

STATE OF IDAHO  
 County of BONNER )<sup>ss</sup>  
 FILED \_\_\_\_\_  
 AT \_\_\_\_\_ O'Clock \_\_\_\_M  
 CLERK, DISTRICT COURT  
 \_\_\_\_\_  
 Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER**

**WATERFRONT PROPERTY** )  
**MANAGEMENT, LLC., an Idaho LLC, and** )  
**R&S PROPERTIES, an Idaho Limited** )  
**Partnership,** )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
**STATE OF IDAHO, BD. OF LAND** )  
**COMMISSIONERS, DEPT. OF LANDS, and** )  
**the STATE OF IDAHO TRANSP. DEPT.,** )  
 )  
 Respondents. )

Case No. **S CV 2007 23**

**MEMORANDUM DECISION AND  
 ORDER DENYING PETITIONER'S  
 SUPPLEMENTAL MOTION FOR  
 STAY PENDING JUDICIAL REVIEW**

**I. INTRODUCTION AND BACKGROUND.**

On January 7, 2007, petitioners Waterfront Property Management, LLC (WPM) and R&S Properties (R&S) (collectively "petitioners") filed a Petition for Judicial Review of the decision made by respondent State of Idaho Board of Land Commissioners, Idaho Department of Lands (IDL), regarding the permit application made by respondent State of Idaho Transportation Department (ITD), and its proposed "Sandpoint Bypass Project". Years before, ITD had made an earlier application with IDL, permit number L-96-S-1640. The decision on the initial application was subject to Petition for Judicial Review in Bonner County, but the initial application was withdrawn by ITD and the review was dismissed on August 14, 2006.

With changes made to the withdrawn application, a subsequent application was filed by

ITD on September 11, 2006. The present application hearing was published by legal Notice of Application and Public Hearing and was held on November 20, 2006. On December 20, 2006, IDL issued the Final Order conditionally approving the encroachment permit. This condition was dependent upon the ITD finalizing all purchases of title or obtaining the necessary easements required. Affidavit of Murray Feldman, p. 2, ¶ 2, Exhibit 1 (Recommended Decision of IDL Hearing Officer J. Kahle Becker), p. 7, ¶20. At the request of the attendees of the initial hearing, on January 26, 2007, a reconsideration hearing was held pursuant to IDAPA 20.03.04.030.09. On October 5, 2007, the hearing coordinator issued a recommendation that the permit be issued, and a Final Order was entered on October 11, 2007. All written and verbal responses made in response to the notice of hearing were incorporated into the decision after the rehearing. Affidavit of Murray Feldman, p. 2, ¶ 2, Exhibit 1 (Recommended Decision of IDL Hearing Officer J. Kahle Becker), p. 4, ¶6. The permit for this application was issued March 3, 2008, and allows for major construction including bridges, placement of fill and dredging material from Sand Creek all known as the Sandpoint Bypass Project. This recent permit is the subject of this Petition for Judicial Review.

Petitioner R&S is the owner and lessor of real property adjacent to the proposed project. Petitioner WPM is the lessee of that property, upon which a business commonly known as Sandpoint Marina is operated. Sandpoint Marina is located upon Sand Creek, where part of the proposed Sandpoint Bypass Project will be built. Ralph Sletager is the manager of both R&S and WPM. Affidavit of Ralph Sletager, p. 2, ¶2.

Respondents, ITD and IDL are executive departments of the State of Idaho. ITD has been delegated to maintain the transportation in the State of Idaho. IDL is charged with protecting the public interests in the State of Idaho. ITD sought the application after extensive research for the purpose of reducing traffic and provide safety to pedestrians within the city of

Sandpoint. The current route on Highway 95 winds through downtown Sandpoint. The ITD has secured the financing to proceed with the project, including \$35 million budgeted for the year 2008 and millions of dollars spread out through the next several years. Bids for the construction were opened on April 22, 2008, and ITD would like to begin construction after July 4, 2008.

On April 2, 2008, petitioners R&S and WPM filed a Supplemental Motion for Stay Pending Judicial Review, seeking to stay the permit for encroachment in the interim while the judicial review is pending. Respondents ITD and IDL have moved for dismissal arguing that Petitioners cannot meet the elements to withstand favorable Judicial Review which would override the IDL's application approval. ITD also seeks a \$5 million bond if the stay is issued, which is an increase from the \$500 bond that has been posted by the Petitioners.

## **II. ANALYSIS.**

### **A. STANDARD TO BE USED BY THIS COURT.**

Petitioners filed their Supplemental Motion for Stay Pending Judicial Review under the Idaho Administrative Procedure Act (IDAPA), Idaho Code § 67-5274 and under I.R.C.P 84 (m). Supplemental Motion for Stay Pending Judicial Review, pp. 1-2. Idaho Code § 67-5274 states:

The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

Idaho Rule of Civil Procedure 84(m) reads:

**Stay during consideration of petition for judicial review-Power of agency states:**  
**Stay of proceedings:** Unless otherwise provided by statute, the filing of a petition for judicial review with the district court does not automatically stay the proceedings and enforcement of the action of an agency that is subject to the petition. Unless prohibited by statute, the agency may grant, or the reviewing court may order, a stay upon appropriate terms.

Because this statute is silent on the standard to be used by this court for deciding motions for stay and Because Idaho Code § 67-5274 uses the permissive word “may”, it is a matter

committed to this court's discretion. However, Idaho Code § 67-5274 is silent on the *standard* to be used by this Court in exercising its discretion on this motions for stay. ITD urges this court to use the preliminary injunction standard to evaluate when to grant or deny a motion to stay. Brief of Respondent Idaho Transportation Department Opposing Petitioners' Motion for Stay, p. 5. ITD argues the use of the preliminary injunction standards is appropriate because I.R.C.P. 84(r) directs courts to apply the relevant standards from the Idaho Rules of Civil Procedure or the Idaho Appellate Rules when an administrative decision appeal procedure is not specified by the civil procedure rules. *Id.* ITD cites *Great Beginnings Child Care, Inc. v. Office of the Governor*, 128 Idaho 158, 159, P.2d 751, 752 (1996), suggesting the preliminary injunction process be applied by district courts in stay determinations in petition for judicial review proceedings. *Id.* Other jurisdictions provide some guidance to courts in making these discretionary decisions. Courts have used preliminary injunctions criteria to evaluate stays. Those criteria include: 1) Is the party seeking the stay likely to prevail on the merits?; 2) Will the effected party suffer irreparable injury if stay is denied?; 3) The party seeking the stay must show that no other parties will be harmed as a result of the stay; and 4) That no harm will be done to the public interest as a result of the stay. *Combustion Systems Services v. Schuylkill* 153 F.R.D 73 (E.D. P.A. 1994); *Natural Resources Defense Council, Inc. v. Winter* 502 F.3d 859 (9<sup>th</sup> circ. 2007). Note that this is usually written in the conjunctive, using the term "and" to join the four criteria. This means that if the party seeking the injunction or the stay fails to prove any of these criteria, granting an injunction or a stay is an abuse of discretion by the court. *City of Gary v. Mitchell*, 843 N.E.2d. 929, 933 (Ind.App. 2006).

Courts often use the word preliminary injunction and stay interchangeably. According to Black's Law Dictionary, the definition of injunction is: "an order commanding or preventing an action; to get injunction no plain, adequate or complete remedy at law and that irreparable injury

will result unless relief is granted.” BLACK’S LAW DICTIONARY 788 (7th ed. 1999). This definition has a more permanent consequence than that of a stay. The definition of stay is the “postponement or halting of a proceeding, judgment or the like.” For an example see *State Department of Health and Mental Hygiene v. Baltimore City*, 281 Md. 548, 383 A.2d 51 (1977). In that case an injunction was sought to stop the county from dumping in the landfill awaiting hearing to see whether or not the landfill operators could proceed while the judicial review was pending. *Id.* When assessing the facts of the previous case, it is clear that what the court was intending was a stay, according to the definition in Black’s Law Dictionary. Injunction insinuates permanency and on the other hand a stay is meant for holding action, permitting a judicial review to take place before action is taken by the administrative judgment. *State Department of Health and Mental Hygiene v. Baltimore City*, also used the four factors set out the *Combustion System* court. 281 Md. 548 (1977); 153 F.R.D 73 (E.D. PA, 1994). This is known as the traditional test for preliminary injunctions. *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).

In addition to the traditional test for preliminary injunction a modified test has been proposed. *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007). This modified test consists of two *alternative* parts: 1) the plaintiff has to demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or, 2) that serious questions arise and the balance of hardships tips sharply in their favor. *Id.* at 1200. Due to the word “or” being used, if *either* of the two alternative parts is proven, a stay may issue. Thus, this modified test may be more lenient and easier to prove by the party seeking the stay. However, the Sixth Circuit noted both considerations should be analyzed, and that in that case, each consideration standing alone might not justify the denial of a stay, but taken together, both considerations warranted the denial of a stay. *Hamlin Testing v. U.S. Atomic Energy*, 337 F.2d 221, 223 (6th Cir. 1964).

In reality, both the traditional test and the modified test are similar, and ask this Court to review: 1) the likelihood of petitioners prevailing and 2) damage to a) petitioners, b) respondents and c) the public, such that balancing those damages tips “sharply” in petitioners’ favor.

Because many jurisdictions have used the injunction and stay standard interchangeably, courts have set forth additional guidelines for courts to follow when evaluating whether those standards are met. When dealing with one governmental agency versus a private party, courts do not have to weigh the evidence based on traditional equity because it is assumed that the governmental agency is working with the protection of public interests. *Baltimore City*, 281 Md. 548, 555, 383 A.2d 51, 55-56 (Md. 1977). “In litigation involving administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.” *Hamlin Testing v. U.S. Atomic Energy*, 337 F.2d 221, 222, citing *Virginia Petroleum Jobbers Ass’n v. 104 U.S.App.D.C. 106*, 259 F.2d 921, 925 (10<sup>th</sup> Cir. 1962). The governmental agency has the scale tipped towards them in the latter two elements that deal with harm to others and harm to public interests. Even if all of the elements at issue in every case and an injunction/stay is proper, courts should use the power to grant injunctions/stays sparingly. *City of Gary v. Mitchell*, 843 N.E.2d. 929, 933 (Ind.App. 2006). Stays should be granted in rare instances where law and facts are clearly within the moving parties’ favor. *Id.* It is also established that the burden is on the moving party to prove their right to a stay, presumably by proving the four standards of evaluation. *Harris v. Cassia County*, 106 Idaho 513, 517-18, 681 P.2d. 988, 992-93 (1984).

## **B. LIKELIHOOD OF PETITIONERS PREVAILING ON THEIR CLAIM.**

To address the first criteria in either the preliminary injunction guidelines or the modified test, this Court must analyze at this time the likelihood of the petitioners prevailing on their

claims. This Court ordered both petitioners and respondents to address the likelihood of prevailing on the merits.

Idaho Code § 67-5279 states that following regarding judicial review of administrative proceedings: (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. That statute also states:

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) not supported by substantial evidence on the record as a whole or; 5) arbitrary, capricious or and abuse of discretion.

That statute then states that if the action of the agency is not affirmed by these provisions, then the court shall set aside the action and remand for further proceedings as necessary. I.C. § 67-5279. Petitioners set out the statutory requirements in support of their claim that they have merit for judicial review. These include I.C. § 58-1303 (board of land commissioners shall regulate and permit encroachments for navigation and non-navigation), I.C. § 58-1304 (allowing the board to adopt minimal standards for decision making and that they shall not be adopted until after they have been proffered for review by the interested parties), I.C. § 58-1302 (defining riparian and littoral rights) and I.C. § 58-1306 (e) (the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation when granting/denying an application). It is not disputed among the parties that the Petitioners are riparian adjacent property owners to the proposed Bypass, thus, falling in the category of interested parties, and that they received notice of the application and were provided opportunity to speak according to the statute. What is disputed among the parties is whether or not the Petitioner exhausted their administrative rights during the hearing proceedings prior to the approval of the application.

“Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. Absent a

statutory exception, the exhaustion of an administrative remedy is a prerequisite for resort to the courts.” *State Dept. of Agriculture ex rel. Commodity Indem. Fund v. Curry Bean Co. Inc.*, 139 Idaho 789, 792, 86 P.3d 503, 506 (2004), citing *Pounds v. Denison* 115 Idaho 381, 384, 766 P.2d 1262, 1264 (Ct. App. 1988).

Petitioners had the statutory right to be notified of the proceedings related to ITD’s application and the right to appear at the proceedings and exhaust their administrative rights in opposition of the application. They question is “did petitioners ‘appear’ at the IDL proceedings?”

According to I.C. § 58-1306(c), the agency is required to hold hearings related to the filed application and provide adequate notice to the public pursuant to chapter 52 title 67 of the Idaho Code. One issue between the two parties is whether or not upon notice of the hearing, parties are *required* to attend the hearing and give oral testimony, or, are they permitted to submit written comments and have them be considered upon any reconsideration of the initial decision. IDAPA 20.03.04.030 discusses how hearings and reconsiderations will be held in administrative proceedings. IDAPA 20.03.04.030.04 states:

**Written Objections:** Any resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake in question, or any state, federal or local agency may, within thirty days of the first date of publication file with the director written objections to the proposed encroachment and a request for a public hearing on the application.

IDAPA 20.03.04.030.06 states:

**Hearing Participants:** Any person may appear at the public hearing and present oral testimony. Written comments shall also be received by the Department.

IDAPA 20.03.04.030 .09 states:

**Reconsideration:** The applicant, if dissatisfied with the Director’s decision, or other aggrieved persons who appeared at the public hearing and gave oral or written testimony, shall have twenty days from the date of the Director’s decision to request reconsideration thereof.....the person requesting reconsideration and the applicant may appear in person or through an authorized representative and present briefing and oral argument. Upon conclusion of reconsideration, the director shall by personal service or by registered or certified mail notify the applicant of his decision.

IDAPA 20.03.04.030 .10 states:

**Judicial Review:** Any applicant aggrieved by the Director's final decision on reconsideration or other aggrieved party appearing at the reconsideration hearing shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within 30 days from the date of the final decision.

Petitioners and Respondents have different interpretations of the meaning of "appear" in Section 10 of IDAPA 20.03.04.030. Respondents argue the Petitioners are not permitted under the statute to seek a Judicial Review of this court because neither R&S nor WPM were in attendance at the initial hearing held on November 20, 2007. Petitioners argue that they were not required under the statute to be physically present at the either hearings and that written comment was sufficient to qualify for Judicial Review. Both parties offer arguments in their favor, whether or not to use the plain language theory of statutory interpretation, but no Idaho case has addressed the issue of the definition of "appear" in these types of administrative proceedings. Therefore, it is up to the discretion of this court to determine the meaning of "appear" within the context of IDACA 20.03.04.030.

Petitioners state the administrative measures were exhausted when they were denied their application for reconsideration on January 5, 2007. Despite not attending the initial hearing, Petitioners argue Mr. Sletager's numerous letters voicing his opposition to the Respondent's application constitute an "appearance". These letters, all dated October 4, 2006, were serial in nature, with each letter addressing a separate opposed issue. Petitioners argue these letters qualify as a substitute for a physical appearance as allowed in IDAPA 20.03.04.030.06, because that section provides that written comments "shall be received by the department". Mr. Sletager did not attend the initial hearing, but he did apply for a reconsideration, which was denied, and stated his opposition to the application in a letter dated January 4, 2007. His petition for reconsideration was denied because IDL stated that he was not eligible under the statute because he did not attend the initial hearing. Consequently, he was not notified of the reconsideration

hearing and did not attend the proceedings. Petitioners feel that this lack of notification was an error, citing IDAPA 20.03.04.030.09, because Petitioners are an aggrieved party and fit within the statute and submitted written comments for the initial hearing.

Respondents argue that the statute should be interpreted using its plain language and should require participants to be physically present at the hearings in order to participate in reconsideration and have the ability to seek Judicial Review. Respondents cite *Blanton v. Canyon County*, 144 Idaho 718, 720, 170 P.3d. 383, 385 (2007), arguing it provides a definition of “appearance” in an administrative statute as meaning physical presence. Respondent ITD Motion to Dismiss and Supplement Brief, p. 5 . *Blanton* is distinguishable from the present case. In *Blanton*, the statute provided for disciplinary actions for persons not appearing at hearings when it involves tax administration. 144 Idaho at 719. This provision that statute suggests legislative intent to have “appearance” mean “physical appearance” at hearings. IDACA 20.03.04.030 does not provide such a disciplinary provision and leaves the definition of “appearance” up to the discretion of the court.

The issue does not appear to be the definition of “appear.” When looking at IDAPA 20.03.04.030 regarding reconsideration, it states “the applicant, if dissatisfied with the Director’s decision, or other aggrieved persons who appeared at the public hearing **and** gave oral or written testimony, shall.....” IDACA 20.03.04.090.09 (emphasis added). The “and” in between the two criteria suggest that despite submitting written comments at the initial hearing, the applicant or aggrieved persons need to be present at the hearing in order to be eligible for the reconsideration hearing. IDAPA 20.03.04.030.10 regarding Judicial Review states that parties appearing at the reconsideration hearing are eligible to appeal an unfavorable decision to the District Court. According to the language in the statute, in which it appears the legislative intent was to make both criteria mandatory in the initial hearing, Petitioners simply did not meet the

requirement that they physically appear. Sleteger did not attend the initial hearing (although his opinions and comments were considered in the decision making process) and his letters were noted in the record. However, providing written comments does not qualify as appearing according to the mandatory language provided in the statute. Therefore, because Petitioner did not meet the standards for administrative proceedings, he “chose” not to exhaust all of his administrative remedies when he did not personally appear at the initial hearing.

Regardless of whether this Court uses the injunction criteria or the more lenient modified criteria, the bar is set high for petitioners. As stated above, even if all of the elements at issue in every case and an injunction/stay is proper, courts should use the power to grant injunctions/stays sparingly. *City of Gary v. Mitchell*, 843 N.E.2d. 929, 933. Also, it is assumed that the ITD in its application and the IDL in its decision are “working with the protection of public interests.” *Baltimore City*, 281 Md. 548, 555, 383 A.2d 51, 55-56. “In litigation involving administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.” *Hamlin Testing v. U.S. Atomic Energy*, 337 F.2d 221, 222, citing *Virginia Petroleum Jobbers Ass’n v.* 104 U.S.App.D.C. 106, 259 F.2d 921, 925. The governmental agency has the scale tipped towards them in the latter two elements that deal with harm to others and harm to public interests. *City of Gary v. Mitchell*, 843 N.E.2d. 929, 933. Using either the injunction criteria or the more lenient modified criteria, petitioners have failed to meet their burden of showing a likelihood of prevailing upon the merits of their claim.

### **C. DAMAGE TO THE PARTIES.**

Petitioners WPM and R&S argue the adverse effects that the Sandpoint Bypass project will have on their adjacent property. Petitioners cite I.C. § 58-1306(e) which states:

In recognition of continuing private property ownership of lands lying between the

natural or ordinary high water mark and the artificial high water mark, the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a non-navigational encroachment.....if upon reconsideration of a decision disallowing a permit, or following a hearing, the board determines that the benefits, whether public or private, to be derived from allowing such encroachment exceeded its detrimental effects, it shall grant the permit.

Petitioners also cite to IDAPA 20.03.04.060(5) which defines “Presumed Adverse Effect.” This provision states that “adverse effect” is presumed when the non-navigational encroachment is less than 25 feet from the adjacent property. *Id.* The provision cited does not discuss what would be an unreasonable adverse effect but rather states that adverse effects will be presumed in the case of close proximity. Petitioners dispute the IDL’s measure of water marks (the amount of feet stated as artificial high watermark versus ordinary high water mark) and argues the encroachment is likely to be less than 25 feet away from their adjacent property. According to petitioners, the encroachment poses an unreasonable adverse effect on their property by implication. In their initial brief, petitioners do not tell this Court what those adverse effects are, but simply state that they would be unreasonable and that the adverse effects fall within the guidelines of the code provision. Petitioners argue that by implication provided in the IDAPA 20.03.04.060(5) they should be granted a stay because of the adverse effects that the encroachment poses on their adjacent property and that those adverse effects cannot be compensated for monetarily.

Petitioners arguments are vague and speculative. For example, petitioners argue that: “Any failure of the Idaho Department of Transportation on the U.S. 85 Sand Creek Bypass project even remotely similar to the 2002 U.S. 95 project that resulted in sedimentation of Mica Creek on Lake Coeur d’Alene, the 1994-5 U.S. 95 Project that resulted in wetland upheaval adjacent to Sand Creek, or the 1998 Bonners Ferry North Hill U.S. 95 project land slide that took out county roads, the Union Pacific Rail Road main track, and main power lines, would have an

economically devastating impact upon the property rights of R&S and WPM in the ownership of the real property and operation of the Sandpoint Marina located on Sand Creek and Lake Pend Oreille.” Affidavit of Ralph Sletager, p. 3, ¶6. Nowhere have petitioners explained *why* the ITD is *likely* to fail on this particular project, nowhere have petitioners explained *how* the ITD is likely to fail, nowhere have petitioners explained that *if* such failure occurs by ITD then what sort of harm is *likely to follow*. All petitioners claim is other projects have failed and caused damage, and if such failure occurs here, there will be an “economically devastating impact.”

The ITD addresses the “damages” issues, which comprise the last three elements under the injunction criteria for evaluating whether to grant or deny a stay: whether there is irreparable injury to the effected party if the stay is denied; whether other parties will be harmed as a result of the stay; and whether harm will be done to the public interest as a result of the stay. ITD criticizes the petitioners’ lack of evidence of adverse effects that the encroachment places on their adjacent property. Respondent ITD’s Brief Opposing Motion for Stay, p. 7-8. Petitioners state that the proposed encroachment and Sandpoint Bypass project will place fill within Sand Creek, but the IDL weighed this narrowing of the creek when making its decision and concluded that it would not place a burden on the navigability of the creek and would not place an adverse effect on the navigability adjacent to the Petitioner’s property. *Id.* p. 8. This narrowing of the creek with fill will take up a total of 1.06 acres within Sand Creek. Public Notice of Permit Application and Public Hearing, October 11, 2006 p. 3 ¶ 3. Additionally ITD argues that if there are adverse effects posed on the Petitioner’s adjacent property, there is no evidence that these effects cannot be compensated monetarily. Respondent ITD’s Brief Opposing Motion for Stay, p. 11. Indeed, Ralph Sletager’s affidavit anticipates only monetary damages even if there is catastrophic failure by ITD in the future in some unknown way, as he states such failure by ITD would have only an “economically devastating impact”. If that eventuality occurs, petitioners

will have recourse against ITD for damages in a different lawsuit.

Furthermore, ITD addresses the adverse effects that the public and the ITD will suffer if the stay is granted. *Id.*, 2. These include potential for loss of funding if the project is delayed for the 2008 construction season and the effects to the public safety (at least one more year with the dangerous conditions of having Highway 95 weave through Sandpoint) that would result from delaying the Bypass construction. ITD estimates that the delay of one year (the 2008 construction season) would conservatively cost the State of Idaho at least \$5,000,000.00. *Id.*, p. 4. Additionally, respondents argue that a delay in construction may necessitate additional permitting and additional design costs leading to more planning on the project because of the expiration date on some of the permits. *Id.* p. 12-13. ITD argues the injury to the ITD and the public interest outweigh the injury to the petitioners because they have failed to provide evidence as to what petitioners' injuries *might* entail.

If a stay is granted by this court, ITD requests a \$5,000,000 bond be posted to cover their estimated costs for the delay. This is substantially larger than the \$500 minimum already posted by the petitioners. Because petitioners fail to give specific evidence of injury that denying a stay would entail and there is strong evidence of injury that the Respondent would sustain, the stay must be denied. Because the stay is denied, the issue of bond need not be addressed.

Petitioners do not present any substantial evidence of how they or the public will be harmed as a result of the permit being commenced. They do not provide any substantial evidence of irreparable injury, merely stating that injury might be caused, and even then, petitioners seem to admit any injury could be remedied monetarily. Petitioners have only engaged in speculation on all fronts, not only as to the nature of the harm, the magnitude of the harm, the means by which harm could result, and the likelihood of such harm occurring.

On the other hand, the ITD presents substantial competent evidence of the harm to the

public, both via monetary harm and via safety issues related to having highway 95 continue in its current route. The magnitude of that harm is great. This stay would result in substantial amounts of public money, possibly millions, being lost. The certainty of that harm is also great as construction costs are rising at unprecedented rates.

**III. ORDER.**

IT IS HEREBY ORDERED petitioners' Supplemental Motion for Stay Pending Judicial Review is DENIED.

Entered this \_\_\_\_ day of July, 2008.

\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of July, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
John A. Finney	(208) 263 8211		Clive Strong, Steven J. Schuster	(208) 334-2297
Murray Feldman, Mary v. York	(208) 343-8869			

\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk