IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY et al. and FRIENDS OF THE CLEARWATER, et al. Petitioners and Intervenors, vs IDAHO TRANSPORTATION DEPARTMENT Respondent, and IMPERIAL OIL RESOURCE VENTURES, LTD., and MAMMOET CANADA WESTERN, LTD., Applicants	HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDATIONS FOR ORDER

This matter is a contested case proceeding before the Idaho Transportation Department (ITD) conducted under the Idaho Administrative Procedures Act. The hearing officer is retired senior judge D. Duff McKee, Boise, Idaho, appointed by order of the Director. Appearances are:

> For the petitioners Linwood Laughy, Karen Hendrickson, Peter Grubb, John Crock, Owen Fiore, Mary Anne Fiore, Janice Inghram, Roger Inghram, Julian Matthews, Ruth May, Jim May, Gail Ryan and Richard Ryan, and the intervenor Friends of the Clearwater: Laurence J. Lucas and Natalie J. Havlina, Advocates for the West, Boise, Idaho.

For the respondent Idaho Transportation Department: Deputies Attorney General Lawrence G. Allen and J. Tim Thomas, Office of the Attorney General, Boise, Idaho.

For the applicant Imperial Oil Resource Ventures, Ltd.: Kevin J. Beaton and Bradley J. Dixon, Stoel Rives, Boise, Idaho.

For the applicant Mammoet Canada Western, Ltd.: M. Michael Sasser and Richard M. Hart, Sasser & Inglis, Boise, Idaho.

A nine-day evidentiary hearing was conducted at the headquarters of ITD in Boise beginning on April 25, 2011, and concluding on May 11, 2011. A simultaneous round of written briefs was submitted to the hearing officer on May 23, 2011. The record was held open to May 27, 2011, for submittal of rebuttal briefs. All parties waived rebuttal argument, and the case was deemed submitted for decision on May 27, 2011.

Now therefore, being duly advised in the premises, the hearing officer makes the following findings of fact, conclusions of law and recommendations for entry of order.

Procedural History

Imperial Oil Resource Ventures, Ltd. (Imperial) is constructing an oil refinery at the Kearle Oil Sands project site in northwestern Alberta Province, Canada. The concept for the construction is to manufacture component parts of the refinery away from the site in modules, ship the modules to the site, and fit the modules together on site. Somewhere in the materials this was likened to a very large, very expensive and very technical Lego project.

Some of the modules are manufactured in Canada and transported a relatively short distance to the project. However, certain highly technical modules have been and are being manufactured in Korea. These modules are being shipped by sea to the port at Lewiston, Idaho. Imperial proposes to transport these modules to the Kearle Oil Sands

project by truck, first across Idaho into Montana, north through Montana to the Canadian border, and then through Canada to the construction site in northern Alberta Province.

The subject of this proceeding is Imperial's proposal to transport approximately 200 of these modules through Idaho on Highway 12. Each module is of extraordinary size and weight, requiring the issuance of overlegal load permits from the ITD to traverse the highways in Idaho. The protesting parties object because the route from Lewiston up the Clearwater, up the Lochsa, and over Lolo Pass to the Montana border is a spectacular scenic highway running through the edge of the primitive area and over the breathtaking mountainous route of Lewis and Clark. These parties maintain that, for a variety of reasons, ITD should not issue the overlegal permits requested.

The module at the heart of this proceeding is a test module, formally termed the "Test Validation Module" and referred to throughout as the TVM. The TVM was constructed expressly for the purpose of testing the feasibility of transporting the actual construction modules by truck along the routes proposed. The TVM represents the extreme in height, width, length and weight of the planned modules to follow. Imperial intends to follow with approximately 200 additional modules, consisting of the actual parts to the refinery. Although the proceeding here involves only the single permit issued to the TVM, it is understood by all parties that also under examination in this proceeding is Imperial's expectation that the result here will control the issuance of approximately 200 additional overlegal load permits covering the actual construction modules that are now being collected at the port facility in Lewiston.

Imperial owns the modules. Mammoet Canada Western, Ltd., (Mammoet) is an independent contractor specializing in the transport of extraordinary loads throughout the

world. Imperial contracted with Mammoet to actually accomplish the transporting of the modules through Idaho. Imperial, Mammoet, and a plethora of engineers, consultants and other subcontractors began working with ITD on the process of securing permission to transport these loads across Idaho approximately three years' ago. This eventually resulted in the issuance of a single trip overlegal load permit to cover a single trip of the TVM across Idaho in February of 2011, which is the nominal subject of this proceeding, and which will form the basis for the department's action on the remaining permits for the actual modules.

Meanwhile, in a completely unrelated proceeding, Conoco Phillips also sought permission to transport overlarge pieces of an oil refinery across Idaho on Highway 12. In that proceeding, ITD issued several overlegal permits to Conoco Phillips in August of 2010. The permits were issued administratively, although the head of the Division of Motor Vehicles did write a memorandum decision explaining the decision. Some of the protesting parties in this case filed an action against ITD and Conoco Phillips in district court. The case was heard at the trial level by District Judge John Bradbury, who entered an order reversing the issuance of the overlegal permits to Conoco Phillips.[1] That case was appealed to the Idaho Supreme Court and was heard on an expedited basis. The Supreme Court released its opinion on November 1, 2010, vacating the district judge's order and directing that the case be dismissed without prejudice.[2] Central to the Supreme Court's conclusion was that the parties had not exhausted their administrative remedies before the department and the courts had no jurisdiction to intervene.

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[1] *Linwood Laughy et al. v Idaho Department of Transportation,* Idaho County Docket CV-40411, Memorandum Opinion dated August 24, 2010 by Hon John Bradbury, District Judge (unpublished.)
[2] *Laughy et al v Idaho Department of Transportation,* 243 P.3rd 1055 (Idaho, 2010).

On October 19, 2010, the protesting parties in this case submitted an administrative petition to ITD seeking a contested case proceeding of issues pertaining to the issuance of an overlegal trip permit for the TVM. The department, by Director Brian W. Ness, responded by letter on February 14, 2011. The departmental letter advised that the department had determined to issue the overlegal permit for the single TVM load but was initiating a contested case proceeding pursuant to IDAPA 04.11.01.104. A hearing officer was appointed and instructions were given for the lodging of further documents. On the same day, Alan Frew, Administrator of the Division of Motor Vehicles of the ITD, released a Memorandum of Decision authorizing and directing the issuance of the TVM permit.[3] The single overlegal permit for the TVM was issued by ITD on the same day.[4]

The contested case proceeding was opened initially with the protesting parties and ITD. Imperial and Mammoet were permitted to intervene as respondents. The organization "Friends of the Clearwater" was permitted to join as a protesting party. Merlyn Clark, who had served as the departmental hearing officer for the unrelated Conoco Phillips permits, was replaced with Judge McKee. An order was entered by Director Ness directing that the case be heard on an expedited basis with hearings to convene in Boise on April 25, 2011.

A hearing was held pursuant to this order.

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[3] Hearing Exhibit 1

[4] The permit for the TVM has been extended or reissued several times because of delays, but there has been no substantive change to the subsequent or reissued permits. The exact date of the TVM permit, and the exact dates for the travel allowance noted in the permits, are not material to these proceedings.

Issues Presented

The issues to be presented were framed by agreement of the parties at the preliminary conference held April 11, 2011:

1. Whether the ITD properly followed its rules requiring it to make "safety and convenience to the general public and the preservation of the highway system" is primary concern in issuing the overlegal permit, as is required by IDAPA 30.03.09.100.01.

2. Whether the ITD properly followed it rules which require it to "predicate the issuance of an overlegal permit upon a reasonable determination of necessity and feasibility of the proposed movement" as required by IDAPA 30.03.09.100.02.

3. Whether the ITD has properly determined and applied the appropriate restriction on traffic delays as set forth in department's administrative regulations.

The parties agreed at the preliminary hearing that the issue of "feasibility" under IDAPA 30.03.09.100.02 was not being challenged.

Analysis and Findings of Fact

A. Background of Uncontested Facts

Much of the background circumstances, necessary to an understanding of this case, are not in dispute. I include them here not as "findings" but merely to frame that which is to come.

The relevant section of the highway in question runs approximately 174 miles east and west, connecting Lewiston to the Montana border along the Clearwater, Selway and Lochsa Rivers, and up and over the Bitterroots at Lolo Pass. Much of the route is through forest service lands, and much of it borders on Idaho primitive area. It is a narrow, winding mountain road, barely 25 feet wide in many places, with sheer rock faces on one

side and steep banks to the river on the other. The highway was designated a federal scenic by-way by act of Congress in 1968 and has become an outdoorsmen's paradise. Virtually every part of the rivers alongside the highway offer unparalleled opportunities for fishing, rafting, and white water adventure. Highway 12 is the exclusive gateway to this wonderland. By anyone's definition, it is a spectacular example of Idaho's majesty.

It is also a part of the federal highway system and is a significant commercial thoroughfare. In addition to accommodating normal commerce among the numerous communities along its way, the highway links the wheat fields of western Montana, the Camas Prairie grain fields and the forests of central Idaho to the seaport and sawmills at Lewiston. One is as likely to see 18 wheel freightliners, logging trucks and grain hoppers as camping rigs and jet boat trailers heading both up and down the scenic byway.

The subject loads in this case have become known as "mega-loads" for good reason. The TVM, which is intended to typify the largest of the actual loads, is over 29' high, 23' wide, 208' long and weighs 254 tons.[5] Until the Conoco loads arrived on the highway in late 2010, nothing like these loads had ever been seen on Idaho roads before, and certainly not on the winding mountain roads above Lewiston.

B. Safety and Convenience

1. Standard to be applied

In examining the subjective issues of concern to the ITD in the issuance of overlegal permits, and when considering the impact of elements such as safety and convenience, the first determination to be made is the comparative standard to be applied. When examining an overlegal load such as the TVM, is it to be compared with no traffic

[5] The permit for the TVM indicates that it is 29'6" in height, 23' in width, 208' in length, with a gross weight of 508,804 lbs. including the pusher. Hearing Exhibit 6

at all on the highway, with non-commercial traffic, with commercial traffic within legal limits, or with commercial traffic of some measure of overlegal characteristics short of the scale of the megaloads?

There does not appear to be any regulatory or statutory guidance on this question, and no authority on point has been cited. For the purposes of this analysis, then, I find and conclude as follows.

It is not practical to compare the operation of the megaloads against no traffic at all. With such an absolute, any operation becomes marginally more dangerous or intrusive than no operation at all, meaning that measurement of risk or intrusion becomes pure speculation.

It is not reasonable to limit the comparison to non-commercial traffic. This appears to be the argument taken by the protestants in this case. The protesting witnesses all offered comments and illustrations based upon their personal experiences, which were all occurrences in normal passenger vehicles and small pickups. However, and as noted by ITD, Highway 12 is also a commercial thoroughfare. At least, it would appear, the megaloads should be compared with other commercial traffic.

It does not appear realistic to compare the megaload with other overlegal traffic. By definition, overlegal traffic is not the norm – all such require permits and special consideration by ITD. If the comparative standard was to be some measure of other overlegal loads, the task of determining standards, even hypothetically, would be a definitional impossibility

Based upon all of this, I conclude that from a practical standpoint, the standard to be applied must be to measure the megaloads against other commercial traffic that is

within legal limits. In other words, and for ease in comparison, I conclude that the questions become on each of the elements under consideration, how does or will the operation of the TVM (and by inference the remaining 200 megaloads of Imperial) compare with the operation of a legal and fully loaded 18 wheel semi-truck and trailer operating upon the highway under the same or similar conditions?

2. Safety

With this in mind, the first issue under examination is the protestants' contention that the megaloads pose an undue risk upon the highway, and that ITD erred in granting the permit because it failed to give adequate concern to the safety issue. They make this argument in three parts: (1) access to health care, (2) police unavailability and (3) traffic concerns.

a. Access to Health Care

Much of Highway 12 is narrow, winding mountain road, with very little shoulder and bordered by rocky cliffs on one side and steep river banks on the other. When in motion, the TVM load occupies the entire highway from fog line to fog line, with no way for other traffic to pass. Oncoming traffic must be stopped and held, and following traffic must trail behind, until the load moves off the highway. The operation plan (which will be discussed in detail below) calls for this to occur frequently, with the load being periodically moved onto designated turnouts to allow both oncoming and trailing traffic to clear. The stated requirement of ITD and the intent of the traffic plan is that traffic is not to be delayed for longer than 15 minutes.

The overlegal permit issued by ITD limits operation of the megaloads on the highway to the hours of 10:00 p.m. to 5:30 a.m. This corresponds to what ITD and

Imperial claim are the hours of lightest traffic on Highway 12. It is required that the megaloads be pulled off the highway completely during the daytime and earlier evening hours.

The protesting parties' argument on this issue is that operation of the megaloads will delay access to emergency care. Because the loads block the highway completely, ambulances and emergency runs in private vehicles would be delayed. The emergency physician from the hospital in Orofino testified that in his opinion, this would result in a delay during the critical "golden hour" of trauma are, and would be unacceptable. Several other witnesses testified to medical emergencies requiring rapid transport to medical facilities by private vehicle that would have been hindered had the megaloads been on the road.

The question becomes, does the possibility of a medical emergency of the nature described outweigh the commercial utility of allowing the highway to be used as requested, assuming other conditions are satisfied? I think from a pragmatic standpoint, the answer must be no. Although there was testimony of numerous medical emergencies through the hospital in Orofino in the course of a year, and although many of these may have been time critical, there was no actual evidence of hindrances or delay on the highway as having any bearing on the issue. There were no statistics or break downs on emergencies during the late night hours. There was no breakdown of the emergencies treated as to how many were truly life threatening, and how many were of a more mundane nature – requiring treatment, but not on a time-critical basis. One would expect that the life threatening emergencies would be a sole smaller fraction of the total. There was no breakdown of how many of the life threatening emergencies occurred during the

late night hours. Again, this would be an even smaller fraction of the total emergencies treated. For the megaload to pose any problem at all in this area, the emergency would have to arise during the span of time the load was actually on the road between the emergency and the hospital. If the load is above or below either the location of the emergency or the hospital, it poses no problem. If the load has been or can be pulled off into a turnout when the emergency vehicle approaches, it poses no problem. Finally, and as was testified, the convoy will include an ambulance staffed with EMT or paramedic personnel. In an extreme situation, the patient could be transferred around the megaload vehicle to the convoy's ambulance.

All of the megaload convoy vehicles will be in radio communication, and the convoys will be escorted by the Idaho State Patrol. If an ambulance is involved in communication with its dispatcher, the ISP escort can be contacted to hold the megaload at a turnout until the ambulance passes. Even if by private vehicle, if the hospital is notified that the patient is on the way, contact could be made to the megaload convoy to hold the convoy until the private vehicle passed. Mammoet personnel have traveled the highway and identified 675 emergency turnouts which can be used to allow an emergency vehicle to clear. Counsel observes that for the 174 miles of the route, this is one every quarter-mile. The traffic plan contains a chart of these turnouts, together with eight specific "emergency response plans," or ERPs, covering a variety of circumstances from medical emergencies through vehicle accidents to extreme weather.[6]

In one such episode that did occur with the TVM, a flagger was informed by the driver of an oncoming car of an emergency circumstance (a sick dog). The flagger immediately radioed the convoy, the TVM was promptly pulled onto one of the

[6] Hearing Exhibit 2

secondary turnouts, and the oncoming traffic was permitted to clear with a delay of less than one minute.[7]

In addition, Mammoet witnesses observed that if a forward turnout was too distant and time was of the essence, the pusher truck can be turned around and hooked up to the rear of the megaload in less than 90 seconds, and the megaload can be pulled back to an earlier turnout or a secondary turnout to allow the emergency vehicle to pass. All of these alternatives are covered as contingencies in the traffic control plan.[8] These contingency plans serve to reduce to the minimum any delay that might be encountered in the event of an emergency situation.

In cross examination, the Orofino hospital physician acknowledged that all of these alternatives were included in the transportation plan, and acknowledged that they would serve to alleviate if not eliminate potential problems. He had no criticism of the plan, and only commented that, based on his military experience, Murphy's Law might apply and they might not work. He appears to hold the opinion that any delay on the highway would not be acceptable. Since any traffic emergency on Highway 12 has the potential for causing some traffic delay, to carry this expert's opinion to its necessary conclusion would mean that all traffic should be prohibited – a practical absurdity.

I do not find any of this to be sufficient evidence to overcome the actual occurrences and experiences of the TVM on the highway and the planning that is evident in this case. Basing the standard of comparison of the megaload operation with normal commercial traffic and because of the nighttime operation and the (relatively) low traffic to be encountered during the hours of operation, I find as a fact that the probability of

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[7] Hearing Transcript, p. 2763.
[8] Testimony of Darren Bland; Testimony of Ken Johnson

encountering a medical emergency that would be impacted at all by a megaload on the highway is quite low. I further find that if such an emergency is encountered, and because of all the factors enumerated in the traffic plan, including specifically the additional communications available in the megaload convoy, the ambulance and paramedics accompanying the convoy, the immediate presence of the ISP escorts, and the meticulous planning for contingencies that has gone into the effort, such occurrence would be probably accommodated without undue delay, difficulty or additional risk to the patient. I further find as a fact that because of the factors enumerated above, in any medical emergency situation that might arise, the circumstance would in all probability be better accommodated in an interaction with the megaload convoy than in many if not most emergency situations involving normal commercial traffic.

b. Police Unavailability

The protesting parties make a narrowly focused argument that possible unavailability of state police to serve as escort officers affects the validity of the permit. The argument is based upon the following facts, which do not appear to be in dispute.

A transportation plan as approved by ITD calls for each megaload convoy to be escorted by two officers from the Idaho State Patrol (ISP).[9] A contract between the ISP and Mammoet was entered into for the ISP to provide personnel and equipment for this purpose.[10] The officer's service while on escort for the megaload convoy is considered to be "on duty on overtime." The entire expense of the convoy escort duty is passed on by the ISP to Mammoet under the contract. The duty is voluntary, with officers drawn from a pool of approximately 17 ISP officers stationed in the area. While four officers and

[9] Hearing Exhibit 2
[10] Hearing Exhibit 18

patrol units were assigned to the TVM convoy initially, by the time the TVM reached the third leg of the trip across Idaho, fewer ISP units accompanied the convoy for the final leg.[11]

The protestants argue that operational planning divides Highway 12 into three segments, with one load being permitted on each segment at any given time. They argue that this means that three loads, one per segment, could be on the highway at any given time, and then argue that ISP does not have sufficient off-duty officers to draft for escort duty for the three convoys. I consider the argument to be a red herring.

This is not a permitting process issue with the ITD, it is an operational issue with ISP. While the traffic plan and contract state two ISP officers will accompany each convoy, Director Frew in his memorandum decision simply observes, "State police escorts and traffic control contractors will maintain emergency vehicles access throughout the entire route."[12] He makes no comment upon the level of staffing required.

It would appear that since it is a requirement of the permit that the convoy be escorted by the ISP, then anytime there are not officers to staff the escort requirement, the convoy cannot go. Any internal issues over staffing would not be matter of concern to ITD, but would be a matter between Imperial or Mammoet and the ISP. There was no testimony that any of the parties – Imperial, Mammoet or the ISP, anticipate any difficulty meeting the expected staffing as required by the contract between them on this issue. The existence of an escort is a matter of permit as required by the ITD, but the staffing of the ISP escort is a matter of police interest, covered by separate contract with the ISP. While ISP involvement generally is part of the traffic plan that was approved by

[11] Testimony of Officer Lonnie Richardson
[12] Hearing Exhibit 1

ITD as part of the overlegal permit, the actual operational levels and responsibility assumed here are matters of police business, and are between Mammoet and the ISP. There was no testimony the staffing levels of the ISP escort were of concern to ITD or had any bearing on any of the permitting issues under examination.

I find as a mixed issue of fact and law that there is no evidence of ISP convoy escort staffing levels relevant to the validity of the permits or the process of issuing the permits, which are the issues under examination.

c. Traffic Safety

The overlegal permit requires that the megaload convoys operate only at night, between the hours of 10:00 p.m. and 5:30 a.m. The loads are to be parked completely off the highway during daylight hours. The indication by witnesses and by Administrator Frew in the memorandum decision is that this limitation was for safety reasons. Protestants argue that nighttime operation is more dangerous, and the restriction by ITD is an error.

According to the testimony of a number of witnesses, nighttime operation is more dangerous than daytime. The general testimony was that in most overlegal situations, if any limitation is to be imposed, ITD usually requires that travel be only during daylight hours. In some sense, this seems to support the protestants' argument.

However, as all parties observe, the ITD duty in its consideration of overlegal permits as established by statute and regulation is multifaceted. In addition to safety ITD must consider convenience – to surrounding land users and to the traveling public. The problem in the megaload situation is that during the daylight hours, significantly more traffic and more land users can be expected to be on and about the highway. Because of

the size of the loads and because the loads will block the highway completely, the additional traffic and users during the daytime would pose a significantly greater degree of inconvenience and interference than operation limited to late night hours.

The point to be decided becomes whether the aspect of convenience is more properly served by the nighttime limitation, and whether any increase in risk attributed to nighttime operation is acceptable under the circumstances. I discuss the aspect of convenience separately below. Here, I consider the isolated issue of whether, notwithstanding consideration of convenience, the risk posed by nighttime operation should be considered unacceptable.

The protesting parties make much of testimony offered by several witnesses that the witness was "confused" when he or she encountered one of the megaloads at night because of the lights, magnitude of the load and other factors, and felt threatened thereby. I find the testimony on the whole disingenuous. While the circumstances encountered were no doubt unusual and curious, the situation appears not significantly different from many types of traffic emergency one might encounter late at night, with police flares, flashing lights and uncertainty. One responds normally to such situations by slowing down and moving cautiously until one has moved past the event and the way is again clear. Despite the dramatic adjectives used in the descriptions, this is how the testifying witnesses reacted here. There was no testimony of any real danger, no testimony of any accident or damage, and no testimony of any harm to any of the witnesses. I am not persuaded that any of this bears on the issue of safety.

ITD has determined that the increased risk is acceptable, with the conditions imposed by the permit. The conditions imposed include the requirement for ISP escort

vehicles front and rear, traffic control vehicles and flaggers front and rear, illuminated warning signs as required by the MUTCD,[13] and illumination of the TVM itself. The speeds in question will be generally quite low – under 35 mph maximum. The testimony was that these factors supported ITD's conclusion that risks of serious collision was quite low, and although minor scrapes might occur, the risk of serious injury or significant property damage was not great.

Measured against the standard of normal commercial traffic, which would be traveling at higher average speeds and without the illumination, escorts and warnings, I believe this conclusion is justified. I find as a mixed finding of fact and conclusion of law that the operation of the megaload at night, under the conditions imposed by the permit, does not present an unacceptable safety risk over operation during daylight hours.

d. Highway Safety

The engineer expert offered by the protestants testified that Highway 12 was statistically more dangerous than the average highway in Idaho, offering recent statistics compiled by the ITD. I will certainly find as a fact that this highway produces a greater statistical incidence of accident as compared with highways that are not as narrow, not as winding and not as mountainous. But I also conclude that this finding is irrelevant to the permit or permitting process.

As large as the TVM is, and there is no question but that it is huge, the parties stipulated to feasibility meaning that the load could navigate the highway without

[13]The Manual on Uniform Traffic Control Devices, or MUTCD has been adopted in Idaho as a regulation established detailed specifications for all traffic control devices. There was some inconsistent testimony from several witnesses as to exactly what type of warning device would be employed by the flaggers and traffic control vehicles in this case. I believe the knowledgeable testimony was provided by Mammoet's witnesses. I do not detail the specific of the actual signs in use, but conclude as a fact that all signs and devices were and are as specified in the MUTCD.

difficulty. The load is carried on a specially designed trailer that is equipped with a number of independently suspended and steerable axle assemblies. The axles can be steered independently, if need be, or automatically by connection to the pulling tractor. The articulated assembly of the trailer is designed to enable the rig to negotiate the tight curves of the highway without difficulty.

From this testimony, and from the stipulation of the parties as to feasibility, I find that operation of the TVM on the highway to present no greater risk because of the highway limitations that is posed by normal commercial traffic. The safety rating of the highway is not a factor in the issuance of permits in this case, or, so long as feasibility is not at issue, in the permitting process.

3. Convenience

The argument on convenience can be divided into two parts – the impact upon other traffic and the impact upon surrounding land users.

a. Trip Delay to Following Traffic

The protesting parties devote considerable argument to the concept that delay of other traffic is not just the time when oncoming traffic is stopped, but should include the delay encountered by trailing or following traffic. Protesting parties claim error on the part of ITD for not calculating and considering this component of trip delay.

ITD acknowledges that it does not consider the element of delay to following traffic that is moving slower than might be expected, but only considers delay with respect to traffic that has been stopped. Upon only brief consideration, however, it readily becomes apparent that so long as the trip delay encountered by stopped traffic is found to be within tolerable limits, then the trip delay by trailing traffic that occurs over the same

amount of time must also be within tolerable limits because such trip delay, as a matter of simple physics, will always be less than the delay encountered by the stopped traffic.

According to the traffic plan, the TVM (and other megaloads) will move from one designated turnout to the next along the route from Lewiston to the Montana border. At each designated turnout, if there is any other traffic, the TVM will be pulled off the highway so the other traffic may clear. Sets of flaggers and traffic control vehicles will leapfrog one another ahead of the convoy, establishing stop points just ahead of the forward turnout where oncoming traffic will be stopped and held while the TVM moves up from the last turnout. Trailing flaggers will follow the convoy to control following traffic. Following traffic will not be stopped, but will be directed to slow down and follow the convoy until it reaches the next turnout. The following traffic speed will not be reduced to zero, but will continue at whatever the speed of the convoy is traveling.

The distance between the designated turnouts and the average expected speed of the convoy between turnouts has been calculated for each of the designated turnouts along the way, and plotted on maps and into a table. The maximum time an oncoming vehicle would be stopped, assuming the oncoming car arrived at the stop point at the exact moment the TVM departed the previous turnout, has been calculated using simple arithmetic. According to the distance measurements and calculations contained in the traffic plan, no oncoming traffic will be stopped for longer than 15 minutes. The trip delay for such a stopped vehicle would those minutes, because the vehicle was stopped.

Traffic following the convoy will be slowed somewhat, and will be required to follow the convoy at the reduced speed until the convoy reaches the next designated turnout. Once the rig is pulled off the highway at the turnout and both the oncoming and

following traffic will be allowed to clear. Because both oncoming and following traffic will clear whenever the convoy is pulled over, the minutes of delay for any following traffic will be essentially the same as the minutes of delay for stopped traffic,

However, the trip delay for following vehicles will necessarily be something less than the total trip delay for the stopped traffic, because the following traffic will have some following speed during the minutes it is required to follow the convoy, which speed will be higher than zero. As long as the trip delay for stopped traffic is within tolerable limits, then since the exact minutes of delay would apply to following traffic, it is not necessary to further calculate the trip delay for the following vehicles. On those turnouts where the oncoming traffic is stopped for a lesser time than 15 minutes, the trailing traffic will have a correspondingly lower trip delay because the factor of trip delay is at least some speed and not zero.

I find as a fact that once delay time and trip delay for stopped traffic is established and calculated, it is unnecessary to consider the impact of trip delay for following traffic any further. Under the circumstances presented here, this aspect of delay will always be a lesser figure than the delay for stopped traffic.

b. Other Forms of Delay

The protesting parties contend that ITD erred in not considering other forms of delay occasioned by the megaload operation on Highway 12. The elements enumerated are the delay encountered while the utilities dug up and relocated utility and communications lines in the highway right of way, and the delay encounter while the tree trimming contractors were in the highway right of way trimming the trees to provide necessary clearance.

The only evidence on this came from protesting witnesses who live or operate businesses along the route. There was no testimony that the tree trimmers acted in any way other than they usually do when trimming trees. There was no testimony of what the utility trucks did during normal maintenance or how the circumstances of burying cable here differed. There was no testimony of what might be savings in maintenance time down the road once the cables were buried. I am not persuaded that any of this is a proper concern of the overlegal permit or permitting process. Certainly the utility companies and tree trimmers have the right or license to go onto the right of way in carrying out their normal activities along the highway. While there may well have been some extra work in connection with making the highway ready for the megaloads, there was no evidence of the extent or degree to which such extra work was carried out. From empirical knowledge, I would expect that the delays in this area would generally be minimal, given the relatively light traffic on the highway. Only where there was competing traffic would I expect there to be momentary delays while competing traffic is guided around a work truck intruding into the right of way.

Concerning the episode where the TVM cut a utility pole guy wire causing a power outage, there was no testimony of how this would have been different if a normal truck or even a passenger car had run off the road and severed the cable, or if the cable had been severed by severe weather. While it is true that it might not have happened in the same manner – i.e. being clipped by a high corner of the load – certainly accidents on the highway have occurred where a utility pole or guy wire is damaged by an ordinary vehicle, or where severe weather has caused power lines to fall. I fail to see any difference here.

Protestants observe that Administrator Frew, in the memorandum decision, observed that disruption of utility service was not expected. They point out that since the TVM clipped a wire and did interrupt service, this conclusion was clearly wrong. However, this was not the point of Frew's comment. In context, he was observing that the normal operation of the megaloads was not expected to interrupt utility service. There was no call, as can happen with very large overloads, to interrupt service while the load passes, such as by having to actually take lines down. The observation by Frew was that in normal operations, no such interruptions were expected.

The interruption that did occur was the result of an accident. If anything, it provides evidence of how the traffic plan works in the event of an unexpected occurrence. From the testimony of the witnesses who handled the event, it appears that the TVM was quickly moved off the highway, the utility was notified and identified the damage, the state patrol maintained traffic control until the situation was clarified, and the highway was returned to normal operations with a relatively short time. Once identified, it took a short time to fix the problem so it would not be repeated, and then TVM operations resumed. With the exception of this event, it appears that the entire TVM trip was otherwise without incident.

When measured against normal inconveniences one may expect along a highway, the complaints here become trivial. Consider a school bus with stop sign out, pothole repair or minor road repair, an auto accident, normal utility work, normal tree trimming, an ISP cruiser with a stopped motorist, or any of a plethora of other incidents that can slow or momentarily stop traffic along the way. The hyperbolic complaints and

arguments advanced here do not help the petitioners' cause. The arguments are not plausible.

I find as a fact that the "other forms" of delay raised by the protesting parties are nothing more than incidents of minor delay of a type that may be expected from a variety of causes along the highway. As such, they are simply not an aspect of the overlegal permitting process, and not a concern of the permit.

4. Preservation of Highways

Protesting parties make two arguments under this topic: (a) that the granting of the permits in this case will turn Highway 12 into a commercial corridor for high and wide loads, and (b) that the megaload will put an undue load on the existing highway, which, given its existing condition, will result in an unreasonable burden on the state highway system from the standpoint of maintenance, repair and replacement.

a. The High and Wide Corridor

The argument is that extending the permits will lead to the highway becoming a corridor for high and wide loads, which is inimical to the classification of the highway as a scenic byway and to its use by sportsmen and outdoorsmen as an access way to the scenic beauty of the Clearwater, Lochsa and Selway rivers. Passionate and well-meaning testimony was offered by a number of residents of the area, testifying to these aspects, and to their fears that commercial activity on the highway of the nature of the megaloads will ruin the aesthetics and ambiance of the entire region.

The other side of the argument is that the highway is a federal thoroughfare, originating on the Pacific Coast and extending across the country to the banks of the Great Lakes. It is a primary route for all manner of intra and interstate commerce, as well

as the only commercial route for purveyors to supply the local communities along the way. Although the highway has been designated as a scenic byway, there are no restrictions on commercial traffic included within the classification. No federal statute or regulation bears on this issue. Although a significant part of the route passes through federal land regulated by the U.S. Forest Service, the rights of way are under the control of the ITD and the Forest Service has no regulation restricting commercial traffic.

The phrase "high and wide corridor" does not appear in any regulation or statute. It appears to be a phrase created by the protesting parties to characterize their opposition to intruding commercial traffic along this particular highway. The problem here is that everyone thinks that their piece of home is heaven, and everyone wants to keep their backyard clear of intruders. Although there was not direct evidence on this point, there was indirect evidence that ITD and Imperial were receiving at least some degree of pushback from other areas of the state to the prospect of moving the loads up Highway 95 to the Interstate. I make no finding on this issue, but simply observe that the argument on this aspect is not grounded in any statutory or regulatory authority. There are no actual facts to be found in this area, and I only observe here that the highway is what it is. If it turns out that it is a suitable route for high and wide loads to traverse the state, and such loads meet all the requirements of statute and regulation – so be it.

The argument is reduced to a classic variation of NIMBY – Not In My Backyard! Even though there may be no technical or legal difference between the megaloads and other commercial traffic, even though the loads are configured to place comparable weight and burden on the roadway to normal commercial traffic, and even though it appears that these loads can move through the state with a minimum of disruption, the

argument persists that they are still too large, too loud, too bright and too smelly – and should therefore be consigned to someone else's backyard, and not theirs. When reduced to this aspect, it becomes clear that the argument must fail.

b. Highway Burden -- Background

Considerable technical testimony was presented by several ITD engineers from the state bridge section,[14] the district maintenance engineer,[15] a district traffic engineer,[16] and the state materials engineer.[17] The protestants offered technical testimony from a professional engineer with considerable experience in transportation and highway issues.[18] From this testimony and as a background to the arguments raised in this area, I make the following findings.

The TVM exemplifies the very largest of the 200 megaloads to follow. It is not disputed that it is close to 30' high, 23' wide, 208' long, and weighs over 500,000 lbs. However, these overall figures are not truly relevant in considering the impact of these loads on the highway. The parties stipulated to feasibility, meaning to me that they are in agreement or have conceded that this thing will fit on the highway, it will negotiate all the curves and turns, the tractor and pusher trucks are capable of getting it up and over Lolo Pass at the speeds indicated in the traffic plan, and that it will fit sufficiently into the designated turnouts along the way to allow other traffic to clear and thereby accommodate the requirements of the traffic plan. I consider all of these factors to be included within the stipulation of feasibility, and therefore find such as a fact without the necessity for further evidence.

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[14] Shannon Murgoitio and Kathleen Slinger
[15] Doral Hoff
[16] David Couch
[17] Jeff Miles
[18] Pat Dobie

The state's engineers are in agreement that because of the particular configuration of the special trailer carrying the TVM, and because of the number of axels, wheel sets and tire size that have been provided under the load, and so long as the conditions imposed by the bridge engineers are observed on the designated bridges, the actual impact of the TVM on the highway with respect to any particular wheel or wheel set will be no greater that the impact of a normally loaded commercial truck. The critical numbers are not the size or weight of the entire load, but the size and weight of each tire or wheel set carrying the load. With the TVM on its custom trailer, the load is distributed in such a fashion that no tire or wheel set places a greater weight on the highway than is allowed for normal commercial vehicles. Specifically, the state materials engineer testified that the legal load limit per tire was 600 lbs per inch width, and that up to 800 lbs per inch width could be allowed under certain circumstances. The TVM loads in this case measured a maximum of 491 lbs per inch width per tire throughout the entire vehicle. The state material engineer's conclusion was that the TVM would cause no more impact on the highway than four logging trucks. "Stacked on top of each other?" he was asked. "Not what I meant," he responded and then clarified, "It's just four logging trucks going down the road one after the other."[19]

The bridge engineers testified that the bridges on the route were the weakest link. If the TVM was able to safely negotiate the bridges, it could legally – from an engineering standpoint – negotiate the entire highway. All highway bridges in Idaho, from river and canyon spans to single irrigation ditch culverts, are inspected and rated. Many have load or speed restrictions. The bridge engineers testified that the TVM engineering specifications were checked against every bridge along Highway 12. They

[19] Hearing Transcript, testimony of Jeff Miles, pp 2361-2362.

testified that with some conditions imposed, in their opinion the TVM would be able to negotiate all of the bridges on Highway 12 without undue risk – meaning without putting any more stress or load on the bridge than would be expected from normal commercial traffic. The factors considered were weight per axel, distance between axels, and speed. In the case of the TVM, and for certain bridges, ITD engineers required a 20 mph maximum speed on the bridge. In one case, it specified that the pusher truck could not be on the bridge with the load. The restrictions are all contained in an attachment to the permit.[20]

From this testimony and the opinions expressed, I find as a fact that the TVM can negotiate the entirety of Highway 12 in a satisfactory manner, without any marginal increase in load or stress over that expected from normal commercial traffic. The impact on the highway from the TVM could be equated to four legally loaded logging rigs traveling one after the other.

b. Increased Cost over Design Life of Highway

The protesting parties presented testimony through a professional engineer that the actual cost of repairing or replacing the pavement caused by the overlegal loads far exceeded the revenue derived from the permits. This testimony is fatally flawed on a number of aspects.

The first assumption that this witness makes is that heavier loads will cause more damage to the highway than normal traffic. As noted above, I find that this assumption is not supported. I find that the ITD engineers are correct in this case, that the TVM and equivalent megaloads, when on their custom trailers and configured as indicated in the permit under examination and as set forth in the traffic plan, will actually place per tire or

[20] Special bridge requirements attached to permit, Hearing Exhibit 5.

per wheel unit weights on the highway that is within legal limits. As such, the megaloads will cause no more use or wear to the highway than other normally loaded and legal commercial traffic.

The second assumption this witness made is that the cost of replacement/repair of highway attributed to the megaloads on a unit basis can be calculated against the revenue generated. To determine unit cost, the witness determined that the TVM constituted 28 ESALs – "Equivalent Single Axel Load" – and that this figure times the number of loads and then divided into the projected cost to replace would give the cost of highway repair/replacement for the anticipated megaloads in this case. The fault here is that it is not just the raw cost that might be relevant, but it would be the marginal cost in excess the costs resulting from the operation of a normal truck. Since the TVM and related megaloads do not put any more weight on the highway per axel, or per ESAL, than a normal commercial vehicle, there would not be any difference in the marginal repair/replacement costs per ESAL. As the ITD engineers pointed out, if one accepts just the number of axels over the life of the highway, the 200 or so megaloads would constitute a tiny fraction of the total number of axels – whether one uses 28 ESALs per load (as testified by the protestant's witness) or 19.5 ESALs per load (as testified by the ITD engineer.). The fractional increase in total number of ESALs is trivial.

On this comparison, no matter how the raw cost of repair/replacement is calculated for the TVM and related megaloads, the cost would be exactly the same for an equivalent number of ESALs on any commercial vehicle, and therefore, there is no marginal difference. The trivial increase in total usage caused by these loads on an

equivalent axel-count basis, which the state engineer estimated to be somewhere between .013 and .018 percent, becomes irrelevant.

The final faulty assumption is that the revenue generated by the permit fee is intended to offset the increase cost of repair/replacement, and is the only source of revenue. Neither part of this assumption is supported by evidence. There was no testimony that the permit fee was intended to offset this cost, and the witness blithely acknowledged that he did not consider other revenues – significantly the State's share of fuel taxes – in any of his computations.

I find that the expert's conclusions on cost of highway replacement/repair are not supported by the evidence.

C. Necessity and Feasibility

1. Other Alternatives

As noted above, the parties advised at the preliminary hearing that the aspect of feasibility was not being challenged. This means that the first issue addressed here is the element of necessity. The relevant administrative regulation governing the issuance of overlegal permits requires the ITD to make a "reasonable determination of the necessity … of the proposed movement."[21] The protesting parties argue that it is not necessary within the meaning of the statute and regulation that these loads be brought through Idaho. They argue that Imperial and Mammoet had other options.

According to the evidence, the greatest impediment to transporting loads this size is height. Most highways and railways present insurmountable difficulties because of tunnels, overpasses and other permanent, fixed structures crossing over the rights of way that limit the height that a load can be in order to traverse the route. In this case, and for

[21] IDAPA 39.03.11.100.05

the entire length of the chosen route through Idaho, Montana and Canada, there are no permanent, fixed structures limiting the height of the loads. There are no tunnels, bridges, overpasses, pedestrian walkways or other permanent structures.

According to the evidence the only height obstacles on Highway 12 were movable obstacles such as utility lines and tree branches. To resolve this, Imperial, working with the utility companies, arranged to remove, relocate or bury all of the potentially obstructive utility lines. Under directions provided by the U. S. Forest Service, they arranged to trim all trees along the route, clearing limbs to a height of 30'on both sides of the road. These steps were intended to eliminate any height restrictions to the proposed mega-loads.

Apparently, they missed one tree branch and a power pole supporting guy wire. As has been noted elsewhere, on the first day of the TVM trip, it snapped off a tree branch and clipped a utility pole guy wire. The TVM was parked for a week while Imperial and Mammoet resurveyed the entire route, contracted for additional tree trimming, and rechecked all the utility line clearances. Following this work, the TVM continued its journey to the Montana border without incident. The protesting parties argue that these missed elements are evidence of the inconvenience and adverse impact the loads will have on the communities along the way. Imperial argues that these were minor incidents that were carefully and correctly handled to prevent or at least minimize future incidents. I am persuaded that the respondents have the better position on this argument.

According to the evidence, all other routes in Idaho present height limitations – primarily bridges and overpasses – that could not be solved. At least, the alternate routes

would not accommodate the highest loads, the loads approaching the 29'6" height of the TVM. The protesting parties point to testimony that some of the loads are being held in Vancouver, for transport via the Interstate system. However, the testimony was that these loads are much lower in height, can be moved under the existing bridges and overpasses, and do not present the height restriction problem of the TVM. There was no evidence of any other route, other than Highway 12, that could accept loads approaching the 29'6" height of the TVM.

I find as a fact that there are no alternate routes through Idaho capable of accepting loads the height of the TVM.

The protesting parties argue that ITD did not consider the availability of routes other than through Idaho, which is supported by the testimony. The ITD witnesses handling overlegal permits all testified that they only considered alternate routes in Idaho in evaluating the permit application, and did not consider the availability of alternate routes in other states. The protesting parties claim that this is an error that infects the permitting process.

There was scant evidence of other routes outside of Idaho. There was mention of a possible route up the Mississippi and into Canada from the east, and to other possible routes through Canada from the west. Imperial witnesses testified that all alternate routes were dropped, either because of practical limitations or because the alternate routes were significantly more costly in terms of time, distance and other economic considerations. ITD witnesses indicated that they relied upon the representations of Imperial and Mammoet on this and made no independent inquiry.

In this case, I consider evidence of routes through other states to be irrelevant. Once the shipments arrive in Idaho, or are presented to Idaho authorities for consideration, I am persuaded that the only issues for consideration are issues pertinent to the routes in Idaho. If the shipments are "necessary" within the meaning of the statute and regulation, and are in or destined for Idaho, the question is whether an acceptable route in Idaho can be found. If so, this element of determination is satisfied regardless of whether or not other routes in other states might also be available.

Suggesting that routes elsewhere should also be considered is fraught with difficulty. I think the problems are two-fold. First is the practical consideration of whether Idaho's ITD personnel could or should be expected to be familiar with possible routes in other jurisdictions. The testimony was that Idaho processes between 64,000 and 69,000 overlegal permits per year, with 30,000 to 32,000 being for irreducible loads.[22] It would be unreasonable, in my view, to expect ITD personnel to keep at their fingertips the information that would be required to evaluate alternative routes through other states under this kind of administrative load. Second, and more persuasive, is the legal consideration of whether Idaho has any legal justification for such inquiry. I have no difficulty with the proposition that Idaho can and should evaluate alternative routes within Idaho. Such routes would all fall within ITD jurisdiction to oversee. But whether Idaho could step into the arena of evaluating another state's interest presents an entirely different set of considerations. No authority is cited for the proposition that Idaho would have any jurisdiction or responsibility to evaluate routes through other states.

To attempt such without statutory mandate under either federal authority or some sort of interstate compact would appear at first blush to be constitutionally unsound.

[22] Testimony of Reymundo Rodriguez

Suppose Idaho concludes that a route through another state would be preferable, but that state concludes otherwise. The jurisdictional and constitutional dilemmas could quickly boggle. I believe it is an entirely different question for one state to undertake consideration of different routes in other states as opposed to the consideration of different routes within the same state. The latter is permissible and contemplated by the existing statutes and regulations. The former, in my view, is not.

Therefore, as a mixed finding, I first conclude as a matter of law that Idaho has no basis or jurisdiction to inquire into alternative routes in other states. The sole jurisdiction and statutory responsibility of ITD in the area of permitting overlegal loads is to evaluate alternative routes within Idaho. On that basis I find as a fact that the route over Highway 12 is the only available route through Idaho for mega-loads the size of the TVM.

2. Irreducibility

The permit applicant must demonstrate that the overlegal load is "irreducible." The pertinent regulation provides that an overlegal permit is not available if the load in question can be reduced in number or units, or positioned in a manner so as to meet legal requirements.[23] This issue is not relevant with respect to the single permit for the TVM, because the TVM, by definition, is not reducible. The TVM is a test module, intended demonstrate the feasibility and practicality of transporting the largest load of all the intended loads over the route selected.

The issue does have relevance with respect to the actual mega-loads waiting and yet to arrive at the port in Lewiston. These loads will have been manufactured in Korea as independent modules designed to be fitted into the final refinery on site at the Kearle

[23] IDAPA 30.03.16.100.02

project in Canada. The protesting parties have advanced a number of arguments against the conclusion that these loads are "irreducible."

I will accept as a given that the refinery could have been built from scratch in Canada, with pieces and parts all shipped in by ordinary means, and that would have avoided the overlegal issue entirely. I will also accept as a given that the modules could have been designed and manufactured differently – smaller and more numerous, perhaps, or of a different configuration to avoid the issues presented here. While I accept the premise, I conclude that such hypotheticals are irrelevant, and simply beg the question.

The parties are in agreement here that it is "feasible" from a technical and engineering standpoint to transport the TVM – and therefore all of the remaining 200 loads to follow so long as they are configured the same as the TVM – over Highway 12 into Montana. As high, wide, long and heavy as these loads are, it is feasible to move these loads over the highway. This is the conclusive answer to the question of should the refinery have used this process at all, and should the modules have been manufactured this size to begin with.

The question then becomes, once manufactured to size, and once the modules arrive in or are destined to arrive in Idaho, can ITD require that the modules be reduced in size to better comply with the size and weight limitations. In the memorandum decision written in connection with the TVM permit, Administrator Frew concluded not.[24] The protesting parties challenge this conclusion.

The evidence offered is that Imperial has, in fact, chosen to reconfigure a number of modules by taking them apart and reassembling them into lower loads – loads that can then be transported via U.S. 95 and the Interstate. The argument is that since it is

[24] Hearing Exhibit 1, Memorandum of Decision, p.5.

demonstrably possible to reconfigure the loads, they are not "irreducible" as required by the regulation.

The term "irreducible" is not defined in Idaho statutes or regulations. ITD points to federal regulations that provide a load is not required to be reduced where (a) such would compromise the intended use of the vehicle or unit, or (b) destroy the value of the vehicle or unit, or (c) would require more than 8 hours to dismantle.[25] While ITD acknowledges that it is not bound by federal regulations on this issue, ITD argues that the federal provisions are persuasive.

Imperial explained that although it was possible to reconfigure some of the modules, it is an extraordinarily expensive and time-consuming process. Imperial witnesses indicated that it took several thousand man hours and approximately $500,000 to reduce the size of a module to the point where it could be transported under the bridges and overpasses of the alternate routes to Highway 12. Imperial said it undertook this task with some of the modules because of the inordinate amount of time it was taking to work through the permitting processes in Idaho and Montana, and that despite the cost, it was necessary to get some of the modules to the Kearle site to keep construction on schedule.

Administrator Frew concluded in the Memorandum Decision that the regulation on irreducibility was to be interpreted in a practical manner, rather than as an absolute. He concluded that because of the excessive amount of time and money that would be required to reduce the loads further, that the loads as manufactured were at their "practical minimum dimensions" as required by the regulation.[26]

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[25] 23 C.F.R. 1 § 658.5
[26] IDAPA 39.03.16.100.02

I conclude there is no reason to disturb this interpretation of the requirement. Although it may be possible to reconfigure some of the loads, the inordinate cost of doing so in terms of man-hours and dollars make this impractical for any but extreme situations. Further, the evidence was that only some of the loads could be reconfigured in this manner – and the reconfiguration solved only one of the overlegal circumstances, being the height. The resultant reconfigured loads were still over limit in width, length and weight. The result, then, is not a true solution to the overlegal problem but a mere shifting the circumstances from Highway 12 to another highway in Idaho.

Therefore, in a mixed finding, I first conclude as a matter of law that the term "irreducible" is to be applied in a practical manner, rather than an absolute manner, as interpreted by ITD in this case. Based on that conclusion, I then find as a fact that the megaloads as constructed in Korea are at their irreducible minimums as required by Idaho law.

3. Removal of Obstructions as Bearing on Necessity

In a somewhat convoluted argument, the protesting parties argue that Highway 12 was as obstructed as other routes in Idaho initially, because of the overhead utility lines and tree limbs. It was only after Imperial and others had spent millions of dollars to arrange for the relocation of utility lines and other overhead obstructions, and for extensive trimming of trees, that the route became available. The protestants argue that it was an abuse of discretion to conclude that a route that was once not suitable could be considered suitable only because of the work done by the permittees, or alternatively that it was an abuse of discretion to issue the work permits to allow the removal of these

obstructions in the first place. Based upon the following findings, I conclude this issue to be a non sequiter.

The argument that ITD actively aided and abetted in transforming Highway 12 into a "high and wide" corridor by authorizing the permits necessary to move utility lines, trim trees back, and improve turnouts is internally disconnected. The phrase "high and wide corridor" does not appear in any statute or regulation. It is not part of the federal scenic by way statutes. This phrase is a tag line created or adopted by the protestants, but otherwise without legal significance.

There is no dispute that Imperial spent considerable money in modifying the route to remove obstructions. Although ITD was aware of these efforts, and did issue permits for various contractors and subcontractors to go onto highway rights of way to accomplish the work, there is no testimony that ITD participated in or directed the work in any fashion. Imperial, working with the utility companies other contractors, accomplished the work independently and at no cost to the state.

There was no evidence on the issuance of rights of way permits to relocate power and communications lines, or that any of these permits involved any discretion on the part of ITD at all. The utilities in question all had to have easements for the maintenance of lines over ITD rights-of-way in the first place, which would necessarily include the right to go onto highway rights of way to maintain the lines. Any work to change the lines from overhead to underground would appear to be within the rights of the utilities, and any permits by ITD to authorize the work would be ministerial. Here there is no evidence or authority cited otherwise.

ITD issued permits to allow the trees alongside the highway to be trimmed, with limbs removed to a height of 30' for a distance of 18" from the fog line.[27] The argument is that if ITD had not granted permission for this trimming, there would have been overhanging limbs from trees under 30' height that would have intruded over the highway and presented an obstacle to the transport of the megaloads.

The only evidence on tree trimming is that it was done, or was to be done, in accordance with Forest Service specifications. It does appear that the most recent trimming might have been incorrectly done, in that some (perhaps even most?) trees were not trimmed as close to the bole or in as a uniform a manner as was expected under the Forest Service specifications. However, the testimony was that the trimming contractor would be required to come back and redo the most recent work to clean it up. In any event, the adequacy of the tree trimming by the contractor involved, who is not a party to this proceeding, would appear to be a separate contract issue, but would not appear to be material to the issue of overlegal permit issuance or the terms of the permit itself.

I do find as a fact that ITD did cooperate with Imperial and its contractors, and did facilitate the issuance of rights of way permits to accomplish the work necessary to remove obstacles from the route and accomplish the tree trimming. However, I also find as a fact that these permits were issued within each permit's own parameters of statutory and regulatory authority. There was no evidence to the contrary on this point. There has been no evidence nor any claims at all offered that ITD breached any of the pertinent standards, administrative regulations or statutory authority relevant to the issuance of any of the specific permits to contractors and utilities needed to accomplish this right of way work.

[27] See, e.g., Hearing Exhibits 41 and 42.

The protesting parties argue that ITD should have anticipated the impact that the work authorized by these permits might eventually have upon the issue of allowing megaloads to travel along routes in question, and should have appreciated that by refusing the work permits at the level of moving utility lines or trimming trees, ITD could have stymied the eventual overlegal permits for the megaloads and avoided this issue completely. I do find as a fact that ITD did not consider any these aspects in the process of issuing the rights of way permits for moving utility lines or trimming trees. However, as a mixed conclusion of law and finding of fact, I further conclude there exists no statutory or regulatory duty for ITD to consider such aspects in connection with the issuance of these rights of way permits. The argument of the protesting parties on this point is founded upon a premised duty of ITD that is not sustained.

The plain fact is that ITD is under no regulatory or statutory duty to see around this many corners in the issuance of what appear to have been routine rights of way work permits for work that falls within the gambit of ordinary maintenance. That the work done under these rights of way permits may have also accommodated the later consideration and issuance of overlegal permits for the megaloads is immaterial.

D. The Fifteen Minute Delay Rule

1. Introduction

The protesting parties argue that the delay to be encountered by other traffic when coming upon the megaloads on Highway 12 is unacceptable, and that the ITD should have denied the overlegal permits in this case on that basis. The argument is in several parts but all are advanced against the following circumstances.

There is no dispute as to the following facts: (1) the megaloads will take up the entire traveled portion of the highway when traveling on two-lane highways; (2) Highway 12 is a two-lane highway for much of its length in Idaho; and (3) for much of this length, there are no shoulders to the highway upon which other traffic could use to go around the megaload. This means that oncoming traffic must be stopped and held when a megaload is approaching, and following traffic must slow down and trail, until the megaload can be pulled sufficiently off the highway to allow the obstructed traffic to clear.

The traffic control plan submitted by Imperial and Mammoet identifies a series of turnouts throughout the length of Highway 12 where the megaload can be pulled off the highway in order to clear obstructed traffic. These turnouts are mapped and charted in the traffic control plan, and are located such that between the most distant pair of the identified locations, oncoming traffic will be held a maximum of 15 minutes.

As noted in another discussion above, I have concluded that if oncoming traffic is stopped for a given amount of time, and if trailing traffic is slowed for the same amount of time, the trip delay for slowed traffic is necessarily shorter than the trip delay for stopped traffic. It is only necessary, then, to evaluate the trip delay for the stopped traffic – so long as the delay times are identical, it is not necessary to separately calculate the trip delay for the slowed traffic. The discussions here with respect to delay, then, will only involve discussion of stopped traffic.

2. A 10-Minute Delay Rule Should be Applied

The first argument advanced by the protesting parties is that ITD has incorrectly interpreted the administrative regulations to allow a 15 minute delay time. They argue

that the proper application of rule should limit the maximum delay to 10 minutes. The regulations in question are found in Chapters 11 and 16 of Title 39 of the Idaho Administrative Code.

IDAPA 39.03.11.100.05 provides in its relevant part,

> "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 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 ....

IDAPA 39.03.16.100.01 provides in is relevant part

> Overlegal permits will not normally be issued for movements which cannot allow for the passage of traffic as provided in IDAPA 39.03.11...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.

Protesting parties argue that the provisions of Chapter 16 control, limiting any delay time to 10 minutes in all cases. ITD responds that the 10 minute limitation contained in Chapter 16 only applies when there is no traffic control plan. When there is a traffic control plan, the more general language of Chapter 11 allows ITD determine what is "feasible" and "frequent," which it says it has done in this case by incorporating the provision of Section 104.05 of the departmental Standard Specifications for Highway Construction, which generally limits allowable delay in any construction project to 15 minutes.

It is of note that the provision of Section 104.5 of the Standard Specifications for Highway Construction is clearly a target and not an absolute. The standard construction specification contemplates that occasional delays may approach up to 30 minutes without remedial action, and allows that a contractor may obtain written permission to exceed the stated maximum. Such has not occurred here, as the respondents maintain that they can

meet the 15 minute requirement. The point is only that these time limits are not absolute deadlines.

I am persuaded that this issue of traffic delay is entirely within the discretion of ITD. The requirement for a traffic control plan to assure accommodation of standards of feasibility and frequency, which is the stated mechanism of the provisions of the section in Chapter 11, is consistent with vesting discretion in the department to evaluate the traffic control plan in determining what is sufficiently feasible and frequent. This interpretation is also consistent with the first sentence of the section in Chapter 16, which incorporates the provision of Chapter 11 by reference. ITD construes Chapter 16 to allow it to issue an overlegal permit without complying with Chapter 11, i.e. without a traffic control plan, only under "special circumstances" – which does not apply to this case – providing that traffic delay does not exceed 10 minutes. I consider this to be a consistent and logical construction of the two sections.

The protesting parties' interpretation of the two regulations is internally inconsistent. Under their interpretation, if the 10 minute limitation of Chapter 16 is to control in all situations, the references to subjective standards of feasibility and frequency, and the requirements for setting such forth in a traffic control plan to be reviewed by the department, all as contained in Chapter 11 become superfluous. Regulations, as well as statutes, are to be construed so as to give meaning to all parts thereof, and to avoid rendering any part unnecessary.

The law is clear that the department should be accorded deference when construing its own regulations, so long as the departmental construction is within the statutory authority of the department, reasonable and practical under the circumstances,

not inconsistent with other statutes, and not countered by any underlying rationale against deference.[28] The statutory authority is found within Idaho Code § 40-1004, which is sufficiently broad to make obvious that considerable discretion is being left to the department in the implementation of it. Practical application of elements like traffic delay, feasibility and appropriate frequency are exactly the types of subjective elements that the executive department should be expected to determine in implementing the authority vested in it.

In a mixed finding, I conclude that the department is entitled to deference in its construction of Chapters 11 and 16 of Title 31 of the Administrative Regulations, and that its determination of a 15 minute delay under the traffic control plan as presented by Imperial and Mammoet is a practical and reasonable determination of what is feasible and frequent under the requirements of IDAPA 31.03.11.100.05.

3. The Delays Will Exceed 15 Minutes

The protesting parties aimed a number of arguments at the traffic control plan arguing in sum that Mammoet will be unable to adhere to the plan and that the delays to be encountered will exceed 15 minutes. None of these arguments survive close scrutiny.

a. ITD Has Correctly Defined and Considered "Delay"

Calculating the trip delay for a stopped vehicle is sufficient, as is discussed above. Since the time of delay is the same for stopped vehicles and trailing vehicles, it is not necessary to separately evaluate the trip delay for trailing vehicles. There may be a minor difference in clearing time, since the oncoming traffic will be cleared first, but the difference in total delay is not significant.

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[28] *J. R..Simplot Co. v Idaho Tax Commission,* 120 Idaho 849, 820 P.2d 1206 (1991).

The argument was made that a motorist might be stopped, permitted to crawl forward, and then stopped again pointing to the testimony of Janice Inghram. However, her testimony on this was in connection with the occurrence where the TVM snapped a utility pole guy wire. The ISP took over, and directed that traffic be held until the utility company determined it was safe to proceed. The delay encountered was not the delay contemplated by the traffic control plan of normal operations, but rather was under the emergency procedures. It does not support a conclusion that ITD failed to consider the extent of delay under normal operations.

The statement was made in protesting parties' briefing that Doral Hoff conceded that the formula used to calculate delay was incorrect. I do not find this to be an accurate representation of this witness's testimony in context. It is true that some of the ITD witnesses were confused about some of the intricacies of the tables showing the calculations on delay, but I do not find testimony that the formulas were incorrect. I do recall my own comment to the effect that once understood, the calculations were within reach of any smart 5th grader.

The argument is made that approval by ITD was arbitrary and capricious because it relied upon the representations of Imperial and Mammoet and did not "really understand" the plan. I will accept that the ITD witnesses could not explain all the detail of the attachments to the traffic control plan. The subject of testimony here is not the plan itself, but an appendix to the plan containing a very detailed spread sheet of calculations on each of the designated turnouts, showing the respondent's calculations of delay time. The spread sheet is not self-explanatory, and the Imperial witness testified that some of the headings to the sheet were confusing. Doral Hoff did testify that the sheet was

explained to him, and that he thought he understood it at one time. He did, however, stumble during his explanation of it at the hearing.

All of the confusion was cleared up by later witnesses. The traffic control plan, and particularly the table of calculations for oncoming traffic delays, was carefully explained in detail by witnesses from Imperial and Mammoet – who were directly involved in the creation and implementation of it. I find from their testimony that the plan was thorough and complete in determining potential delays along the route during normal operation. Their calculations and the details of the plan were borne out by the actual TVM trip, with the testimony indicating that the longest delay encountered during normal operations was 13 minutes.

In practical fact the, offending spread sheet was probably more complicated than it needed to be. However, once explained by witnesses who understood it, it appears that the delay calculations made by Imperial and Mammoet were correct. There is no showing that any of the representations or statements made by Imperial or Mammoet in the traffic plan, in the traffic control plan, or in any of the supporting schedules and spread sheets were misleading or incorrect. In fact, the evidence was to the contrary, that all of the calculations and planning was accurate and was carried out in actual practice with the TVM.

Absent some showing that ITD was mislead or deceived by the representations of Imperial or Mammoet, it is not wrong in the abstract for the agency to rely upon the submissions made. No authority has been cited for the proposition that ITD is required to re-engineer or independently verify any calculations made. When the required conclusions of the plan are accurately and sufficiently stated, as they are here, it is not

fatal to the agency's approval of the plan that the intricate details of supporting schedules are not fully understood. I make not finding on this, as the evidence is unclear. Hoff testified the he looked at the spread sheet but not in detail, but that he and another actually "drove" the entire route on the ITD simulator to see the calculations worked out. I find this is adequate under the circumstances shown by the evidence to confirm the essential details of the traffic control plan.

Much criticism was aimed at what the protesting parties termed as errors in the traffic studies conducted to measure traffic levels on Highway 12. The studies were made from data collected and published by ITD from traffic counting stations located along the highway. Criticism stemmed from the argument that the counts were not accurate because traffic that originated and ended from points within the counters – principally traffic between Lowell and Kooskia – was not being recorded. Criticism was also directed at the use of 2008 statistics from one counter combined with 2009 statistics from other counters, and from a failure to properly weight the statistics to account for the higher summertime volumes.

There was no evidence that better data was available. These traffic counters are the only counters available on the highway. There was no evidence that Imperial misapplied the data it did collect to the calculations, or that it misrepresented the data in any way. Imperial took the best evidence available and used it in its calculations. The attempted impeachment of these studies fails, as what as offered to compare were statistics from the state of Maryland that had obvious and fatal foundational differences from data generated in Idaho.

The final difficulty with the argument is that nowhere was there any testimony or evidence of what the correct statistics would have shown, or that such would have made a difference. What the statistics did show was that late night traffic along Highway 12 was very, very light. While it is alleged the correct statistics would show some marginally higher counts at various locations along the route, there was no evidence that the relative weight or relative value of the data would change – that being that the nighttime traffic was expected to be significantly lighter than daytime traffic. This was born out when the TVM traversed the last section of highway on the last night of its trip without meeting a single oncoming vehicle.

From the evidence available, and even accepting the argument of some degree of inaccuracies in the count, I find as a fact that the relative statistics are sufficient for the purpose. The data shows that even in the summertime, and even in the close vicinity of the several communities along the way, the conclusion that can be drawn from the statistics available is that the late night operation of the megaloads can expect to find the lightest traffic on the highway.

The protestants argue as though the raw numbers are significant. To my mind, it is not the raw numbers, but the comparison between late night and daytime. At every data point, at every hour, and throughout the year, the very late night figures revealed that the traffic was significantly lighter when compared to traffic during the rest of the day. This is the important finding, and one that is not affected by what the protesting party refers to as errors. I find no merit to the protesting parties' arguments.

E. Economic Considerations

1. Business Interference

The individual protesting parties who testified either live along Highway 12 or conduct business operations on Highway 12. All claim they will be harmed by operation of the TVM and following megaloads. The evidence offered was that the huge loads will destroy the character of the river and drive off business. The testimony of an economist was offered on the importance of river based activities to the economy of the region.

There was no testimony or evidence of actual economic harm as a result of the operation of the TVM or following megaloads. All of the testimony on the economic issues was prospective, based upon the premise that operation of the huge loads and the delays that might result would harm business. The only actual testimony concerning operations comes from the operation of the TVM.

On the first day, it clipped a utility pole guy wire which stopped operations for a period of time, the guy wire shorted a transmission line, and interrupted electrical service for several hours. I do not find this occurrence to be typical of operations, or uniquely attributable to the megaloads. Any normal commercial vehicle involved in an accident at this particular place on the highway could have clipped the guy wire with the same consequence.

With this exception, the remainder of the TVM trip was completely uneventful. Although there were a few weather delays where the TVM remained parked in its day stop location, as far as the witnesses who testified, the trip went without a hitch. The longest traffic delay was 13 minutes. The last part of the trip was run without

encountering any competing traffic at all. There was no interference with economic activity along the highway, and no complaints from any of the residents.

The actual interference with river operations when the trips go as planned will be virtually non-existent. The loads pass by on the highway and are gone within minutes. The day stop locations have been selected to not interfere with surrounding businesses. None of the witnesses testified to any activity on the rivers in the dead of night, when the megaloads are about, and none testified to any interference during the day around the day stop locations. The only business traffic that was identified was the possibility of early morning fishermen – but even here, they testified that the earliest fishermen's starts were about the time the megaloads were pulling in to the day stop parking positions.

Even if the trips do not go as planned, the traffic plan contains detailed scenarios to handle occurrences and minimize interference. In this case, in the only events that did occur was when the guy wire was clipped and the emergency planning was activated, and when the TVM was held up at the base of Lolo Pass by weather. Although the TVM remained parked in is turnout for the periods of time it took to rectify the situation and for the weather to clear, there was no testimony that this interfered in any way with normal business activities up and down the river.

I find as a fact that there was no evidence of, and no sufficient basis for claim of economic interference on any of the business ventures along the route.

2. Stigma or Reputation

Concerning the claim that the existence of the loads will create a stigma on the area damaging its reputation, there is a saying, "Beauty is in the eye of the beholder." While the protesting witnesses complain how distressful and out of place the megaloads

appear in the setting of the Clearwater and Lochsa rivers, others might have a completely different view. These are extraordinary vehicles, and seeing them move along the roads could be viewed by some, perhaps many, perhaps even most, as a magnificent example of modern technology at work. The point is that for every person that stays away because of the megaloads, another might come forward for the express purpose of witnessing the operations. Several witnesses who testified spoke with awe at the size and monstrous appearance of these loads in the dead of night; another, witnessing the same event and with the same awe might view the event as a memorable scene. The point here is that all of this is entirely speculative. Once the operation settles into a routine, it is just as practical to expect that the movement of these loads through the dead of night will pass virtually unnoticed by all who use, live on and enjoy the scenic beauty of the area.

I find as a fact that the potential for economic or personal distress from the operation of the megaloads is speculative. There is no evidence to support the concerns, and such evidence as does exist negates the concerns completely.

F. Traffic Control Plan

Considerable testimony was offered by the protesting parties' engineer concerning the traffic control plan. I conclude as a fact that none of the criticism has merit.

The protesting parties' expert made much of the fact that particular drawings and charts within the traffic control plan, and the plan itself, were not signed or stamped by a professional engineer. He testified that this indicated that a professional engineer had not prepared these items, which he thought improper. The witness misstated the regulation, that states that a plan may be prepared by an engineer or "an American Traffic Safety

Association (ATSSA) certified traffic control supervisor."[29] Here, the evidence was that the traffic control plan was prepared by engineers and planners from Imperial and Mammoet, with a first draft being prepared and submitted for comment in 2009. The plan then went through twelve iterations before the final version was approved.[30] It appears that a number of hands were involved in the various processes, with both Imperial and Mammoet representing to ITD that the drafters were appropriately accredited. Mammoet witnesses at hearing testified that the traffic control plan was prepared in accordance with ITD regulation, which testimony was not challenged on cross examination.

There is no challenge to the professional accreditation of the traffic plan other than the assumption based on the fact that the plans were not stamped. I conclude that that evidence, standing alone, is insufficient to establish that the drawings, schedules and plans were not properly prepared by accredited professionals. Rather, I conclude, that the lengthy process of preparation, the 12 separate drafts being circulated, the involvement of ITD along the way, and the testimony of the Mammoet witnesses, are sufficient evidence that the plan was properly prepared in accordance with regulation. I find as a fact that the transportation plan and the included traffic control plan were prepared in accordance with the regulations of ITD.

The expert witness spent a considerable time trying to explain that the flagger plan for controlling traffic around the megaloads would not work. Without detailing the testimony, I find that his attempted explanations were thoroughly and completely refuted by the testimony of Mammoet witnesses and by the evidence of the actual TVM trip across Idaho.

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[29] IDAPA 39.03.11.100.5(b)
[30] Hearing Exhibit 2, page 1

Although there are many moving parts to the plan, and a number of people are involved who have to know their jobs and ensure that they are in the right place at the right time, the concept is relatively simple. All of the people involved in carrying out this plan are in radio contact at all times with one another, and with the ISP escorts and supervisors on the TVM. One flagging team trails the convoy to control following traffic as needed. Three flagging teams operate ahead of the convoy, leapfrogging ahead of one another so that one team is located at the existing stop point to control traffic for the current stop location, one team is standing by at the next stop point, and one team is setting up two stop points ahead.

If there is traffic at an existing stop point, the flagger team there would stop and hold the traffic until the convoy reaches the turnout and pulls off. If there is no traffic at the existing stop point, and if the forward teams and scouts indicate that there is no traffic approaching (and providing there is no trailing traffic that needs to be cleared), then the second stop point is immediately activated, the third point transitions to standby, and the present stop's flag team picks up and leapfrogs two stops down the road, which becomes the new "third" point, to begin setting up. The convoy can simply "blow by" any turnout when there is no traffic holding or approaching. This is exactly the procedure that is described in the traffic control plan, and notwithstanding the hand wringing of the protesting parties' professional engineer, the plan worked without a hitch for the entire TVM trip across Idaho.

I find as a fact that the protesting parties' criticism of the traffic control plan with respect to the manner in which traffic is to be controlled by flag teams is completely unwarranted.

Conclusions of Law

1. I.C. § 67-5279 directs that an agency action is to be sustained unless that action is (a) in violation of constitutional or statutory provisions, (b) in excess of statutory authority, (c) made upon unlawful procedure, (d) not supported by substantial evidence on the record as a whole, or (e) was arbitrary, capricious or an abuse of discretion.

2. The party contesting the action has the burden to show the specific violation of I.C. § 67-5279, and further to establish that a substantial right of the complaining party has been prejudiced thereby.

3. The hearing officer is directed not to substitute his judgment for that of the executives of the agency as to matters within the discretion of the agency, or as to findings of fact made by the agency upon proper evidence before it. The hearing officer is to defer to the decision of the agency upon matters pertaining to interpretation of the agency's rules and regulations, unless the decisions are clearly erroneous.

4. The Idaho Transportation Department is the entity within the state charged with responsibility and authority over the state highway system. This agency also has jurisdiction to administer the federal highway system within the boundaries of the state. State statutes, I.C. §§ 40-1001, 49-1002 and 49-1010, establish allowable gross weights and maximum sizes of vehicles operating on state and federal highways within the state. Idaho Code § 49-1004 vests with this agency the discretion to grant special permits allowing vehicles with a greater weight or size than permitted by law to operate on the highways within the state. Administrative regulations of ITD collected at IDAPA 39.03.09, IDAPA 39.03.11 and IDAPA 39.03.16 provide the regulatory basis for issuing overlegal permits in Idaho. The permit issued to the TVM, and the permits to be issued

the remaining 200 Imperial loads, will be issued by the ITD under these statutes and regulations. The ITD has the legal authority under the statutes and regulations to issue overlegal permits to permittees, provided the conditions of statute and ITD regulations are satisfied.

5. In this case, and based upon the findings of fact and analysis above, I conclude that ITD properly followed its rules pertaining to the issuance of he TVM permit requiring it to make "safety and convenience to the general public and the preservation of the highway system" its primary concern, as is required by IDAPA 30.03.09.100.01. Specifically, I conclude:

5.a. The requirements and limitations contained on the face of the permit and in its attachments, and as detailed in the traffic control plan approved by ITD adequately satisfy the requirements of safety and convenience to the general public, as contained this section of the regulation.

5.b. Because the TVM as configured will cause no greater impact upon the highway per tire or per axel than the per tire or per axel load of a normally loaded commercial vehicle, and because the TVM and related loads will travel at significantly less than legally allowed speeds, these loads will have no greater impact upon the highway than normal commercial traffic and therefore highway preservation is not an issue.

5.c. So long as the remaining loads of Imperial are configured the same as the TVM, are not of a greater size or weight than the TVM, are carried by the same transportation contractor on the same or equivalent types of equipment, are subject to the same transportation plan and traffic control plan, then, upon a

appropriate physical inspection and a satisfactory showing to ITD that there is no material change to any of these aspects pertaining to the issuance of permit to the TVM, overlegal permits to the remaining loads of Imperial would also satisfy the regulatory provisions of safety and convenience.

6. In this case, and based upon the findings of fact and analysis above, I conclude that ITD properly predicated the issuance of the overlegal permit upon a reasonable determination of necessity and feasibility of the proposed movement, as required by IDAPA 30.03.09.100.02. Specifically, I conclude:

6.a Feasibility was stipulated and was accepted as established without further evidence.

6.b. ITD has no jurisdiction or authority to look outside of Idaho for alternative routes. Highway 12 within Idaho is the only route capable of accommodating the TVM and related loads, given the height of the load.

6.c. Imperial has a legitimate commercial purpose to transport these loads across Idaho on their way to northern Canada. This satisfies the requirement of "necessity" under the regulation.

6.d. So long as the remaining loads of Imperial are configured the same as the TVM, are carrying parts of the described refinery destined for the Kearle Oil Fields of northern Canada, are not of a greater size or weight than the TVM, are carried by the same transportation contractor on the same or equivalent types of equipment, are subject to the same transportation plan and traffic control plan, then, upon a appropriate physical inspection and a satisfactory showing to ITD that there is no material change to any of these aspects pertaining to the issuance

of permit to the TVM, overlegal permits to the remaining loads of Imperial would also satisfy the regulatory provisions of necessity and feasibility.

7. In this case, and based upon the findings of fact and analysis above, I conclude that ITD properly determined and applied the appropriate restriction on traffic delays as set forth in department's administrative regulations. Specifically, I conclude:

7.a. The traffic control plan included within the transportation plan prepared by Mammoet and incorporated into the application for permit for the TVM and other overlegal loads of Imperial and Mammoet, fully satisfies the statutes and regulations pertaining to minimizing delay of other traffic by overlegal size vehicles operating within the state.

7.b. With respect to the remaining loads of Imperial, so long as there is no change to the conditions of travel, or to the restrictions and conditions of the overlegal permit as issued to the TVM, and upon appropriate physical inspections and a satisfactory showing to ITD that there are no material changes to any of these aspects pertaining to the issuance of permit to the TVM, the traffic control plan included within the transportation plan prepared by Mammoet may be adopted and incorporated into the permits for the remaining loads of Imperial.

8. In this case, and based upon the findings of fact and analysis above, I conclude that none of the complaints or issues raised by the protesting parties are sustained. Specifically, I conclude:

8.a. With the procedures of the traffic control plan in place, with the emergency procedures available in the event of an a situation requiring special attention, with all elements of the megaload convoy being in radio communication

with one another, with a fully staffed ambulance and state patrol officers traveling with the convoy, and with the limitation of operations to late night and early morning hours where traffic is at its lowest level, I conclude the risk of harm to an ill or injured member of the public because of a delay in travel to a hospital or medical facility is no greater than the normal risks one undertakes in any trip upon a highway. This consideration of access to medical care is fully accommodated by the traffic control plan, and the circumstance does not present a basis for denying or further modifying the overlegal permit in this case.

8.b. ITD correctly defined the delay under consideration as the trip delay for stopped vehicles. Since trailing vehicles are subject to the same minutes of delay as stopped vehicles, and since the trip delay for trailing vehicles will necessarily be shorter that for stopped vehicles, it is not necessary for ITD to separately consider trip delay for trailing vehicles.

8.c. ITD correctly construes its regulations to mandate that the 10 minute delay limit in Chapter 16 is only for instances where a traffic control plan is not submitted. Where, as here, a traffic control plan is submitted, the ITD has discretion in determining what is a reasonable delay to allow under the circumstances. In this case, the 15 minute delay taken from the construction specifications was and is a reasonable delay to allow

8.d. The federal designation of Highway 12 as a "Scenic Byway" imposes no restrictions or limitations on the type of traffic that may travel on the highway. The phrase "High and Wide Corridor" has no legal significance. The highway is a thoroughfare for commercial vehicles of all types. The TVM and the related loads

to follow are commercial vehicles that have demonstrated the capability to navigate the highway without damage or undue risk. So long as the conditions imposed by ITD are satisfied, neither their designation as "High and Wide" loads nor the highway's designation as a "Scenic Byway" presents any legal reason to deny access.

8.e. The main wear and usage damage to a highway is mainly caused by the weight and speed of commercial vehicles. The TVM and its related loads will travel at much lower than allowed speeds, and will place less weight per tire or axel upon the highway than is allowed per tire or per axel for a normal commercial vehicle. These loads will cause no marginal damage to the highway above that expected from normal commercial traffic. There is no marginal cost attributable to excess weight or use by the TVM to recover.

8.f. The TVM by definition is an irreducible load. The loads to follow are all irreducible under the federal definition, and under the practical consideration that reduction in the size of the loads can only be accomplished at enormous cost. The federal standard and the practical considerations are reasonable standards for ITD to apply in its determination of irreducibility. There is no basis to interfere with ITD's discretion on this issue in determining that the loads in this case are irreducible.

8.g. ITD has no jurisdiction to consider alternate routes in other states or countries. ITD had and has a duty only to consider alternate routes through Idaho. Highway 12 is the only route through Idaho capable of accommodating the TVM and the related loads to follow.

8.h. There is no evidence that the megaloads will actually impact the business operations of the complaining witnesses in this case. The evidence was there will be no more than one convoy per night passing any given location with travel restricted to very late hours at night to very early hours of morning, which will greatly reduce any impact on the normal business operations of others.

8.i. The traffic control plan and the procedures for controlling oncoming and following traffic were prepared by qualified traffic professionals, were reviewed and approved by ITD, and have proved in the field under actual conditions that the procedures called for will work. The claim that it was not prepared by a qualified person is not sustained. The claim that approval by ITD was arbitrary and capricious is not sustained. The claim that the traffic control procedures will not work is not sustained. The claim that the data was incorrectly collected and calculated is not sustained.

9. I conclude that there is no other basis under the law or regulations of ITD that would justify a denial or revocation of the overlegal permit in this case. I conclude there was no error in procedure on the part of ITD in the issuance of the permit in this case, or any other basis to interfere with the executive determinations of the department in issuing the permits in this case.

Recommendations for Order

This case involved the examination of the processes surrounding the issuance of a single permit to the TVM. – the "Test Validation Module" It is clearly the understanding of all parties that Imperial wishes to follow the TVM processes with approximately 200 more overlegal permits on loads waiting or to arrive at Lewiston. To the extent possible,

the administration, consideration and issuance of overlegal permits for the remaining 200 loads should be governed by the findings and conclusions reached here, with respect to the TVM.

In the case of the TVM permit, and following the practice in the Conoco Phillips permits, the administrator of the Division of Motor Vehicles released detailed memorandum opinions on the issuance of the overlegal permits for the megaloads. Memorandum opinions are not required by statute or rule for the issuance of overlegal permits generally. ITD may issue close to 70,000 permits in any one year so adding a requirement for findings or other written decision to support each permit would significantly increase the administrative burden of ITD.

Accordingly, I recommend that the Director consider entering an order that not only resolves the issue of the TVM permit but also paves the way for administrative consideration, processing and issuance where appropriate, of overlegal permits for the remaining 200 loads of Imperial. With that objective in mind, I recommend a final order in these proceedings as follows.

1. The Director should affirm the issuance of the overlegal permit issued to Imperial and/or Mammoet for the TVM, affirming that the permit was issued in full compliance with the statutes of the state and all relevant regulations of the department.

2. The Director should declare that the petition of the protesting parties for a contested case proceeding is not sustained in any respect, and the relief therein requested should be denied.

3. The Director may declare that the procedures followed by ITD in considering and processing the application for permit for the TVM, and the conditions applied to the

permit by ITD, are the procedures to be followed and conditions to be applied for the remaining loads of Imperial.

4. The Director may declare that the Idaho Transportation Plan and included Traffic Control Plan submitted by Mammoet in connection with the TVM permit, being Revision M, dated November 29, 2010,[31] conforms to the requirements of ITD regulation, and that this plan may be accepted and approved as the transportation plan and traffic control plan for each (of any) of the remaining overlegal loads of Imperial.

5. The Director may declare that the showing necessary for future permits of the 200 loads of Imperial may be limited to those aspects demonstrating that the load in question fits within the characteristics of the TVM load, which may include specifically (but not necessarily by way of limitation):

5.a Physical inspection of each load to ensure that it does not exceed the size of the TVM, and that the TVM is otherwise an adequate representation of its configuration, and to ensure that the carrier and related equipment is the same as or equivalent to that used in connection with the TVM;

5.b. Verification by Imperial that there are no changes of condition in the load at variance from the representations made in connection with the TVM load, or any other circumstance of which Imperial and/or Mammoet are aware that would affect issuance of an overlegal permit to the instant load;

5.c. Verification by departmental bridge engineers and the district engineer that there are no changes in condition of bridges or the highway bearing on the issuance of an overlegal permit.

[31] Hearing Exhibit 2

6. The Director may declare that any subsequent permit of the 200 loads of Imperial that can be issued based upon these conditions and without change or exception may be issued administratively, without issuance of a memorandum of opinion on findings.

Dated this 27th day of June, 2011.

D. Duff McKee, Hearing Officer

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IDAPA 04.11.01.720.02. a, b, and c.

a. This is a recommended order of the Hearing Officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director with the Hearing Officer issuing the order within fourteen (14) days of the service date of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director. The Hearing Officer issuing this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

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

c. Written briefs in support of or taking exceptions to the Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director shall be filed with the agency head (or designee of the agency head). Opposing parties shall have

twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.