IN THE SUPREME COURT OF THE STATE OF IDAHO

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, Plaintiffs-Respondents, vs. IDAHO DEPARTMENT OF TRANSPORTATION, Defendant-Appellant, CONOCOPHILLIPS COMPANY, Intervenor-Appellant.	)	**Supreme Court Nos. 37985-2010 & 37994-2010 (consolidated)** District Court No. CV 2010-40411

PLAINTIFFS' RESPONSE BRIEF

Appeal from the District Court of the Second Judicial District for Idaho County
Honorable John Bradbury, Presiding

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INTRODUCTION

Did the Idaho Transportation Department ("ITD") misinterpret and misapply the ten-minute delay rule of its own regulations when it approved the ConocoPhillips ("Conoco") coke drum shipments, which will delay traffic on Highway 12 by at least fifteen minutes? That is the core question for this Court to decide, and it is a question of law over which this Court exercises free review. *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 181 P.3d 456 (2008) (agency's interpretation and application of regulations presents a question of law determined *de novo*).

The ten-minute rule is set forth in Chapter 16 of the ITD regulations, which is entitled "Rules Governing Oversize Permits For Non-Reducible Vehicles and/or Loads." *See* IDAPA 39.03.16.100.01. ITD acknowledges that the Conoco shipments are, in fact, "non-reducible" loads subject to these Chapter 16 rules. *See* ITD Brief, p. 8 ("IDAPA 39.03.16.100.01 applies to non-reducible loads, such as the coke drums at issue here").

Chapter 16 establishes an outer boundary of ten-minute traffic delays that may be caused by such non-reducible loads, and it further expresses ITD's intention that permits for such non-reducible shipments "will not normally be issued" if traffic passage cannot occur more frequently than that.

Specifically, Chapter 16 provides that non-reducible load permits must comply with Chapter 11 of the ITD regulations, "except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes)." *Id.* (emphasis added). For its part, Chapter 11 requires that overlegal shipments must allow for the "frequent passing of vehicles" traveling in the same direction. IDAPA 39.03.11.100.05(a) (emphasis added).

Because Chapter 16 expressly invokes Chapter 11, the Court must construe these related regulatory provisions together – as the district court did. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 208 P.3d 289 (2009) ("Provisions should not be read in isolation, but must be interpreted in the context of the entire document"). Reading the provisions together produces only one logical construction: Chapter 16 establishes that ten minutes is the maximum delay allowable for non-reducible loads, unless more "frequent passing" can occur under Chapter 11. ITD thus violated its own regulations by allowing the Conoco loads to delay traffic by fifteen minutes.

By contrast, ITD's reading of the regulations is not reasonable, and hence receives no deference from this Court. *See Stafford*, *supra* (no deference owed to agency interpretation of regulations that is not reasonable). ITD's interpretation produces an illogical result, by defining "frequent passing" as allowing delays of fifteen minutes in normal circumstances, even though Chapter 16 expressly states that ten-minute delays are the maximum allowed if that "frequent passing" standard cannot be satisfied.

Because ITD misinterpreted and violated its own Chapter 11 and 16 regulations in approving the Conoco permits, the Court should thus affirm the district court's decision reversing the permits – and it need not reach Plaintiffs' other claims, because the permits are invalid on this legal ground.

The record before the Court confirms, however, that ITD violated two other requirements of its Chapter 9 regulations, as Plaintiffs claim and the district court agreed. Chapter 9 obligates ITD to place a "primary concern" on public convenience and safety, and make a "reasonable determination of the necessity" of the Conoco shipments. *See* IDAPA 39.03.09.100.01 & .02. While the Administrative Record is replete with ITD's

analysis of bridge and highway safety issues, there is virtually no record material showing that ITD placed a "primary concern" on the inconveniences and hazards posed by such massive shipments to the businesses and local residents of Highway 12, nor that ITD undertook an independent determination of the necessity of the shipments, as the district court found.

Only after this case was filed did ITD scramble to address these issues, as reflected in the August 20th "Memorandum of Decision" by ITD traffic manager Alan Frew. The district court rightly held that this August 20th Memorandum is a *post hoc* litigation document which deserves little deference; but even so, the district court fully considered the August 20th Memorandum and found that it does not satisfy the Chapter 9 requirements. Even ITD appears to recognize that the August 20th Memorandum is inadequate to justify the Conoco permits under Chapter 9, since ITD now relies on a later Frew Affidavit that it filed with this Court to justify its "necessity" determination. *See* ITD Brief, pp. 5-6, 16 & 20 (multiple citations to Frew Affidavit). As a matter of law, of course, ITD cannot fill gaps in its record by relying on materials filed with this Court for the first time. *Chisholm v. Idaho Dept. of Water Resources,* 142 Idaho 159, 162, 125 P.3d 515 (2005) ("This Court is bound by the record and cannot consider matters or materials that are not part of the record or not contained in the record").

Plaintiffs recognize that this Court may not substitute its judgment for that of the agency; nor is it the Court's province to decide whether the Conoco shipments should be allowed or not. The Court's role instead is to make sure that agencies follow their own regulations and adequately explain their decisions. When an agency falls below those

standards – as ITD has done here – the Court must reverse and remand the challenged agency decision.

In summary, the record shows that ITD misinterpreted and violated Chapters 11 and 16 by allowing the Conoco shipments to delay traffic by fifteen minutes, when ITD itself provided in those regulations that ten-minute delays are the maximum allowed for non-reducible shipments; and it did not heed its Chapter 9 duties in approving the Conoco shipments either. Accordingly, the Court should affirm the district court, and reverse the Conoco permits.

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Where Chapter 16 establishes ten-minutes as the outer boundary for traffic delays caused by non-reducible loads, while also providing that such shipments should normally be denied if they cannot allow for more frequent passing under Chapter 11, has ITD misread and misapplied its regulations in approving the Conoco shipments to delay traffic on Highway 12 by fifteen minutes?

2. In this case, where ITD admittedly deferred to the applicant and made no independent inquiry or investigation of the necessity of using Highway 12 for the shipments, did ITD violate Chapter 9 of its regulations by not making a "reasonable determination" of necessity?

3. In not holding any public hearing and brushing off public concerns about the impacts of the shipments, did ITD also violate the separate requirement of Chapter 9 that it must place a "primary concern" on public safety and convenience?

4. Should the Court award Plaintiffs their reasonable attorney fees and expenses incurred in this litigation under I.C. § 12-117(a)?

STATEMENT OF THE CASE

A. Nature of the Case.

As ITD's brief acknowledges, this case centers on the interpretation and application of ITD regulations governing "overlegal" shipments, *i.e.*, shipments which are too long, wide, and/or heavy under the applicable statutes. *See* ITD Brief, p. 1.

Weighing over three hundred tons, standing nearly three stories tall, and spanning up to two-thirds the length of a football field, the Conoco coke drum shipments will entirely block Highway 12 as they inch slowly up along the Clearwater and Lochsa rivers; and all vehicle traffic will be required to wait fifteen minutes or more, before being able to pass. Whether ITD has properly interpreted and applied its regulatory requirements in approving these shipments is the focus of the dispute before the Court.

B. Course of Proceedings.

Plaintiffs Linwood Laughy and Karen ("Borg") Hendrickson are longtime residents, business people, and property owners on Highway 12 near Kooskia. *See* R. 3, 14-23, 66-68. Plaintiff Peter Grubb, along with his wife, built and manages the River Dance Lodge, which is located on Highway 12 in Syringa; and they own ROW Adventures, a commercial rafting company that takes guests down the Lochsa and other rivers. *Id.* Plaintiffs rely on Highway 12 for both personal and business purposes. *Id.*

Plaintiffs brought this case under the Idaho Administrative Procedure Act ("APA") on August 16, 2010, after having previously submitted numerous comments to ITD expressing their concerns about the planned Conoco shipments, and after ITD publicly announced that it would approve the Conoco permits to begin shipments on August 18th. *See* R. 1-13 (Petition for Judicial Review).

Because the shipments would occur rapidly – within a five-day period – Plaintiffs moved for immediate injunctive relief. *Id.* They supported their motion with briefing on the invalidity of the ITD permits, and affidavits attesting to the irreparable harms which they and the public would suffer, including both personal and economic harms. *See* R. 14-68 (Plaintiffs' affidavits and exhibits) & R. 235-48 (Plaintiffs' opening brief).

The district court, Hon. John Bradbury presiding, granted a temporary restraining order on August 17, 2010. *See* R. 249-50. The court found that Plaintiffs made a "prima facie showing that they may suffer great damage" if the shipments occurred, and that "by issuing permits for the transportation of the equipment the Department may be violating its own regulations." *Id.* The court set a preliminary injunction hearing for Friday, August 20th. *Id.*

Subsequent to issuance of the TRO, ITD filed a motion to automatically disqualify Judge Bradbury. *See* R. 249 (TRO issued at 10:02 a.m.) & R. 71 (motion to disqualify filed at 4:59 p.m.). Plaintiffs opposed the disqualification motion under Idaho Rule of Civil Procedure 40(d)(1)(I)(i), since a district court hearing a petition for judicial review under the Idaho APA sits in an appellate capacity. R. 73-74.

Only in response to that filing did ITD disclose, for the first time on August 18th, that it had not actually signed the Conoco permits before the TRO was entered. R. 75-78. But ITD does not dispute the fact that it had determined to approve the shipments which would begin on August 18th; and the Administrative Record confirms this fact. *See* R. 228, AR 878, 886, 893, 894 (copies of unsigned permits dated August 12-13 authorizing shipments to begin August 16) & AR 870 (August 16 announcement that Emmert would

start moving the loads on August 18). ITD simply had not signed the permits at the time Plaintiffs secured the TRO.

Conoco moved to intervene on August 19th, and participated in the telephonic hearing scheduled by Judge Bradbury to consider the disqualification motion. R. 79-99. Even though the Conoco coke drums were shipped to the Port of Lewiston back in May 2010, and had been awaiting transport ever since then, counsel for Conoco argued during the hearing that "time really is of the essence" and "the reality is that there will be a multi-million dollar loss to my client unless it can get across this bridge [the Arrow Bridge] during a very brief window." *See* Tr., 8/19/10, pp. 19-20. Conoco further emphasized that "[w]e really want to get this resolved, Your Honor, as quickly as we can," and that "unless we get the okay from this Court by Monday, and at the absolute latest Tuesday, we're going to miss our window. . . ." *Id.*, pp. 20-22.

Plaintiffs – as well as ITD and the district court – sought to accommodate these timing concerns by agreeing to vacate the TRO and injunction hearing, so that ITD could finalize the permits; and a hearing was set for Monday, August 23rd, in Lewiston. *Id.*, pp. 21-25. ITD prepared and served the Administrative Record upon Plaintiffs' counsel late on August 20th; and submitted its briefing to the district court on the claims raised in Plaintiffs' petition the same day. R. 108-119.

Notably, the Administrative Record that ITD served on Plaintiffs' counsel did not contain the August 20th "Memorandum of Decision" dated that same day; and Plaintiffs' counsel was only provided with a copy of it at the hearing on August 23rd. Likewise, that document was omitted from the Administrative Record filed with this Court. ITD

and Conoco have thus moved to augment the record to include the Memorandum, after they submitted their opening briefs in this Court.[1]

At the hearing on August 23rd, all parties agreed to go straight to the merits of Plaintiffs' challenges, rather than address an injunction or stay. After hearing lengthy arguments, Judge Bradbury promised to issue a ruling by the next day, as Conoco had requested. *See* 8/23/10 Tr., pp. 110-12.

The district court issued a written decision on Tuesday, August 24th, which reflects an enormous investment of judicial time and resources on a super-expedited basis. R. 179-95. Although Conoco now seeks to attack the district court for supposedly not making all findings it should have – particularly on whether Plaintiffs demonstrated "prejudice to a substantial right" under the Idaho APA – this Court should recognize that the district court worked hard under very short deadlines to get this case decided within the timeframe sought by Conoco.

The district court's opinion found that ITD misinterpreted its own regulations and acted arbitrarily, capriciously, and without substantial evidence in approving the Conoco shipments on several grounds, including the following:

"Frequent passing" and ten-minute delay rule under Chapters 11 & 16: The court held that the "frequent passing" provision of Chapter 11.110.05 and the ten-minute delay limit of Chapter 16.100.01 of the ITD regulations must be construed together, since Chapter 16 "wholly incorporates" Chapter 11, and establishes ten minutes as the outer boundary for the delays that non-reducible loads can cause. *See* R. 190-93. This is the

[1] The fact that the Memorandum was not in the Administrative Record originally compiled and served by ITD – and that no earlier drafts of the document appear in the record either – underscores that it is simply a *post hoc* rationalization concocted by ITD in response to this litigation.

logical reading of the regulations, the court reasoned; whereas under ITD's proffered interpretation, an illogical result would occur. As the court explained:

> When the "frequent passing" restriction is thus viewed within the context of 16.100.01, it is clear that "frequent" must mean something less than ten minutes; any other interpretation would be incompatible with the context of 16.100.01. For instance, the interpretation proffered by the Department would mean that, after placing the "frequent passing" restriction within the context of 16.100.01, the regulation would read as follows:
>
> > 01. Maximum Dimensions Allowed.... Overlegal permits will not normally be issued for movements which cannot allow for [passing of vehicles in the same direction at least every fifteen minutes], 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.
>
> Under the plain meaning reading of 16.100.01 announced above, the Department's interpretation would thus be that one cannot normally obtain a permit if traffic will be delayed more than fifteen minutes, but, even if it will be delayed more than fifteen minutes, one can still obtain a permit if a movement will at least not delay traffic more than ten minutes. Such an interpretation of "frequent" is untenable at best, and it is clear to me that, when the "frequent passing" restriction is read in the context of 16.100.01, as it must be, the term "'frequent" must mean something less than every ten minutes.

R. 191 (emphasis added).

"Primary concern" for public safety and convenience under Chapter 9: Under Chapter 9 of the ITD regulations, the district court found "no doubt there is substantial evidence that the Department honored its duty to preserve Highway 12," but "the same cannot be said about the public's safety and convenience." R. 185. The court held that this violated subsection 100.01, which directs that ITD's "primary concern" in issuing overlegal permits must be "the safety and convenience of the general public and the preservation of the highway system." IDAPA 39.03.09.100.01 (emphasis added).

As the court explained, its review of the Administrative Record showed that ITD "never solicited public comments about what would best serve its safety and convenience." *Id.* And despite concerns voiced by the public about the large percentage of medical emergencies (85%) that reach the Clearwater Valley Hospital Emergency Room in Orofino via private vehicles, "the Department has not required or arranged for any means for private vehicles involved with emergent medical situations to contact it, or Emmert, or the state Police to arrange for access to the local hospital." *Id.*

The court also found that "there is no contingency response plan to deal with a breakdown in transit," even though citizens warned how dire such risks could be. R. 185-89. These include the logistical delays and difficulties of getting a crane sufficiently large to lift the 300-ton load from the river, if such a disaster occurred. *Id.* Not only could this block Highway 12 for weeks or longer, but – as ITD admitted in the district court – the $10 million performance bond it required would not cover "damages to people or their property which may result from the project." *Id*., p. 189.

Reasonable Determination of Necessity: The district court further concluded that ITD did not make a "reasonable determination" as to the necessity of the Conoco shipments, as also required by Chapter 9 of the regulations. *See* IDAPA 39.03.09.100.02; R. 189-90.

First, the court expressed concern that the Administrative Record did not establish when ITD determined to approve the Conoco shipments – even though the facts indicated that ITD must have signaled its approval to Conoco sufficiently in advance that the company shipped the coke drums to Lewiston in May – and it observed that the August 20th Memorandum memorialized a decision that was previously made. R. 184-85.

Even though the district court indicated it would thus give "very little deference" to the reasoning set forth in the August 20th Memorandum prepared by ITD manager Frew, *see* R. 185, nevertheless Judge Bradbury fully considered and discussed the explanations in that Memorandum seeking to justify ITD's determination as to the feasibility and necessity of the Conoco shipments. *See* R. 189-90. The court noted that "Mr. Frew states that Emmert investigated the feasibility" of transporting the loads using other routes; but that the Memorandum simply cited a one-page Emmert report from the Administrative Record, in which Emmert advised that other states would likely not approve the shipments because of their size, impacts on congested urban areas, or for other reasons. *See* R. 189; R. 288, AR 40 & 744.

While the court concluded that Mr. Frew had substantial evidence to support his conclusion that the project is <u>feasible</u> – based on the extensive analysis of bridge and highway engineering issues that ITD had done – it reached the opposite conclusion as to the <u>necessity</u> finding required by Chapter 9, because of the very limited information contained in the one-page Emmert survey and the lack of any independent investigation done by ITD: "It is unclear therefore how Mr. Frew drew his conclusion that Highway 12 is the only viable option. There is no evidence in the record to support it . . . [and ITD has] <u>not made a neutral determination of necessity</u> as required by the rules." R. 190 (emphasis added).

Based on these three different violations, the district court thus reversed the Conoco permits under the Idaho APA. R. 193-95. These appeals followed, and were expedited by this Court on August 30th.

C. Statement Of Facts.

Highway 12

U.S. Highway 12 is the artery that supplies the lifeblood to the rural communities along the Clearwater and Lochsa rivers in north central Idaho. It provides residents access to jobs, groceries, health care, and emergency services. R. 4-5. In many places, Highway 12 is the only route available to reach these essential goods and services; detours simply do not exist. *Id.*

Historically, the primary industry along the Highway 12 corridor was forestry, and logging trucks continue to rely on Highway 12 for timber transport. With the timber industry decline, tourism and recreation have become the engine of growth in the region – and Highway 12 is central to that growth. Travelers from all over the United States flock to the Highway 12 corridor, drawn by its scenic beauty and outdoor recreation opportunities, including hiking, camping, hunting, fishing, and rafting on the Lochsa and Middle Fork Clearwater Rivers. *Id.*

Idaho itself has recognized these values, having designated Highway 12 as a "scenic byway" in 1989. The Federal Highway Administration later designated it as the "Northwest Passage Scenic Byway," and as an "All American Road." R. 67. These designations reflect the fact that the Idaho stretch of Highway 12 is considered "a destination unto itself" so exceptional that travelers would "make a drive along the highway a primary reason for their trip." *See* 60 Fed. Reg. 26759, 26760 (May 18, 1995).

Efforts to Convert Highway 12 to a "High and Wide" Corridor.

The record before the Court confirms that the Conoco shipments are part of a plan by ITD to convert Highway 12 into a "high and wide" corridor for the transport of

massive oil industry equipment from overseas manufacturers, as a new alternative transportation route to prior inland routes that took cargo shipped via the Panama Canal.

ITD advises this Court that it held public hearings on the Conoco shipments. *See* ITD Brief, pp. 1 & 4. That is false. ITD did not conduct any public meetings concerning Conoco's proposal, and the agency responded to the numerous public comments it received about the proposal with a form letter. *See* R. 228, AR 1227-28, 1730-2233.

In truth, the public hearings referenced by ITD – and many of the public comments contained in the Administrative Record – addressed the proposal by Exxon Mobil and its affiliate Imperial Oil to ship more than 200 overlegal loads of Korean-manufactured oilfield equipment destined for Alberta tar sands, known as the Kearl Project. *See* R. 228, AR 1304 (agenda for ITD open house on "Kearl Module Transportation Project"); 1210-11 (emails between ITD staff discussing meetings to "provide information and take comment on proposed plans by Imperial Oil to truck up to 200 large pieces of equipment on U.S. 12"); 1768 (public comment regarding "Imperial Oil/Exxon Mobile Kearl Sands Over Legal Equipment Transportation on Highway 12"); 1773 (public comment stating, "To imperil this fragile and beautiful roadway for an environmental disaster like the Kearl Oil Sands Project is unconscionable.")

With ITD's support – and long before the public learned of these plans – Exxon/Imperial made numerous modifications to Highway 12 to accommodate the Kearl loads, including upgrading or relocating at least 39 utility lines, reinforcing nine turnouts, and removing a substantial amount of vegetation along the corridor. R. 6.

ITD is also currently seeking federal funding to help finance additional port and road improvements to facilitate the use of Highway 12 as a new "high and wide" corridor

for these and other oil industry shipments. *See* R. 6. Indeed, in its federal grant application, ITD underscored that: "If one oil company is successful with this alternative transportation route, many other companies will follow their lead." *See* R. 144. That quote underscores the importance of the Conoco shipments to the future of Highway 12 and its residents.

The Conoco Coke Drum Transport Project.

Conoco is the first company to take advantage of the changes made to Highway 12 to accommodate such "high and wide" loads – and in fact, the Conoco shipments are the largest ever authorized by ITD to travel up the Highway 12 corridor.

The record indicates that the Conoco project began in July 2009, when Conoco's contractor Emmert contacted ITD and announced its intent to use the route developed for the Kearl loads to transport coke drums manufactured in Japan to Conoco's oil refinery in Billings, Montana (the "Coke Drum Transport Project"). R. 228, AR 744. Even though ITD argues that it did not approve the overlegal permits until August 2010, Conoco shipped the coke drums to Lewiston in May 2010 – a risky corporate gamble, if ITD were to deny the permits. *See* 8/23/10 Tr., pp. 67-68 (counsel for Conoco admitting, "there is a reality there which ConocoPhillips had a sense that it would be able to obtain the permit").

But the Administrative Record contains no evidence that ITD ever contemplated denying the Conoco permits. Instead, the record shows that ITD worked extensively with Emmert to structure load configurations that could be transported over the several bridges along Highway 12; and to develop the traffic control plan that is described in more detail in Conoco's and ITD's briefs. *See* R 228, AR 1-729.

Under the traffic control plan, the coke drums will travel between 10 p.m. and 5:30 a.m. The loads will be accompanied by an entourage of support vehicles, including five pilot car escorts, two State Police escorts, and two signboards. Altogether, this line of vehicles will extend for almost 500 feet. Lights and flaggers will be employed to alert other traffic. *Id.*

The loads will travel in two different configurations. *Id.* Loads in the first configuration will be approximately 110 feet long, 27 feet wide, 29 feet high, and weigh 646,200 lbs. Loads transported in the other configuration will be approximately 225 feet long, 29 feet wide, 27 feet high, and weigh 636,204 lbs. *Id.*

The traffic control plan acknowledges that, despite all the planning that has been done, such unprecedented shipments will "inevitably" encounter unexpected events or "emergent" situations:

> It is inevitable that on a transportation project of this size and complexity, which uses the variety of equipment types that Emmert International will have to employ, some abnormal and/or emergent situations may occur. These may be caused by a variety of factors including equipment breakdown or malfunction, meteorological, environmental, structural failures in the load or in the ground under the transportation equipment, human error or the impact of third parties. It is essential that contingencies be in place to deal with these situations and Emmert International constantly review and update as necessary their procedures and detailed scheduling to cover these occurrences.

R 228, AR 16. Yet the traffic control plan makes no specific provision for many of the contingencies it describes, as discussed further below.

ARGUMENT

I. STANDARDS OF REVIEW.

In reviewing Plaintiffs' challenges to the ITD permits for the Conoco shipments, the Court employs the standards set forth in the Idaho APA. *See* I.C. § 67-5270 *et seq.*;

I.R.Civ.P. 84. Under these standards, the Court must reverse ITD's decision if "the agency's findings, inferences, conclusions, or decisions" are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

I.C. § 67-5279(3).[2]

In an appeal, such as this, from a district court acting in its appellate capacity under the Idaho APA, the Supreme Court reviews the agency record independently of the district court's decision. *Cowan v. Bd. of Comm'rs of Fremont County,* 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006). "We give serious consideration to the district court's decision, but review the matter as if the case were directly appealed from the agency." *Stafford v. Idaho Dept. of Health & Welfare*, *supra*, 181 P.3d at 459.

Central to this case, the Court also exercises free review over questions of law – including the application and interpretation of regulations. *See Dry Creek Partners, LLC, v. Ada County Com'rs*, 217 P.3d 1282, 1287 (2009) ("Determining the meaning of a statute, its application, and whether the statute was violated are matters of law subject to plenary review"); *Stafford, supra,* 181 P.3d at 459 ("Interpretation of a statute is an issue of law over which this Court exercises free review . . . Administrative regulations are subject to the same principles of statutory construction as statutes"); *Mason v. Donnelly Club,* 135

[2] ITD briefly suggests I.C. § 67-5279(2) as the appropriate standard here, because it contends that it was not obligated to base its decision upon a record. *See* ITD Brf., p. 23. But as this Court previously held in an another ITD case, judicial review of the permits is governed by I.C. § 67-5279(3), since they are "orders" as defined under the Idaho APA – they represent "agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific individuals." *See* I.C. § 67-5201(12); *Westway Const. v. Idaho Transp. Dept.*, 139 Idaho 107, 111-12, 73 P.3d 721 (2003) (discussing Idaho APA applicability to ITD).

Idaho 581, 583, 21 P.3d 903, 905 (2001) ("It is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law . . . This principle extends to our review of administrative rules").

Appellants devote much of their briefs arguing that the Court must simply defer to ITD's reading of its regulations under *J.R. Simplot Co. v. Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). However, *Simplot* makes clear – and the Court has held many times since that decision – that it does not owe deference to an agency interpretation that is not reasonable. *See Simplot*, 820 P.3d at 1219; *Farber, supra,* 147 Idaho at 313 (finding interpretation unreasonable because Department of Insurance erroneously relied on practices from other states that did not have the same statute as Idaho); *Farrell v. Whiteman*, 146 Idaho 604, 610-11, 200 P.3d 1153, 1159-60 (2009) (rejecting agency interpretation because it was contrary to the language of the statute and the situation in question was provided for by the language of the statute); *Hillcrest Haven Conv. Center v. Idaho Dept. of Health and Welfare*, 142 Idaho 123, 125, 124 P.3d 999, 1001 (2005) (reversing because agency decision was contrary to unambiguous language of regulation); *Parker v. Underwriters Laboratories*, 140 Idaho 517, 520-22, 56 P.3d 618, 621-23 (2004) (reversing agency denial of severance benefits based on ordinary meaning of "severance pay" which was not defined in the regulations); *Mason, supra,* 21 P.3d at 905, 908 (not deferring to agency reading of regulation, because "we find unreasonable the Commission's interpretation that a two-week period is not a 'short time' under the rule").[3]

[3] ITD also asserts that the district court should have applied the two-step test described in *Chevron v. NRDC*, 467 U.S. 837 (1984). *See* ITD Brf, pp. 13-15. Under federal law, however, the *Chevron* test applies to questions of statutory interpretation, while an

II. ITD MISCONSTRUED ITS CHAPTER 11 AND 16 REGULATIONS IN APPROVING THE CONOCO SHIPMENTS TO DELAY TRAFFIC BY FIFTEEN MINUTES.

The Court should first address Plaintiffs' claim that ITD misinterpreted and misapplied Chapters 11 and 16 of its regulations in approving the Conoco shipments to delay traffic by fifteen minutes. As noted above, whether ITD has properly interpreted its regulations is a question of law over which this Court exercises free review; and the Court need not reach Plaintiffs' other challenges if it agrees that ITD violated its regulations in approving the Conoco permits under Chapters 11 and 16.

As ITD admits, Chapters 11 and 16 must be read together. ITD Brief, pp. 19-20. Under Chapter 11, overlegal permits must allow for the "frequent passing" of other vehicles. Chapter 16 provides that non-reducible loads should not be allowed if they do not meet this "frequent passing" standard, and it sets the outer boundary of permissible traffic delays for non-reducible loads at ten minutes. ITD's interpretation now that fifteen minutes delays caused by the Conoco shipments constitutes "frequent passing" of vehicles conflicts with the plain language and structure of the regulations; and must accordingly be rejected as unreasonable.

A. Overview Of The ITD Regulations.

To properly understand the ITD regulations at issue here, Plaintiffs begin with an overview of the regulatory scheme under Title 39.03 of the Idaho Administrative Code,

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agency's interpretation of its own regulation is evaluated under *Auer v. Robbins*, 519 U.S 452, 462-463 (1997). Under *Auer*, an agency's interpretation of its own regulation is not entitled to deference if the interpretation is a *post hoc* rationalization or if it is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. These standards thus resemble the Idaho standards discussed above. *See Simplot*, 820 P.2d at 1218-19 (discussing *Chevron*).

which is the portion of the ITD regulations entitled "Dealing with Highway Matters." *See* IDAPA 39.03.01 *et seq*.

Chapter 1 of Title 39.03 contains definitions. *See* IDAPA 39.03.01.010. These include terms relevant here, such as "overlegal" and "non-reducible" loads. "Overlegal" is defined as: "Any vehicle, vehicle combination or load which exceeds the limits established in Idaho Code." IDAPA 39.03.01.010.37. "Non-reducible" is defined as: "A load that consists of a single piece (a machine and its accessories loaded separately is considered non-reducible also)." IDAPA 39.03.01.010.31. Notably, there is no entry or definition of the term "frequent passing" of vehicles as used in Chapter 11. *See* IDAPA 39.03.01.010.

Chapter 9 of the regulations is entitled: "Rules Governing Overlegal Permits – General Conditions and Requirements." *See* IDAPA 39.03.09 *et seq.* The "scope" of this Chapter "states the general conditions and requirements for overlegal permits." IDAPA 39.03.09.02. Because the Conoco shipments are "overlegal" loads, they are subject to the general conditions and requirements of Chapter 9 – including the following two requirements from subsection 100 which are addressed in more detail below:

> **100. RESPONSIBILITY OF ISSUING AUTHORITY.**
>
> **.01 Primary Concerns.** The primary concern of the Department, in the issuance of overlegal permits, shall be the safety and convenience of the general public and the preservation of the highway system.
>
> **.02 Permit Issuance.** The Department shall, in each case, predicate the issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement.

IDAPA 39.03.09.100.01 & 02 (bold emphasis in original).

Chapter 11of the regulations is entitled "Rules Governing Overlegal Permittee Responsibility And Travel Restrictions." *See* IDAPA 39.03.11. The "scope" of this Chapter 11 is: "This rule states the responsibility of the permittee and the travel restrictions for overlegal loads." IDAPA 39.03.11.001.02. As discussed further below, Chapter 11 imposes the requirement that overlegal permits must allow for "frequent passing of traffic traveling in the same direction," and it provides for traffic control plans to achieve this and other traffic management issues. *See* IDAPA 39.03.11.100.05.

Whereas Chapters 9 and 11 deal with overlegal permits generally, Chapter 16 specifically addresses non-reducible loads. The title of Chapter 16 is: "Rules Governing Over-size Permits For Non-Reducible Vehicles and/or Loads," and the scope of this chapter is stated as: "This rule states the maximum sizes allowed by overlegal permit. It does not apply to the transport of oversize manufactured homes or office trailers." IDAPA 39.03.16.001.02.

As noted above, ITD acknowledges that the Conoco shipments are "non-reducible" loads, and thus are subject to these Chapter 16 provisions. *See* ITD Brief, p. 8 (admitting that Chapter 16 "applies to non-reducible loads, such as the coke drums at issue here").

B. Chapters 11 and 16 Must Be Construed Together, And Limit Delays Caused By Non-Reducible Loads To Ten Minutes.

With this general structure of the regulations in mind, Plaintiffs next analyze the specific language of Chapters 11 and 16 relating to the question of the maximum delays allowed for non-reducible loads, such as the Conoco shipments.

Section 100 of Chapter 16 provides "general oversize limitations" regarding non-reducible loads, which include the following provision that is at the heart of the parties' dispute in this case:

> **100. GENERAL OVERSIZE LIMITATIONS.**
>
> **.01 Maximum Dimensions Allowed.**
>
> . . . Overlegal permits will not normally be issued for movements which cannot allow for passage of traffic as provided in IDAPA 39.03.11, "Rules Governing Overlegal Permittee Responsibility and Travel Restrictions," Subsection 100.05, except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available.

IDAPA 39.03.16.100.01 (bold in original).

By providing that non-reducible loads "will not normally be permitted" unless they can satisfy traffic passage requirements under Chapter 11, Subsection 100.05, the plain language of Chapter 16 thus requires evaluating these Chapters together. Subsection 100.05 itself reads:

> **.05 Movement, Traffic Control Plans, Loading, Parking on State Highways**
>
> **a.** The movement of over legal loads shall be made in such a way that the traveled way will remain open as often as feasibly possible and to provide for the frequent passing of vehicles traveling in the same direction. In order to achieve this a traffic control plan is required to be submitted when operating on two (2) lane highways and exceeding the following dimensions:
>
> i. Width exceeds twenty (20) feet.
>
> ii. Length exceed one hundred fifty (150) feet.

IDAPA 39.03.11.100.05 (bold in original; underscore added).

Although Chapter 11 does not define the term "frequent passing of vehicles," in the context of non-reducible loads – as at issue here – this term must be construed within the context of Chapter 16, which establishes the requirements for non-reducible loads and references this provision. *See Mason v. Donnelly Club, supra*, 21 P.3d at 907-08 (relevant rules must be construed together, and given their plain, obvious and rational meaning).

In adopting the rules for non-reducible loads under Chapter 16, ITD determined that such shipments should not normally be permitted unless they allow for "frequent passing of vehicles" under Chapter 11, or in special circumstances involving light traffic, in which case maximum delays of ten minutes can be allowed. *See* IDAPA 39.03.16.100.01. The only reasonable, logical way to read these provisions of Chapters 16 and 11 together is that – in the context of non-reducible loads subject to Chapter 16 – the "frequent passing of vehicles" must allow for passing more often than every ten minutes, and that ten minutes is outer boundary for traffic delays caused by non-reducible loads.[4]

The district court analyzed the regulations together in the same way, noting that the term "frequent passing" of vehicles under Chapter 11 has to be interpreted consistent with the ten-minute outer boundary for traffic delays set in Chapter 16, with respect to non-reducible loads such as the Conoco shipments. *See* R. 190-93.

[4] Of course, when non-reducible loads are not involved, the "frequent passing" language of Chapter 11 may have a different meaning, because Chapter 16's language would not apply. Although that issue is not before the Court here, ITD would presumably have broader discretion in determining what "frequent passing" means in those contexts, since there is no similar limitation on delays as the ten-minute rule found in Chapter 16 for non-reducible loads. ITD thus goes too far in claiming that enforcing its ten-minute delay rule for non-reducible loads would affect all overlegal permits, the vast majority of which do not involve non-reducible loads of the massive size of the Conoco shipments.

Moreover, this reading is supported by the common meaning of the term "frequent passing" as used in Chapters 11 and 16. The dictionary definition of the term "frequent" is "constant, habitual, or regular," or "happening or occurring at short intervals." Webster's Encyclopedic Unabridged Dictionary of the English Language, 767 (1996). The Conoco permits obviously do not qualify as "frequent" under these common definitions of the term – they will not allow traffic to pass "constantly" or at "short intervals," but instead will limit traffic passage to at most four times an hour.

In summary, construing Chapters 11 and 16 together – as the Court must do – leads to the conclusion that non-reducible loads, such as the Conoco shipments, must allow for "frequent passing" of vehicles with a maximum delay of ten minutes. Since ITD has not adhered to this regulatory requirement, and instead is authorizing Conoco to delay traffic by fifteen minutes under the approved traffic control plan, it has violated its own regulations, requiring reversal by this Court.

C. ITD's Interpretation Is Unreasonable.

ITD's interpretation of Chapters 11 and 16 is unreasonable because it conflicts with the plain language of the regulations and reaches an illogical or absurd result.

First, the plain language of the regulations refutes ITD's argument that Chapter 16 is only applicable to unusual situations where it is not feasible to prepare a traffic control plan, such as emergencies. *See* ITD Brief, pp. 18. The language and structure of the regulations do not support this reading at all. To the contrary, as explained above, the title and text of Chapter 16 state expressly that it applies to all non-reducible loads, whereas Chapter 11 addresses overlegal permits more generally. Nothing in Chapter 16

says that ITD should not use traffic control plans when authorizing non-reducible loads, as ITD seems to argue to this Court.

Second, ITD's interpretation is unreasonable because it would construe Subsection 100.01 such that fifteen minute delays constitute "frequent passing," even though the regulation defines ten minutes as the outside time limit allowed for non-reducible loads that otherwise do not allow for "frequent passing" of vehicles. Fifteen minutes is obviously not more "frequent" than ten minutes; yet ITD's reading would have it be so. Given that the agency itself has identified ten minutes as the permissible boundary for delays caused by non-reducible loads, it is illogical to then say that fifteen minute delays constitute "frequent passing." Again, the Court owes no deference to an agency reading that misconstrues the plain language of its own regulations and produces illogical results. *See Mason*, *supra,* 21 P.3d at 905, 908 ("we find unreasonable the Commission's interpretation that a two-week period is not a 'short time" under the rule").

Third, ITD's interpretation is also unreasonable because it effectively writes out of existence the language of Subsection 100.01 imposing ten minutes as the maximum delays allowable for non-reducible loads under special circumstances of light traffic. Under ITD's reading, fifteen minute traffic delays caused by non-reducible loads are acceptable as the normal standard, thus eliminating any need to impose the ten minute delay maximum specified under Subsection 100.01 for "special circumstances." Of course, the Court should not accept a reading of the regulations that effectively rewrites them to eliminate existing language. *See Farber*, *supra,* 208 P.3d at 292-93 ("the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant").

ITD accordingly erred as a matter of law when it misinterpreted and misapplied the provisions of Chapters 11 and Chapter 16 in allowing Conoco to delay traffic for periods of fifteen minutes. This legal violation requires reversal of the permits.

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

If the Court proceeds to the other challenges raised by Plaintiffs, it should affirm the district court's reversal of the Conoco permits on grounds that ITD failed to make a "reasonable determination" of the necessity of the Conoco shipments, as required by Chapter 9. *See* R. 184-85, 189-90.

ITD did not address the issue of necessity until after it had decided to issue the permits. When it did so, ITD relied on Emmert's conclusory assertions of necessity rather than conducting the individualized inquiry required by IDAPA 39.03.09.100.02. ITD now attempts to obscure its error with strawmen and red herrings.

A. ITD'S Necessity "Determination" Is Unreasonable.

As noted above, Chapter 9 of Title 39.03 sets forth the "General Conditions and Requirements" for overlegal permits, and provides in subsection 100.02 that: "In each case, the Department shall predicate its issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement." IDAPA 39.03.09.100.02 (underscore added).

Under this language, ITD's decision to issue an overlegal permit must be "founded" or "based" on ITD's conclusion that movement of the load is necessary. Webster's Encyclopedic Unabridged Dictionary of the English Language, 1523 (1996). The inclusion of the phrase "in each case" in the regulation indicates that ITD must take the unique characteristics and circumstances of each load into consideration.

ITD violated its duty to "predicate" the issuance of the Conoco permits on a determination of necessity. The Administrative Record reflects that ITD committed to issuing the permits without ever addressing the issue of necessity.[5]

The record is filled with communications between ITD and Emmert fine-tuning the traffic control plan and figuring out a way to get the drums over Highway 12's bridges. *See* R 228, AR 1197-1201 (emails between ITD and Emmert regarding configuration to be used to cross the Arrow bridge); 816-823 (emails between ITD staff regarding same); 1018-21 (ITD's comments on draft traffic control plan). But there is no record evidence showing that ITD itself considered the necessity of the shipments. ITD instead simply accepted the applicant's assertions that they are necessary.

It is telling that the only document in the Administrative Record which ITD identifies to contend that it made a necessity determination is the August 20th Memorandum of Decision by Mr. Frew.[6] Whatever credence the Court might give to this document, it does not satisfy ITD's duty under Chapter 9 to make an independent determination of the necessity of the Conoco shipments, since the Memorandum makes

[5] In fact, until Plaintiffs filed this case, ITD publicly took the position that it had no discretion to deny a request for an overlegal permit, provided the load in question could be transported without damaging the road. *See* R. 16, 21 (Laughy Aff. ¶ 12; Hendrickson Aff. ¶¶ 8-9); R 288 AR 947 (email from ITD to Lewiston Chamber of Commerce stating "If all of the conditions imposed by the department can be met by Imperial/Exon Mobile, I believe we have no alternative but to issue the permit.")

[6] As noted above, ITD improperly seeks to correct the deficiencies in its necessity determination by relying on the recently-filed Frew Affidavit. *See* ITD Brief, pp. 5-6, 16 & 20 (multiple citations to Frew Affidavit). ITD cannot rely on such extra-record material to fill in the gaps in its decision and record. *Chisholm v. Idaho Dept. of Water Resources*, *supra*, 142 Idaho at162.

clear that ITD has simply relied on the assertions made to it by the applicant. As the Memorandum expressly admits:

> Emmert investigated the feasibility of the transportation of the coke drums by considering several different options, including transporting the drum by various combinations of barge, rail and truck from several different port of entry. The extreme dimensions of the drums precluding the possibility of shipping the drums by rail, leaving only barge and truck options. The only viable option for the transporter of the coke drums to Billings, Montana is from Lewiston, Idaho – the nearest navigable water to Billings – along U.S. 12.

See R 228, AR 2330. This discussion confirms that ITD made no attempt to investigate, check, or verify Emmert's assertions; but rather accepted them blindly.

Chapter 9 does not say that ITD may delegate to applicants the responsibility for determining the necessity of overlegal shipments – instead it requires that "in each case" ITD itself "shall . . . make a reasonable determination" of the necessity. IDAPA 39.03.9.100.02. ITD thus breached its Chapter 9 duty by abdicating the determination of necessity to the applicant here.

Moreover, ITD's complete deference to Emmert's assertions of necessity was unreasonable in view of the large number of public comments that questioned the necessity of using Highway 12. The public submitted numerous comments indicating that other routes were available to transport the coke drums. *See* R. 288 AR 1799 (public comment urging ITD to "use the train rails"); 1782-83 (Ms. Hendrickson explaining to ITD, "I know that until now Imperial Oil and other corporations have used the Panama Canal-Houston-Billings-Canada route for transport of huge industrial equipment. That route is presumably still usable"); 1980 ("These huge pieces of equipment should either be assembled at their destination or they should be hauled through the Panama Canal and shipped through the Plains States as has been done previously"); 1867 ("Before this

application Imperial Oil transported machinery from Houston to Alberta and it worked just fine. They can continue to do so now"). Under the particular circumstances at issue in this case, ITD was obligated to look beyond the self-interested assertions of the project proponent in determining the "necessity" of the project.

B. ITD's Red-Herring Arguments Are Unavailing.

Evidently recognizing that it failed to comply with the Chapter 9 requirement, ITD resorts to several other arguments to deflect attention from its violation, none of which have merit.

First, ITD asks the Court to spare it from having to comply with its own regulations by claiming that it would overburden the agency to have to determine whether every overlegal permit application is necessary. *See* ITD Brief, pp. 21. But as Chief Justice Eismann recently observed, "[i]t is not this Court's function to correct alleged errors or oversights made by the Department when it drafted its regulations." *See Stafford, supra*, 181 P.3d at 468 (concurring in dissent by Justice Warren Jones). If ITD believes its regulations are too onerous as written, its remedy is to revise them – not beg this Court to be forgiven for avoiding that duty.

Second, ITD raises the specter that the dormant commerce clause of the federal constitution binds its hands and requires that it approve the shipments. *See* ITD Brief, pp. 22. This is particularly ironic, when the whole reason why Highway 12 is supposedly necessary for the Conoco shipments is that Emmert determined <u>other states</u> would not allow them. Idaho does not explain why it is appropriate for other states to deny the Conoco shipments, yet Idaho supposedly risks federal liability were it to decline to approve the proposed shipments under its long-standing regulations.

Moreover, Idaho is simply wrong as a matter of law in raising the interstate commerce issue. While a state may not burden interstate commerce unnecessarily, the federal Commerce Clause "does not elevate free trade above all other values . . . [a state] retains broad authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 152-153 (1986). Denying the application of a single private entity to transport four loads of unprecedented size and weight along a state highway does not constitute a burden on interstate commerce. After all, the Commerce Clause "protects the interstate market, not particular interstate firms." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978). Even if denying Conoco a permit for four loads could somehow be construed as a burden on interstate commence, the public interests protected by Chapter 9 (safety, convenience, feasibility, and necessity) would more than justify ITD's decision to deny the permits. The federal Commerce Clause is thus a red herring that should not distract the Court from the central issue of this case: ITD's violations of its own regulations.

IV. ITD FAILED TO PRIORITIZE PUBLIC SAFETY AND CONVENIENCE.

The third reason this Court should affirm the reversal of the Conoco permits is that ITD failed to place a "primary concern" on public convenience and safety, also in violation of Chapter 9.

Again, the "General Conditions and Requirements" for overlegal permits under Chapter 9 requires that ITD's "primary concern" must be "the safety and convenience of the general public and the preservation of the highway system." IDAPA 39.03.09.100.01 (emphasis added). Yet there is no evidence in the record that ITD ever considered denying the Conoco permits on the grounds of public convenience. Instead, ITD

summarily dismissed the public's concerns about convenience and limited its consideration of safety to the question of whether the Conoco loads can reach the Montana border without causing a traffic accident or a bridge collapse.

Notably, there is no documentation in the record that one would expect to see if ITD had placed a primary concern on public convenience and safety (as opposed to highway and bridge engineering issues). Again, ITD conducted no public hearing on this proposal. Neither does the record show that ITD independently investigated public convenience questions. There are no notes from meetings or telephone conversations discussing public convenience, and there are no references in emails to conversations between experts about whether clogging up the highway would endanger public safety.

In contrast, there are a plethora of meeting agendas, notes, and emails in the record relating to ITD's consideration of and concern over the load configurations Emmert would use to get the loads over the Arrow Bridge, the Fish Creek Bridge, and the Maggie Creek Bridge. *See* R 228 AR 747 (notes from January 13, 2010 meeting regarding bridge-crossing issues); 837-847 (emails regarding approved bridge configurations); 978-990 (permit approvals from ITD's bridge section issued in 2009); 925-943 (additional emails regarding approval for bridge configurations). The fact that ITD could not provide a similar trail of documentation of its consideration of public convenience and safety demonstrates that no such consideration was made.

ITD's attitude toward the public's concerns further illustrates that public convenience and safety was not a primary concern during the decision-making process. ITD received numerous public comments raising concerns about safety and convenience. To name just a few examples, the public notified ITD that authorizing the Conoco loads

would damage the tourism industry, R 228, AR 1830,[7] risk public health by delaying access to emergency services, R 228, AR 891,[8] and inconvenience the public to an unacceptable level. R 228 AR 1851.[9]

Despite this outpouring of public concern, there were no public hearings or meetings held to determine how the Conoco proposal might affect the safety and convenience of local residents and tourists using Highway 12. In fact, the portions of the Administrative Record that ITD cites in support of this argument consist of the public's

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[7] *See also* R. 228, AR 1794-95 (public comment expressing "outfitter concern" and explaining, "This proposal to use Highway 12 in this manner will not be good for our industry. A significant portion of the estimated 250,000 Idaho outfitted visitors annually utilize Highway 12, a nationally recognized scenic byway, for transportation to and from guided activities . . . Outfitting is a major component of the north central Idaho outdoor recreation segment of the larger Idaho tourism industry"); 1880 ("This section of US Hwy. 12 is north-central Idaho's only route east. Loss of this route for practically any length of time could be devastating to this area's primary industry - recreation/travel/ tourism"); 1976 ("Travel and tourism is a major economic engine in Idaho. The type of traffic and associated congestion with this project will be disruptive and a hindrance to visitors traveling by car, motor-home and motorcycle. Potential visitors will likely avoid this area altogether"); 1825 (tourist comment that "I am sure I am not alone in making the decision that vacations with huge trucks on small highways is not desirable").

[8] *See also* R. 228, AR 1978 ("I really fear for the health and safety of the local residents and visitors, who are already far from the nearest hospital, if anyone needs urgent care while these vehicles are passing through they would probably be delayed by hours. The road is dangerous for regular vehicles, and there are nearly no bypasses or alternative roads for people to get around the traffic obstruction and get in or out"); 1982 ("I am also concerned about safety Highway 12. The project will possibly disrupt the movement of emergency vehicles"); 2180-81 ("The size of the prospective loads will do great damage to the current highway, cause untold delays to others using the route and could potentially be life threatening for anyone needing emergency services").

[9] *See also* R. 228, AR 1870 ("Issuing such a permit will make the citizens of Idaho as well as the many tourists who come to experience the wonder of driving highway 12 second class."); 1872 ("With the sheer size of these loads dictating the use of "rolling road blocks" in order for these shipments to progress along this route, tourists and visitors to the area will be severely inconvenienced, and the quality-of-life enjoyed by residents throughout the area will be greatly diminished"); 2105 ("The noise and lights will effectively put our dogs into a barking frenzy which in turn will put us straight up in bed on each of those occasions. This is not a minor inconvenience.").

written comments to ITD and a list of individuals who submitted comments. *See* R 288, AR 1225-1226 (list of emails and letter received by ITD commenting on the proposed Coke Drum Transport and/or Kearl Module Transport Projects as of June 6, 2010); 1730-2233 (compilation of written comments received by ITD, ITD standardized 3-paragraph response to comments, and intra-agency emails re: same).

Rather than incorporating the public's concern into its analysis of Conoco's proposal, ITD summarily dismissed the public's concerns. ITD responded to the public's written comments with one of two form letters. The first states, in its entirety:

> Thank you for your comments regarding the proposed shipments of equipment on U.S. 12. The Idaho Transportation Department is continuing to work with ExxonMobil and ConocoPhillips to put together a thorough, detailed plan on how equipment would be moved from the Port of Lewiston into Montana. Hearing from residents in the north-central Idaho area helps the transportation department address concerns. The department is compiling questions it receives, and will be posting them to an Internet page, along with responses to the questions. We'll be sending out an e-mail to those who have written in, letting them know when the web page is active.

R 228 AR 1811, 1829. The second form letter states:

> Thank you for your comments regarding the proposed shipments of equipment on U.S. 12. The Idaho Transportation Department is continuing to work with ConocoPhillips on a transportation plan that will safely and efficiently move equipment from the Port of Lewiston to Montana. In addition to safety and efficiency, the department wants to protect the area's environment. Proposed loads will be of a size that prevents damage to trees or hillsides. In addition, trucks hauling the equipment will have enough axles to prevent shipments' weight from damaging the highway. The transportation department is sharing your comments with ConocoPhillips, and if transport permits are approved/issued, the department will send out a press release announcing when shipments start.

Id. at 1817.

While the adequacy of ITD's response to public comments is not a free-standing legal issue in this case, the inadequacy of these responses demonstrates that ITD did not

take the public's concerns seriously. Both form letters assume that additional coordination between ITD and Emmert in the traffic control plan will ensure that the loads can be moved safely; neither letter leaves room for the possibility that public safety and/or convenience might counsel against issuing the permits at all. ITD does not address the public's concerns about access to emergency services or damage to the tourism industry. Environmental concerns are brushed off with the reassurance that trees and hillsides will not be damaged. Public convenience is not even mentioned.

ITD argues that it addressed public convenience and safety through the provisions and contingency plans of the traffic control plan. The traffic control plan, however, relies on night travel and the unlawful 15-minute limit on traffic delays to protect public convenience. R 228, AR 2331. These provisions are insufficient to address the public's concerns. For instance, ITD failed to address the inconvenience commercial trucks and commuters traveling at night will experience. *See* R. 228, AR 1934 (observing, "each year, the truck traffic going through at night is heavier than the year before"); 2116 ("many Idahoans have been forced to work in Montana and travel it at night to and from work"); 2111 (comment from registered nurse who works 12-hour shifts expressing concern about the loads' impact on her commute).

The traffic control plan also fails to address the vast majority of public safety issues. Although the traffic control plan contains a contingency plan for emergency vehicles, this plan relies on the assumption that emergency vehicles will be able to communicate with the loads' escort by radio. R. 228, AR 112-113. Individuals traveling to the hospital in private vehicles – or 85% of those traveling to the emergency room, R. 22 – will not benefit from this plan.

Furthermore, the traffic control plan's descriptions of how it would deal with problems that might occur are brief, conclusory, and fail to consider important aspects of each scenario. *See* R. 228, AR 22-27. For instance, the traffic control plan's discussion of how Emmert would recover the loads if one or more of them fell off the road speaks in general, hypothetical terms. *See* R. 228, AR 43-44. The plan does not explain how or where Emmert would obtain the equipment necessary to recover the load, the probability that such equipment would be available, or how long it would take to transport the equipment up Highway 12. As both the district court and members of the public have explained, such a situation could result in the highway being blocked for days or weeks. R. 186-188.

The traffic control plan made no attempt to address how the public would be impacted if their primary—and in many cases only—means of accessing grocery stores, hospitals, and other goods and services became impassable for hours, days, or weeks. ITD's failure to take this possibility into consideration demonstrates that, whatever minor adjustments it may have made to the transport process, it failed to give public convenience and safety primary consideration.

ITD thus violated its duty to place a primary concern on public safety and convenience in determining whether to issue overlegal permits for the Coke Drum Transport Project.[10]

[10] Mr. Frew's characterization of Plaintiffs' concerns as "subjective" in his August 20th Memorandum, *see* R 228 AR 2334, reveals that ITD still does not care how these loads will impact the public; and will not make public convenience and safety a priority unless the Court requires it to comply with this regulatory mandate.

V. PLAINTIFFS HAVE SHOWN PREJUDICE TO SUBSTANTIAL RIGHTS.

The drafters of the revised Idaho APA describe the "prejudice to substantial rights" requirement of I.C. § 67-5279(4) as a "harmless error rule." *See* M. Gilmore & D. Goble, "The Idaho Administrative Procedure Act: A Primer for the Practitioner," 30 *Idaho L. Rev.* 273, 366 (1993-1994); *see also Westway Const. v. Idaho Transp. Dept.*, 139 Idaho 107, 73 P.3d 721, 727-28 (2003) (discussing Gilmore & Goble article).

This Court's cases confirm this description that I.C. § 67-5279(4) is essentially a harmless error standard. *See In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170,* 148 Idaho 200, 220 P.3d 318, 324-27 (2009) (failure to record hearing did not prejudice substantial rights where plaintiffs attended the hearing, raised their concerns there, and the agency considered those concerns); *Spencer v. Kootenai County*, 145 Idaho 448, 453, 180 P.3d 487, 492 (2008) (holding substantial rights were not prejudiced where plaintiff failed to explain why he needed 4 more feet of driveway than he had been granted in order to entertain); *In re Application of Kirk-Hughes Development, LLC*, No. 35730, 2010 WL 2179703, at *3 (June 2, 2010) (plaintiff failed to challenge district court's finding that his substantial rights had not been prejudiced and made only vague, conclusory allegations about due process violations).

In contrast, the Plaintiffs here have alleged – and demonstrated – they will suffer irreparable injury in several ways if the Coke Drum Transport Project is implemented. *See* R. 1-13 (Petition for Judicial Review And Request for Immediate Injunctive Relief,

alleging specific forms of irreparable harm facing Plaintiffs); R. 14-70 (Plaintiffs' affidavits demonstrating forms of irreparable harm).[11]

For instance, the transport of Conoco's four loads will compromise the Plaintiffs' ability to earn a living by damaging the Highway 12 corridor's reputation as a destination for outdoor recreation and tourism. The loads will cause traffic delays, degrade the scenic value of the area by parking in turnouts during the day, and disrupt the rest of visitors staying at campgrounds and hotels near the highway. *See* R. 14-23, 63-68 (Laughy Aff., ¶¶ 15-16; Hendrickson Aff., ¶ 12; Grubb Aff., ¶ 9). Far from being speculative, the impact on Highway 12's tourism economy caused by traffic disruptions is empirically proven. *See* R. 68 (Grubb Aff., ¶ 8) (describing how visitors to the area last year were distressed by the amount of construction on the highway and resulting loss in Mr. Grubb's business revenues).

Implementation of the Coke Drum Transport Project will also interfere with the Plaintiffs' quiet use and enjoyment of their property. Mr. Laughy and Ms. Hendrickson's home is located across the highway from a turnout where Emmert plans to stop and reconfigure the loads. This will directly affect them and their property, including by causing noise and creating traffic congestion around their driveway. R. 19-22 (Hendrickson Aff., ¶¶ 3, 13-14).

Perhaps most significantly, the passage of Conoco's loads will threaten the Plaintiffs' health and safety. Because Mr. Laughy and Ms. Hendrickson live so close to

[11] Conoco complains that Plaintiffs did not expressly allege prejudice to a substantial right in their petition, but their allegations of irreparable harm go much further than that. Obviously, if Plaintiffs experience irreparable harm to their personal and economic interests as they allege, they have suffered prejudice to a substantial right within the meaning of I.C. § 67-5279(4).

Highway 12, the passage of the loads will disrupt their sleep. R. 22 (Hendrickson Aff., ¶ 13). This will harm Ms. Hendrickson's health because she has a health condition that requires adequate sleep. *Id.* Blocking Highway 12—not to mention the Plaintiffs' driveway—also places the Plaintiffs' safety at risk by delaying their access to the hospital and other emergency services. Although emergencies are by their nature difficult to predict, past experience illustrates that a delay of 15-minutes (or more if the emergency occurs while the loads are blocking Plaintiffs' driveway) can be life threatening. *See* R. 23 (Hendrickson Aff., ¶ 15) (describing anaphylactic shock incident where delay in reaching hospital could have been life-threatening).

The district court found these injuries to be serious enough to justify the issuance of a temporary restraining order. *See* R. 249-50 (finding that Plaintiffs made a "prima facie showing that they may suffer great damage that would not be recoverable").

If the people who live and work along Highway 12 do not have substantial rights at stake, it is hard to imagine who might have more direct interests. The Court should reject Conoco's misguided effort to belittle the impacts its shipments pose to the individuals and businesses of the Highway 12 corridor.

VI. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

For the first time on appeal, Conoco – but notably not ITD – argues that Plaintiffs failed to exhaust administrative remedies. *See* Conoco Brf, pp. 35-36.

This argument is not properly before the Court, because Conoco failed to raise it at the district court level. *See Cooper v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 134 Idaho 449, 456, 4 P.3d 561 (2000) (Supreme Court will not consider issue that was not raised before the district court in Idaho APA review).

Even if it were proper for this Court to consider exhaustion of administrative remedies at this point, the Plaintiffs were not required to exhaust because no effective administrative remedies were available in this case.

The Idaho APA provides that, as a general rule, "a person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies **required** in this chapter." I.C. § 67-5271(a)(emphasis added). As this Court has held, the "failure to exhaust administrative remedies is not a bar to litigation when there are no remedies to exhaust." *Lochsa Falls, L.L.C. v. State,* 147 Idaho 232, 239-240, 207 P.3d 963 (2009). *See also James v. Department of Transp*., 125 Idaho 892, 876 P.2d 590 (1994) (holding that former ITD employee was not required to exhaust before suing over his discharge, because discharge was not subject to ITD's grievance procedure).

ITD's regulations do not provide any special procedure for appealing the issuance of an overlegal permit. Instead, those chapters of the regulations that authorize administrative appeals simply reference the Attorney General's administrative rules, stating: "Administrative appeals under this chapter shall be governed by the rules of the administrative procedure of the attorney general, IDAPA 4.11.01." *See* IDAPA 39.03.11.03; 39.03.16.03.

In contrast, ITD's regulations do provide specific procedures for administrative appeals of other types of permits. *See* IDAPA 39.03.42.03 (outlining process for appealing the denial of encroachment permits); IDAPA 39.02.72 (procedure for administrative appeal of suspension of drivers' licenses).

In fact, ITD's regulations do not provide for administrative appeals of violations of Chapter 9 at all. *See* IDAPA 39.03.09.002 – 009 ("reserving" the issue of

administrative review). References to the attorney general's rules in Chapters 11 and 16 do not extend to every section in Title 39.03, as evidenced by the fact that still other sections exclude the possibility of administrative review. For instance, Chapter 13 states, "This Chapter does not provide for administrative appeals." IDAPA 39.03.13.03. References in other sections to the attorney general's rules thus cannot be assumed to provide a "catchall" form of administrative review.

This Court's decisions in *Lochsa Falls* and *James* confirm that administrative appeal under the attorney general's regulations is not available for particular issues exempted by an agency's regulations. In both cases, the Court held that a plaintiff was not required to exhaust administrative remedies where the plaintiff could not do so under ITD's particular appeal regulations. In *James*, the particular topic of the grievance was excluded by the regulations. In *Lochsa Falls*, the plaintiff was left in procedural limbo and so could not file an administrative appeal. In neither case did the Court suggest that the plaintiff should have used the catchall administrative appeal procedures in the attorney general's regulations.

Even where an administrative appeal is available under the attorney general's rules, however, these rules do not require exhaustion when an administrative appeal would not afford effective relief. Specifically, the attorney general's rules provide that "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if review of the final agency action would not provide an adequate remedy." IDAPA 4.11.01.790.

In this case, petitioning ITD to reconsider issuance of the permits or to stay their implementation during the adjudication of an administrative appeal would not have

provided the Plaintiffs with an adequate remedy. The attorney general's rules provide no deadline for resolving a petition to stay the implementation of a permit. S*ee* IDAPA 4.11.780. Overlegal permits are only valid for a period of 5 days. *See* R228 AR 894 (unsigned permit valid August 18-August 22); 893 (same); 2290 (overlegal permit issued to Emmert valid from August 25-August 29). Due to the construction situation on the Arrow Bridge, ITD had to keep rescheduling the movement of the Conoco loads and the issuance of the permits. *See* R 228, AR 1014 (email scheduling load transport for late May and early June); 1023 (email from Emmert to ITD rescheduling load transport to August 18th in order to accommodate bridge construction). Under these circumstances, attempting to obtain a stay from the agency risked losing the opportunity for judicial review altogether; and Plaintiffs would be subject to suffering irreparable harm without the opportunity to obtain timely judicial review. Given the importance of the interests at stake, it would be a miscarriage of justice to require the Plaintiffs to take that chance before proceeding to district court.

Accordingly, the Court should reject Conoco's newly-raised exhaustion argument.

VII. CONOCO'S REQUEST FOR ATTORNEYS FEES MUST BE DENIED.

Conoco – but again, not ITD – requests an award of attorneys fees for this litigation from Plaintiffs. *See* Conoco Brf., pp. 36-37. Conoco argues that Plaintiffs "acted without a reasonable basis in fact or law," and hence it should receive fees under I.C. § 12-117(a). *Id.* Alternatively, it asks for fees under I.C. § 12-121. *Id.*

It is difficult to understand how Conoco could claim that Plaintiffs acted without a reasonable basis in law or fact when Plaintiffs won in the district court. Remarkably, Conoco does not even mention that telling fact in its fee request – much less try to

explain how victorious plaintiffs below could somehow be deemed to have acted without a reasonable basis in fact or law when the losing party appeals.

And even if this Court does not agree with the district court on all its rulings, surely the fact that the district court held in favor of Plaintiffs on both the law and facts demonstrates that they had a reasonable basis for prosecuting this action.

Neither does Conoco cite any case where fees have been awarded under I.C. §§ 12-117 or 12-121 after plaintiffs won in the district court. The cases it cites all entailed losing plaintiffs in the district courts who unsuccessfully sought appellate review – and were found to have no reasonable basis for their cases. *See Bonner County v. Bonner County Sheriff Search & Rescue*, 142 Idaho 788, 790, 134 P.3d 639, 641 (2006) (awarding fees where plaintiff lost in district court, and on appeal "has not provided any argument . . . nor can it even define what its cause of action is"); *Anderson v. Larsen*, 136 Idaho 402, 34 P.3d 1085 (2001) (awarding fees because it was "not even a close call").

Conoco also ignores other cases from this Court, which establish that fees should not be awarded against plaintiffs in judicial review cases where they had a statutory right to seek review. *See, e.g.*, *Taylor v. Canyon County Bd. of Com'rs*, 147 Idaho 424, 210 P.3d 532 (2009) ("We have previously found that parties acted without a reasonable basis in fact or law for purposes of awarding attorney fees under I.C. § 12-117 when there was no statute authorizing judicial review, but have only done so in cases where this Court was barred from reviewing all claims").

If anything, it is Conoco that has acted without a reasonable basis in fact or law in seeking an award of fees from Plaintiffs. The Court should obviously deny its request.

VIII. PLAINTIFFS REQUEST AN AWARD OF FEES AND EXPENSES AS PREVAILING PARTIES.

Finally, assuming they prevail before this Court, Plaintiffs respectfully request an award of reasonable attorneys fees and expenses incurred in this litigation, in both the district court and before this Court, pursuant to I.C. § 12-117(a), to be paid by ITD (as the defendant state agency).

That statute authorizes an award of fees and expenses to the prevailing party "in any administrative or civil judicial proceeding involving as adverse parties a state agency . . . and a person," if the court finds that the losing party acted without a reasonable basis in fact or law. *See* I.C. § 12-117(a). ITD is a state agency subject to this statutory fee award provision.

An award in favor of Plaintiffs is appropriate here because ITD lacked a reasonable basis in law for not following its own regulations in approving the Conoco permits. *See Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091 (2005) (awarding fees where commission "ignored the plain language" of its ordinance requiring engineering certification; and holding that "[w]here an agency has no authority to take particular action, it acts without a reasonable basis in fact or law"); *Spencer v. Kootenai County*, 145 Idaho 448, 180 P.3d 487, 498 (2008) ("The purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens . . . attempting to correct mistakes agencies should never have made").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully pray that this Court deny the appeals by ITD and Conoco; affirm the district court's rulings, in whole or in part;

reverse and remand the ITD permits for the Conoco shipments for the reasons identified in this brief and/or by the district court; deny Conoco's request for fees; and award them reasonable fees and expenses as against ITD under I.C. § 12-117(a).

Dated: September 13, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2010, I caused to be served two copies of the foregoing Plaintiffs' Response Brief via hand delivery on the counsel named below:

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