customers are not expected.” Ex. 1, pp. 2-4. *See also* Frew Test., April 28, 2011 p. 59, 62-63. As the hearing showed, this assumption is erroneous – the public has experienced power losses due to both the guy wire incident and periodic interruptions due to the raising of power lines. *See* Frew Test., April 28, 2011 p. 59; Rodriguez Test., April 25, 2011, pp. 210-211. Because the Memorandum of Decision is thus based on false assumptions and analytical gaps, it must be deemed arbitrary and capricious and should not be utilized to approve further Exxon/Imperial mega-loads.

3. Turning Scenic Byway Into “High and Wide” Corridor.

ITD also failed to prioritize public convenience by failing to consider how the conversion of Highway 12 from a national scenic byway into an industrial “high-wide-corridor” would impact public convenience.

From the start, Mammoet envisioned Highway 12 as a potential “high load” corridor from Lewiston, Idaho to Fort McMurray, Alberta.” *See* Phipps Test., April 26, 2011, p. 296 (admitting that Exxon Imperial used the words “high and wide corridor” in early meetings); Hoff Test., April 27, 2011 pp. 56-57 (agreeing that Imperial Oil “wanted to be able to use Highway 12 as a corridor for getting equipment up to the Alberta tar sands.”); Couch Test., April 28, 2011 pp. 128-129 (explaining that, when Mammoet first approached ITD about Highway 12 for the Exxon/Imperial loads, they indicated that Highway 12 “because of the lack of vertical clearances, that this would be a nice corridor for high loads”). *See also* Ex. 200, p. 5.

The public expressed deep concern that allowing the Exxon/Imperial mega-loads would establish Highway 12 as such a high-and-wide corridor, forever damaging its reputation as a scenic tourist destination. Rush. Test., April 27, 2011 p. 149-150; Exh. 3 (ITD responses to comments). By the time Mr. Frew issued the Memorandum of Decision on February 14, 2011, ITD had evidence that such a conversion is in fact taking place. In addition to the 200+ Exxon/Imperial mega-loads, Conoco has already been approved to take four mega-loads up Highway 12; and Harvest Energy has proposed to move between 40 and 60 over-legal loads, similar in size to the Exxon/Imperial modules, up Highway 12. Phipps Test., April 26, 2011 p. 457. *See also* Ex. 187. ITD has also been receiving inquiries from other companies about transporting mega-loads up

Highway 12. Phipps Test., April 26, 2011, p. 473.

Yet, as Mr. Frew admitted, ITD did not take into account the cumulative impacts of the Conoco mega-loads, the Exxon/Imperial mega-loads, and the other mega-loads that will follow after Highway 12 has been established as a high and wide corridor, *see* Frew Test., April 28, 2011 p. 84 – even though all these heavy and wide loads pose significant impacts to the convenience of the public (including local residents and tourists) using Highway 12. It was consequently arbitrary and capricious for ITD to refuse to consider the impacts of a high-and-wide corridor on the public.

4. Public Communication

ITD argues that it has addressed public inconvenience by ensuring that accurate and up-to-date information will continually be provided to the public. However, the hearing established that ITD has not provided the public with timely and accurate information, and neither have the applicants.

The approved transportation plan is premised in part on the provision that “communication with various groups and communities along the route will be required as well.” See Exh. 2, p. 15. In responding to public comments expressing concerns about inconvenience, ITD likewise promised that: “Module movements will be tracked and module schedule and location information will be posted on a website maintained by the transportation department (<http://itd.idaho.gov/projects/d2/us12>) so that the public has real time information on the location of the modules and the shipping schedule”). Ex. 3, p. 3. *See also* Rush Test., April 27, 2011 p. 170 (“accurate information was one of the things that ITD was going to use to minimize public inconvenience”).

However, ITD has failed to enforce the components of the permits and

transportation plan that require communication with the public. The Transportation Plan requires 30-day and 7-day notice. Ex. 2, pg. 15. *See also* Frew Test., April 28, 2011 pp. 25-26 (acknowledging that the Transportation Plan—and by extension, the permit—requires Mammoet to communicate with various communities and groups along the route about when loads will be on the highway). But the ITD employee who was in the best position to know if such notice had been provided—Adam Rush—was unable to confirm if such notice had been provided. Rush Test., April 27, 2011 pp. 179-180. In fact, according to Mr. Rush, ITD had not even asked Exxon/Imperial or Mammoet to provide notice to anyone. Rush Test., April 27, 2011 p. 194.

ITD has not provided a toll-free number for the public to call in about the mega-loads and its website directs the public to a page maintained by Exxon. Rush Test., April 27, 2011 p. 182. ITD does not check the Exxon website to ensure that it is being updated at appropriate intervals. In fact, Mr. Rush did not even know whether the website referenced a toll-free number set up by Exxon. *Id.*

Even when the public calls Mr. Rush to ask about the status of the mega-loads, Mr. Rush often does not have information about whether and when the megaloads will be moving. *Id.* pp. 183-184. *See also* Laughy Test., May 2, 2011 pp. 45-56. Nor does ITD provide the public with notice about when the road will be blocked by trucks trimming trees, even for tree trimming that occurred on Easter Sunday. Rush Test., April 27, 2011 p. 185.

The impacts of ITD's poor communication have been compounded by the fact that ITD allowed Exxon/Imperial to present inaccurate information at ITD's "open

houses” in summer 2010. *See* Rush Test., April 27, 2011 p. 144-145 (admitting that ITD did not investigate the veracity of the claims presented at the public meetings in 2010).

In short, despite promises that the public would be fully informed in order to reduce public inconvenience from the approved mega-loads on Highway 12, these promises have not been implemented; and the public has been kept in the dark about the exact status of the movements – further underscoring that ITD has not placed a primary concern on public convenience, but instead is mainly concerned with facilitating the mega-load movements.

5. Aspects of Inconvenience Unique to Highway 12.

While delay may not be unique to Highway 12, the delays caused by the Exxon/Imperial mega-shipments are unacceptable due to the unique characteristics of Highway 12 – another important consideration relating to public convenience that ITD has ignored here. For many of the local people affected, there are no alternative routes by which residents can reach the post office, the grocery store, or the hospital. *See* May Test., April 25, 2011; Garcia Test., April 28, 2011.

There is also a greater risk that the mega-loads will cause longer delays on Highway 12 than they might on other roads (such as Highway 95). Highway 12 is a very narrow, curvy road where even passenger cars have to slow down. The loads must travel more slowly on Highway 12 than they would on other routes. As Mr. Couch confirmed, “the terrain has a great deal to do with how fast you can go and how long it will take to get between these mileposts.” Couch Test., April 28, 2011 p. 182. *See also* Hoff Test., April 27, 2011 p. 85 (describing how the Test Validation Module had to slow down to go around certain curves).

Delays caused by mega-loads on Highway 12 differ significantly from delays caused by regular commercial traffic. As Ms. Inghram explained when asked encountering a mega-load compared to encountering a logging truck,

There is no comparison. I mean, it's more than apples and oranges. Obviously, a logging truck is in one lane. You can pass it. You can get around it. You expect it, because of where we live and what the economy is. The megaloads, totally unpredictable. We didn't know when they were running, we didn't know where they were going to be parking, although established a route that they said they were going to adhere to. It was very unpredictable of where they were going to be, how long it was going to be.

Inghram Test. April 29, 2011 p. 21.

The Transportation Plan does not address these issues unique to mega-load on Highway 12 because there is no way they can be addressed as long as the chosen route is Highway 12. In fact, Mr. Frew admitted that the “special restrictions” made supposedly out of deference to public safety and convenience were not individualized for Highway 12; ITD would impose the same restrictions if these loads were traveling on any other two-lane Highway. Frew Test., April 28, 2011 pp. 118-119.

6. Refusal Rethink Approval Of The Project.

Finally, ITD’s refusal to rethink the authorization of mega-load travel on Highway 12 illustrates that the convenience of the general public is not its primary concern.

Numerous delays, accidents, and other “contingencies” occurred during the transport of the Conoco mega-loads. *See Couch Test.*, April 28, 2011, pp. 162 (admitting there were multiple instances during the Conoco transport where traffic was delayed more than 15 minutes); *see also* Inghram, Garcia, Laughy Testimony. ITD nevertheless characterized those nighttime moves as a “success.” Hoff Test., April 27, 2011 p. 18.

ITD never considered making any “major modifications” to the leap-frog approach that forms the basis for both the Conoco and Mammoet transportation plans. Couch Test., April 28, 2011 p. 184-185. *See also* Hoff Test., April 27, 2011 pp. 123-124, 128 (admitting that the Conoco loads experienced delays between 38.8 and 73.8, as well as additional “minor delays”).

Even more tellingly, Mr. Rodriguez admitted that, if the Exxon/Imperial plan doesn’t work, ITD will fix it, not rethink the Memorandum of Decision. Rodriguez Test., April 25, 2011 p. 187..

In summary, the above considerations – ITD’s improper definition of delay, its refusal to consider other delays and public inconvenience, failure to adequately inform the public, disregarding the unique values of Highway 12 and impacts of mega-loads on local residents, and refusing even to reconsider approval of the mega-loads despite the actual performance of the initial mega-load runs – demonstrate that ITD did not place a “primary concern” on public convenience. Accordingly, the Hearing Officer must recommend withdrawal of the Memorandum of Decision based on these defects.

C. ITD Failed to Place a Primary Concern on Preservation of the Highway System.

1. Impacts On Highway Pavement.

The hearing evidence also confirmed that ITD violated the over-legal permit regulations by failing to place a primary concern on the preservation of the highway system, as required by IDAPA 39.03.09.100.01.

As noted above, there is extensive evidence in the record showing that ITD’s bridge engineers carefully evaluated whether the Highway 12 bridges could handle the Exxon/Imperial mega-loads. But the bridge engineers admittedly did not evaluate what

kind of toll the mega-loads might exact on the bridges; and bridge inspector supervisor Kathleen Slinger even agreed that it can be years before damage caused by overweight vehicles becomes apparent. Slinger Test., April 26, 2011 p. 706.

In contrast to the bridge analysis, the hearing confirmed that ITD paid precious little attention to impacts of the mega-loads on the Highway 12 pavement. ITD materials engineer Jeff Miles and his staff may have informally conferred with District 2, but they prepared no written analysis or report. And while Mr. Miles disagreed with Mr. Dobie about the exact number of ESALs associated with the TVM, neither he nor any other ITD witness even attempted to dispute Mr. Dobie's showing that that the costs of repairing the damage caused by mega-loads to the pavement will far exceed the revenues that ITD will realize from the mega-load fees. *See* Dobie Test., May 2, 2011, pp. 238-53 & May 11, 2011, pp. 3006-09.

Where ITD has discretion to allow or disallow these unprecedented mega-loads up Highway 12, and where it has the duty to place a primary concern on preserving the highway system, one would expect that – at a minimum – ITD would have thoroughly evaluated their impacts on the pavement and ensured that costs of repairs are born by the mega-loads. And if the costs to the highway are not covered by the fees generated, then the highway system is not being preserved, and the permits should be denied. ITD's failure to even consider this issue, much less ensure that the mega-loads pay for the toll they take on the highway system, thus demonstrates that ITD did not place a primary concern on preservation of the highway system in this instance.

In addition, Mr. Frew's conclusion that authorizing 200+ mega-loads is consistent with preservation of the highway system is arbitrary and capricious because it relies on

the assumption that all of Exxon/Imperial's loads will be weighed prior to departing the Port of Lewiston. Mr. Frew, Ms. Phipps and, most importantly, ITD's bridge expert, Ms. Murgoitio, all testified that it was their understanding that each load would be weighed. Phipps Test., April 26, 2011, p. 435; Murgoitio Test., April 26, 2011, p. 681-682. However, Mr. Frew wrote his Memorandum of Decision before the Bridge Section specifically requested that each load be weigh prior to departure. Slinger Test., pp. 702-703. Consequently, there is no requirement in the Memorandum of Decision or the transportation plan for each mega-load to be weigh prior to leaving Lewiston.

If each load is not weighed, "that becomes problematic." Slinger Test., pp. 704. As Ms. Slinger explained, the Exxon/Imperial loads are very close to the "acceptable threshold" for weight on Highway 12's bridges. Slinger Test., April 26, 2011 pp. 711-712. *See also* Slinger Test., April 26, 2011 p. 701 (describing how vehicles that weigh more than authorized are a source of concern from a bridge standpoint).

2. ITD Failed to Consider Highway 12's Role in the Highway System.

ITD's failure to prioritize the preservation of the highway system is further evidenced by ITD's refusal to consider the unique characteristics of Highway 12 and the role it plays in Idaho's highway system.

Highway 12 provides the lifeblood for north-central Idaho's thriving tourism industry. *See* Testimony of Ruth May, Peter Grubb, Linwood Laughy & Dr. Steve Seninger. As Ms. May testified, Highway 12 was designated as a scenic byway in order to "protect that area as a viable economic option of tourism," and the byway designation has influenced north-central Idaho's infrastructure by making funding available that would otherwise not be. May Test., April 25, 2011, p. 24. Ms. May further testified that

the protections associated with this designation have contributed to the success of her business. *Id.*, p. 22.

The authorization of 200+ mega-loads will damage north-central Idaho's tourism industry by reducing the area's scenic appeal. Dr. Seninger—the only economics expert who testified at the hearing—explained that north-central Idaho's tourism industry depends upon the public's perception of its scenic values. *See also* Grubb Test., April 25, 2011 pp. 78, 80 (explaining that tourists are drawn to the Highway 12 corridor by its scenic beauty). Mega-loads sitting on the side of the road introduce an industrial element into the landscape, diminishing its scenic value. *Id.*

At Exxon/Imperial's request, ITD has already allowed an unprecedented level of tree trimming along the Highway 12 corridor with results described by Mrs. May as “visually offensive.” May Test., p. 34, 38-39. *See also* Ex. 514; Garcia Test., April 28, 2011 p. 268 (explaining, “Once the trees have been carved out to allow for megaload travel, they no longer look natural, which certainly diminishes the aesthetic beauty of the area.”) ITD's commercial services management Mr. Rodriguez admitted that the tree trimming had significant impacts; and ITD's District 2 Maintenance Engineer likewise conceded that Asplundt's trimming had left the trees looking “not quite aesthetically pleasing.” Hoff Test., April 27, 2011 p. 27. Grubb Test., April 25, 2011, p. 114.

As Mr. Hoff admitted, ITD did not conduct “any kind of analysis about tree trimming within a Wild and Scenic corridor to assess how it may affect scenic values.” Hoff Test., April 27, 2011 pp. 75-76. And he further conceded that the tree trimming did not comply with the standards provided by the Forest Service for trimming in the Wild and Scenic River Corridor. Hoff Test., April 27, 2011 pp. 131-132.

In addition to damaging the scenic quality of the corridor, the mega-loads will also impact the tourism industry by delaying traffic. As Mr. Grubb explained,

Highway 12 is not like a farm road out in Nebraska where you have frontage roads and detour routes. It's the only road through this part of central Idaho. And the concern is people don't want to put up with multiple delays. Getting stuck behind something that's moving 15 miles an hour and then getting completely stopped for -- even if it's only 15 minutes. And then they -- you know, people come to this country to look at things and enjoy the place, and so you pull over maybe to look at a rapid or you pull over to visit the Lochsa Historical Ranger Station, and you could easily then fall behind one of these convoys again. And so my concern was the multiple delays and that people would say, well, let's just not go that way.

Grubb Test., April 25, 2011 p. 106.

Contrary to Mr. Frew's abrupt rejection of the public's concerns as being "speculative" or "hypothetical," *see* Exh. 1, pp. 7-8, these impacts to the tourism industry are far from speculative. Past experience shows that delay along the highway annoys tourists, results in the cancellation of reservations, impacts that area's reputation as a tourist destination, and ultimately harms the tourism industry. *See* May Test., April 25, 2011, pp. 28-29 (describing how traffic delays on the highway quickly become public knowledge and cost her business); Grubb Test., April 25, 2011, p. 98-99 (describing how the Syringa to Tumble Creek construction project was "highly disruptive" to outfitting and hospitality business during the summer of 2009 and the associated decrease in patronage from motorcycles). As Peter Grubb explained, "in the tourism business, everything is reputation. So when reputation is tarnished, there's a direct economic impact." Grubb Test., April 25, 2011 p. 100.

Although the public brought their concerns about impacts to the tourism industry to ITD's attention, ITD did not conduct a study or analyze the cumulative impact on

tourism and scenic beauty that will result from authorizing the 200+ Exxon/Imperial mega- loads. Frew Test., April 28, 2011 p. 82. *See also* Ex. 3 p. 4 (ITD refusing to conduct an economic analysis); *id.* p. 14 (public comment explaining, “This would be a devastating blow to tourism in the area, currently the only source of job and income growth for residents and businesses in the area.”); *id.* p. 34 (“Travel and tourism is a major economic engine in Idaho. The type of traffic and associated congestion with this project will be disruptive and a hindrance to visitors traveling by car, motor-home and motorcycle. Potential visitors will likely avoid this area altogether.”). Nor did ITD conduct any kind of an economic study about the impacts of the project on north central Idaho’s tourism economy. Frew Test., April 28, 2011 p. 83.

ITD relies on the fact that the Exxon/Imperial mega-loads will be traveling at night to dismiss the public’s concerns about damage to the tourism industry. *See* Ex. 3; Phipps Test., April 26, 2011 p. 506. However, testimony from numerous witnesses – including Mrs. May, Mr. Grubb, Mr. Laughy, and Dr. Seninger – confirms that the many tourists use the highway at night. *See, e.g.,* Seninger Test., April 26, 2011, p. 534.

In summary, any fair weighing of the hearing evidence leads to only conclusion: ITD did not place a primary concern on public safety, public convenience, or the preservation of the highway system. Instead, the record shows that ITD bent over backwards to facilitate the Exxon/Imperial mega-loads up Highway 12 – including by devoting enormous time from its bridge section to make sure the bridges could handle the mega-loads, while disregarding impacts on the highway surface and brushing off the public’s concerns about safety, convenience, and impacts on the scenic qualities of Highway 12. Accordingly, the Hearing Officers should recommend that the February 14,

20110 Memorandum of Decision be rescinded; and no further Exxon/Imperial mega-loads be allowed for Highway 12.

III. ITD DID NOT MAKE A REASONABLE DETERMINATION OF NECESSITY.

ITD's decision to authorize the transport of "200-plus" mega-loads is also unlawful because ITD failed to make a reasonable determination of necessity as required by its over-legal permit regulations under Chapter 9 of IDAPA 39.03.01.

Chapter 9 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 (underscore added).

This language 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.

ITD's necessity determination in this case is arbitrary and capricious because ITD accepted—and continues to accept, despite compelling evidence to the contrary – Exxon/Imperial's assertion that the equipment modules are "non-reducible" and can only be transported via Highway 12. It was also unreasonable, at least under the unique circumstances of this case, for ITD to limit its consideration to only routes inside Idaho.

A. Exxon/Imperial's Proposal Was Unprecedented.

The reasonableness of ITD's necessity determination must be viewed in light of the unique circumstances of Exxon/Imperial's proposal. In view of the unprecedented nature of the shipments, the extent of the public outcry against them, and the unique

characteristics of Highway 12, the above language of the regulations required ITD to look more closely at the issue of necessity than it would normally do in connection with an over-legal permit.

Exxon/Imperial's equipment modules are some of the largest loads that have ever requested permission to travel on Highway 12. In fact, only the ConocoPhillips Coke Drums that traveled earlier this year even approach the size of the equipment modules.

Exxon/Imperial also proposed to transport loads on a nationally-designated scenic byway that, as explained above, plays a crucial role in the area's regional economy and on which residents rely almost solely to access essential goods and services. ITD was also aware that Highway 12 runs through a Wild and Scenic River Corridor. Phipps Test., April 26, 2011 p. 505.

Given these circumstances, it should come as no surprise that Mr. Frew has never "seen a situation involving overlegal loads that's been as controversial as the megaloads up Highway 12." Frew Test., April 27, 2011 p. 273. The sheer volume of public interest in Exxon/Imperial's proposal motivated both Mr. Rush's involvement and the three public meetings that ITD held in Moscow, Lewiston, and Kooskia in the summer of 2010. Rush Test., April 27, 2011 p. 136. Even now that ITD has closed the comment period, Mr. Rush continues to receive comments "almost daily." *Id.*, p. 136.

ITD needed to take all of these factors into account in order to make an "individualized," and therefore "reasonable" determination of necessity. Its failure and refusal to do so thus renders the Memorandum of Decision arbitrary and capricious, in violation of the Chapter 9 requirements.

B. The Exxon/Imperial Shipments Are Reducible.

In evaluating “necessity” under Chapter 9, ITD considers where a proposed shipment “can and cannot go,” and in this case, ITD concluded that: “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.” Rodriguez Test., April 25, 2011, pp. 142-143.

Thus, ITD’s determination that the transport of the Exxon/Imperial loads via Highway 12 is “necessary” is premised on the notion that the loads are “non-reducible,” and cannot be made smaller to make travel on any other highway possible. *See* Frew Test., April 27, 2011 p. 223 (explaining 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. 143 (stating that ITD evaluates necessity “At the dimensions and the weight that [the loads] are.”).

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 seeking to justify this reliance, ITD cites the definition set forth in IDAPA 39.03.01.42, “That is, will it function as it was intended to function when it is delivered?” Frew Test., April 27, 2011 pp. 219-220. Under this definition, according to Mr. Rodriguez, a load is non-reducible if it “is something that is big and heavy and is intended to be used in the -- how it's constructed,” whereas a “reducible load is something that can be broken apart easily.” Rodriguez Test., April 25, 2011, pp. 123-

126. A load is at its “practical minimum dimensions,” as described in IDAPA 39.03.16, when the load can still be put to its intended use.

All of ITD’s analysis ignores the fact that the Exxon/Imperial modules are not separate pieces of machinery or equipment that are intended to operate by themselves. Instead, as Imperial’s Mr. Johnson explained, Exxon/Imperial is shipping the various modules for the express purpose of putting them together to form one large system to process the tar sands.

ITD also seeks to bolster its position by citing a Federal Highway Administration definition as persuasive authority. *See Frew Test.*, April 27, 2011 pp. 215, 218-219 (discussing 23 C.F.R. § 658.5). However, as Mr. Frew admitted, ITD is not bound by this definition. *Id.* p. 218. Review of the cited regulation further demonstrates that it applies to whether loads are reducible for transportation on the Interstate Highway system. *See 23 C.F.R. §§ 658 et seq.* Because there are federally-imposed weight and height limitations for interstate highways, this definition does not apply to non-interstate highway routes for which over-legal loads are proposed – a fact that ITD has not bothered to address.

Moreover, Mr. Frew was unable to explain his conception of the word “practical.” It would take between 2,000 and 4,000 man hours to reduce the loads to enable them to travel on Highway 95 and cost \$500,000 per module. *Frew Test.*, April 27, 2011 pp. 121-122; *Rodriguez Test.*, April 25, 2011, pp. 149-150. On this basis, Mr. Frew concluded that it would not be “practical” to further reduce the modules due to the amount of time and expense involved. *Frew Test.*, April 27, 2011, p. 122. Mr. Frew insisted that “reasonableness” in terms of cost is the same regardless of who is paying the bill; but was

then unable to set the cost limit that defines reasonableness and reverted to another consideration – whether breaking the load into pieces would render in unsuitable for its intended use. Frew Test., April 27, 2011 pp. 249-250.

As noted above, Imperial’s Ken Johnson admitted that the costs 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. Of course, Exxon/Imperial has decided to go ahead and reduce the size of the 33 modules currently sitting at the Port of Lewiston so that they can be shipped by an alternative route. *Id.*, p. 25. And remaining modules are still in Korea, where they can presumably be constructed to different dimensions that can be transported by routes other than Highway 12. *Id.*, p.82. These facts from the hearing record all establish that it is “practical” for Exxon/Imperial to further reduce the size of the massive modules intended for the Kearl project; and that ITD has acted arbitrarily and capriciously in assuming that the modules cannot practically be further reduced in size.

C. ITD Wrongly Limited Its Necessity Analysis to Routes Inside Idaho.

Although ITD had information that other routes were available to Exxon/Imperial and Mammoet, ITD limited its consideration of possible routes to routes inside Idaho. As Mr. Frew explained, “We looked at the routes in Idaho and determined where these loads could run, and the only necessary route that we could see was using US 12.” Frew Test., April 27, 2011 p. 213. *See also id.*, April 28, 2011 p. 40-41, 44; Phipps Test., April 25, 2011 p. 288 (“We don’t look at route outside Idaho”).

This position is not defensible, first, when the hearing evidence showed that Exxon/Imperial now plan to send 60 of the modules from the Port of Vancouver via the

Interstate Highway system through Idaho and Montana to the Canadian border, as Mr. Johnson testified. This fact alone demonstrates that there are alternative routes available for at least a significant number of the modules; and it is arbitrary and capricious for ITD to continue approving the same modules to be transported up Highway 12 as part of the “200+” mega-loads authorized by the now-outdated Memorandum of Decision approved by Mr. Frew on February 14, 2011.

Moreover, both Mammoet and the public in their comments provided ITD with information about other routes that Mammoet could use to transport the equipment modules. In fact, Exxon/Imperial presented information about other potential routes at their first meeting with ITD in 2008. According to Exxon Imperial’s representations to ITD at the 2008 meeting, Highway 12 not because it was the only possible route, but because it was shorter than other potential routes and would save Exxon/Imperial 1,430 miles of highway travel, 7,000 nautical miles of travel, and 60 days of travel time. *See Phipps Test.*, April 25, 2011, pp. 287-288; Exh. 179. This fact that an alternative route does exist even for the largest modules again shows that it is arbitrary and capricious for ITD to simply presume that Highway 12 must be used for the movements.

The hearing evidence also showed that ITD has refused to consider any of this information based on an internal policy, rather than any statutory authority. Yet ITD could not, at hearing, justify its policy of limiting its necessity analysis to Idaho. Ms. Phipps, who presented herself as the policy maker for over-legal permits, could not justify her policy of refusing to consider routes outside Idaho and could point to no authority that would preclude ITD from acknowledging the existence of alternate routes in making a necessity determination. *Phipps Test.*, April 25, 2011 pp. 289-290.

Given the extent to which the transport of Exxon/Imperial's loads up Highway 12 will impact public safety, convenience, and preservation of the Highway system, looking at routes outside of Idaho would have been the reasonable thing to do. Since the Chapter 9 regulations require ITD to make a "reasonable determination" of necessity, ITD thus violated the regulations by refusing to consider any routes outside of Idaho in this case.

D. Overhead Obstructions.

Finally, ITD's necessity determination is arbitrary and capricious because, at the time that ITD determined Highway 12 was supposedly the only route available for the Exxon/Imperial mega-loads, multiple overhead obstructions in fact rendered Highway 12 just as unusable for loads of this size as other roads in the state.

Multiple ITD witnesses admitted that, at the time Exxon/Imperial approached ITD about using Highway 12, overhead obstructions existed along Highway 12 that precluded the passage of Exxon/Imperial's loads; only after Exxon/Imperial had spent millions of dollars modifying Highway 12 to suit their purpose did Highway 12 become a viable option. *See Phipps Test.*, April 25, 2011 p. 290; *Hoff Test.*, April 27, 2011 p. 58.

It is fundamentally arbitrary and capricious for an agency to say that "only this route is available" after the applicant has spent years and millions of dollars to transform an unavailable route into one that can handle mega-loads; and then refuse to consider whether the applicant could have taken alternative routes in the first place. Moreover, ITD actively aided and abetted in transforming Highway 12 into a "high and wide" corridor for these mega-loads, by authorizing numerous permits to move utility lines, trim trees back, and improve turnouts on Highway 12 – all without ever addressing impacts that these actions would cause in damaging the scenic values of the Highway national

scenic byway and Wild and Scenic corridor. Accordingly, the Hearing Officer again should reject ITD's necessity determination here as not being reasonable under the unique facts presented by this case.

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

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

The Hearing Officer must also recommend reversal of the February 14, 2011 Memorandum of Decision because it expressly allows the Exxon/Imperial mega-loads to delay traffic up to 15-minutes, in violation of the plain language of ITD's over-legal load regulations establishing 10-minutes as the maximum period of time for which non-reducible overlegal loads may delay traffic.

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 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. As noted, Chapter 16 specifically addresses permits for “non-reducible” overlegal loads, and it provides:

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).

Chapters 11 and 16 thus both address the issue of traffic passage around over-legal vehicles; and Chapter 16 specifically provides that “passage of traffic” should meet the “frequent passing” standard required by traffic control plans under Chapter 11. And if more frequent passing cannot be accomplished, Chapter 16 establishes the outside limitation that traffic delays by non-reducible loads cannot exceed 10-minutes.

Chapter 16 thus provides 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).¹ 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 reads Chapter 16 very differently – asserting that it only applies when there there emergency or exigent circumstances in which a non-reducible load cannot obtain a traffic control plan under Chapter 11. This legal reading is erroneous for two related reasons.

First, nothing in the language of Chapter 16 states that its provisions only apply to emergency or exigent circumstances. To the contrary, both its title and the provisions it contains demonstrate that Chapter 16 is the portion of the ITD over-legal regulations that specifically addresses non-reducible loads. ITD is thus reading into the regulations a severe limitation that they do not contain.

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

¹ Judge Bradbury’s decision was subsequently reversed by the Idaho Supreme Court on jurisdictional grounds, because Petitioners had not exhausted administrative remedies by going through a contested case hearing. *See Laughy v. ITD*, 2010 Idaho S.Ct. Opinion No. 110 (11/1/2010). The Supreme Court thus did not reach the 10-minute delay rule.

authorization in claiming that Chapter 16 only applies to such emergencies, when it states no such thing.

Third, 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 authorizes ITD to waive the "frequent passing" requirement, but not the traffic control plan requirement. In addition, the section of Chapter 16 that contains the 10-minute rule is entitled "General Oversize Limitations," which indicates that the 10-minute rule applies to all non-reducible loads, and not merely a subset later chosen by ITD.

ITD's interpretation thus would effectively rewrite the existing regulations to add language regarding emergency movements in Chapter 16 that does not exist, while eliminating the existing 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." Of course, the Hearing Officer should not accept a reading of the regulations that effectively rewrites them to eliminate existing language. *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 Chapter 16 applies to Exxon/Imperial's shipments, then 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. ITD Adoption of A 15-Minute Delay Requirement Was Mistaken.

The hearing evidence further demonstrated that ITD staff simply were unaware of the Chapter 16 language limiting non-reducible load traffic delays to 10 minutes; and instead ITD simply applied a 15-minute delay policy that uses in highway construction.

As noted above, the hearing testimony established that Mr. Hoff was the ITD staffer responsible for approving the Mammoet transportation plan, including the 15-minute delay rule. And Mr. Hoff admitted that ITD “adopted the fifteen-minute rule from it’s construction practices,” specifically from ITD’s Standard Specification Book for Highway Construction.” Hoff Test., April 27, 2011 p. 115. *See also* Ex. 152 (April 2010 Hoff presentation to Idaho Transportation Board, discussing use of 15-minute construction delay for mega-loads); Frew Test., April 27, 2011 p. 235.

Mr. Hoff admittedly did not even know about the 10-minute delay rule in Chapter 16, until after Petitioners challenged ITD’s approval of the Conoco mega-loads in August 2010, based on the same 15-minute delay rule. *See* Hoff Test., April 27, 2011, pp. 17-18, 116-21 & Exhs. 152, 167-68. He had to email Mr. Frew to even learn where the 10-minute rule was located in the ITD regulations. Exh. 168.

Surely ITD staff approving unprecedented mega-loads causing such public concern should be expected to understand and apply ITD’s regulations. Because the hearing showed that ITD erred in applying a 15-minute traffic delay rule, rather than the 10-minute outside delays allowed under Chapter 16 of the over-legal permit regulations, the Hearing Officer can only conclude that ITD has acted arbitrarily, capriciously, and contrary to its own regulations here.

C. The Exxon/Imperial Loads Will Delay Traffic Longer Than Fifteen Minutes.

Even if ITD was correct in applying a 15-minute delay requirement here, the Hearing Officer still must conclude that the Memorandum of Decision is arbitrary and capricious because the bulk of the hearing evidence demonstrates that the Exxon/Imperial mega-loads will not be able to comply with that 15-minute delay rule. Numerous considerations, as already addressed above, support this conclusion as the only reasonable conclusion the Hearing Officer can reach, including the following:

Incorrect definition of delay: As discussed above, ITD applied an incorrect definition of “delay” in approving the Mammoet Transportation Plan. Instead of considering the true delay experienced by motorists – which includes the time during which motorists must slow down for the mega-loads and encountering multiple mega-loads on Highway 12, , – ITD adopted a delay definition that artificially limits the calculation of “delay” to 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 Transportation Plan’s calculations assume that a vehicle will be stopped a single time in order to pass a mega-load, rather than multiple times. Yet the reality is that drivers are required to stop multiple times, permitted to crawl forward, and then brought to a complete stop again. *See Inghram Test.*, April 29, 2011 p. 17-18 (describing being required to stop multiple times when encountering the test validation module).

Errors in the Transportation Plan: The record also shows that the approved Transportation Plan is erroneous in many respects. 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, as noted above, Imperial’s Mr. Johnson admitted that the traffic clearing diagram in the approved transportation plan (Exh. 2, p. 123) is in error; and Mammoet witness Mr. Bland testified that the flagging system to be utilized differs from one described in the transportation plan.

ITD did not verify the 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. Neither of the ITD employees who reviewed the Transportation plan really understood it.

Although both Frew and Couch identified 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 table, 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 Mammoet 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 "Total Module Travel Time" figure used in projecting traffic delays represents the time it takes the module to move or the entire convoy. Couch Test., April 28, 2011 p. 141. Although Mr. Couch did not review the formulas Exxon/Imperial and/or Mammoet used to construct the chart. Couch Test., April 28, 2011 p. 134.

Delay Calculation Flaws: Finally, the Transportation Plan's delay calculations are flawed in numerous respects. The delay chart assumes unrealistically low levels of traffic. Mr. Johnson testified that the Lowell traffic counter was used to project traffic volumes from Kooskia to Lowell, on the assumption that all traffic coming down Highway 12 turns to the west toward Kooskia – which is obviously unrealistic – and further that 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. In addition, 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 p. 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.

Furthermore, the Transportation Plan’s delay calculations do not account for the additional delay created by entourage of 20 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.

Finally, the Transportation Plan’s delay chart assumes that the loads will be traveling a certain speed. *See* Ex. 3, pg. 121. However, since the finalization of the Transportation Plan Exxon/Imperial has pledged to reduce speeds in response to the guy wire incident, in some locations down to walking speed. Couch Test., April 28, 2011 p. 152.

In summary, the Mammoet Transportation Plan, as written and as approved by ITD, is defective on its face; and will not accurately project real world conditions that the 200+ Exxon/Imperial mega-loads will confront on Highway 12, if they are allowed to proceed. The Hearing Officer should recognize that the reality of the situation is more complex and challenging than the assurances reflected in the Transportation Plan and Mr. Frew’s Memorandum of Decision. Given the high level of public concern, and the poor track record already experienced by all the mega-loads that have been approved for

Highway 12, the Hearing Officer should recommend that the Memorandum Of Decision be withdrawn.

CONCLUSION

For the foregoing reasons, the Hearing Officer should recommend that the February 14, 2011 Memorandum of Decision is arbitrary, capricious, and was issued in violation of IDAPA 39.03.09.100.01 & 0.2, 39.03.11.05, and 39.03.16; that the Memorandum of Decision be withdrawn; and that no further over-legal permits be issued to Exxon/Imperial for the transport of mega-loads on U.S. Highway 12.

Dated this 23rd day of May, 2011.

Respectfully submitted,

/s/ Laird J. Lucas
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2011, I caused to be served the foregoing Petitioners’ Post-Hearing Brief upon the following persons by the means indicated below:

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