

IDAHO RIVERS UNITED, and)
MORGAN and OLGA WRIGHT,) No. 3:15-cv-00169-BLW
)
Plaintiffs,) **PLAINTIFFS’ OPENING BRIEF**
) **IN SUPPORT OF MOTION FOR**
vs.) **TEMPORARY RESTRAINING**
) **ORDER and/or PRELIMINARY**
DISTRICT RANGER JOE HUDSON) **INJUNCTION**
in his official capacity, and UNITED)
STATES FOREST SERVICE,)
)
Defendants.)

INTRODUCTION

Plaintiffs Idaho Rivers United and Morgan and Olga Wright seek immediate injunctive relief ordering Defendants U.S. Forest Service and District Ranger Joe Hudson to notify proposed Intervenor Idaho State Board of Land Commissioners and Idaho Department of Lands (jointly “IDL”) that IDL may not utilize Nez Perce National Forest Road 652 within the Selway Wild and Scenic River corridor – and across the Wrights’ property – as part of IDL’s Selway Fire timber sale, pending resolution of this case. IDL intends to start using Forest Road 652 for moving heavy equipment and site clearing for its planned Selway Fire project beginning the week of July 6, 2015, despite Plaintiffs’ request for delay while this case is adjudicated. *See* accompanying Declaration of Deborah Ferguson.

Through the November 20, 2014 decision challenged here, the Forest Service Defendants for the first time declared Forest Road 652 to be a “public road,” and thus authorized IDL to use Forest Road 652 across the Wrights’ property and within the Selway Wild and Scenic River corridor without considering the significant environmental impacts of their decision, or requiring IDL to obtain a special use permit.

Because Forest Road 652 does not qualify as a “public road” under the Forest Service’s own definitions, Forest Service regulations require that IDL must obtain a special-use authorization before using the road for the Selway Fire sale. Moreover, that process requires land use plan conformance, public participation, and environmental impact analysis before approving a special-use permit. None of these critical procedural steps have been taken, placing Plaintiffs’ interests and the Selway Wild and Scenic River corridor in immediate and serious risk of harm.

The November 20th decision asserted that Forest Road 652 is a “public road” simply because the Forest Service obtained an 1937 easement to construct a “public highway” there. But the anticipated “public highway” was never built. And except for approximately 740 feet that crosses the Wrights’ property and is maintained by the Wrights, Forest Road 652 is an unimproved road inaccessible by standard passenger vehicles and with a locked gate; and hence does not qualify as a “public road” under the Forest Service’s own definition. Thus, the November 20th decision declaring Forest Road 652 to be a “public road,” thereby avoiding NEPA analysis and a special use permit for IDL’s Selway Fire sale, is arbitrary, capricious, and unlawful, and should be reversed.

Immediate injunctive relief is necessary to prevent IDL’s imminent use of Forest Road 652 for the Selway Fire sale in reliance on the Forest Service’s flawed November 20th decision. IDL auctioned the sale after this case was filed and after IDL moved to intervene; and IDL intends to begin earth moving, road construction, and tree cutting imminently, which will result in serious and irreversible damage to the Selway Wild and Scenic River corridor and Plaintiffs’ interests, as discussed in detail below.

STATEMENT OF FACTS

I. THE SELWAY WILD AND SCENIC RIVER.

From its headwaters in the Bitterroot Mountains, the Selway River flows through unparalleled scenery and solitude to its confluence with the Lochsa and Clearwater Rivers, creating “one of the highest quality” whitewater river experiences in the nation. RECREATION.GOV: SELWAY RIVER, <http://www.recreation.gov>. The Selway “is unique because it is the only river in the United States that received instant inclusion to both the Wilderness Preservation System and the Wild and Scenic River System.” *Id.*

Through the Wild and Scenic Rivers Act of 1968, Congress mandated that the Selway be protected for the “benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271. The Forest Service is required by the Act to manage its lands to “protect and enhance the values which caused it to be included in said system.” *Id.* § 1281(a).

In 1969, the Forest Service adopted a River Management Plan for the Selway, Lochsa and Middle Fork Clearwater Rivers. *See* accompanying Declaration of Kevin Lewis, Exhibit 1 (copy of 1969 River Plan). Notably relevant here, that Plan requires that “[a]ccess roads to serve private lands are to be controlled by scenic easements to ensure compatibility with development of the special planning area and with river environment protection.” *Id.*, p. 9 (emphasis added).

To protect the Wild and Scenic corridor, the Forest Service has used taxpayer money to acquire some 186 scenic easements to date, which encumber about 4,000 acres of non-federal land within the Selway, Lochsa, and Middle Fork Clearwater Wild and Scenic river system. *See* NEZ PERCE-CLEARWATER NATIONAL FORESTS, FOREST PLAN ASSESSMENT (June 2014), ch. 15, p. 20. These include the 1977 Wild and Scenic easement on the Wrights’ property, discussed below.

II. THE WRIGHTS’ PROPERTY AND FOREST ROAD 652

Plaintiff Morgan Wright is an avid river rafter and long-time member of Plaintiff Idaho Rivers United (IRU), and has enjoyed running the Selway River for decades. *See* accompanying Declaration of Morgan Wright, ¶ 2.¹ Reflecting his love for the Selway

¹ Plaintiff IRU is a membership-based conservation organization whose mission embraces protecting and restoring Wild and Scenic rivers, including the Selway. *See* Lewis Declaration. IRU members prize the Selway River corridor for its recreational, conservation, scientific, and aesthetic opportunities, which are threatened with irreparable

River, he purchased property on the Selway River over two decades ago, and he and his wife Olga have built and maintain a home there. *Id.*

The Wrights' property is located on the south side of the Selway River, about 2.8 miles upstream from the confluence of the Selway and Lochsa Rivers, at Lowell, Idaho. *Id.*, ¶ 3. Access to the Wrights' property is via Forest Road 652, a short spur road off Forest Road 470, which is an improved road that crosses the Selway over the Swiftwater Bridge. *Id.* The Wrights' property lies entirely within the one-quarter mile federally-designated Wild and Scenic corridor of the Selway River. *Id.*, ¶ 4. This area has very steep slopes; and the adjoining Idaho parcel lies partly up-slope from their property. *Id.*

In 1937, the Forest Service obtained an easement for Forest Road 652 over what is now the Wrights' property. *See* Wright Decl., Exh. 2. The 1937 easement conveyed a 30-foot right-of-way to the Forest Service "for the construction, repair, maintenance, and operation of a common, main, or State public highway and as a connecting link in the . . . Goddard Point Road #289 Project." *Id.* Forest Road 652 crosses about 740 feet of the Wright's property in this right-of-way. *Id.*

However, the Forest Service never built the Goddard Point Road #289 Project for which the 1937 easement was obtained; and the Forest Service did not improve Forest Road 652 beyond a native-surface dirt track, apparently made by the Civilian Conservation Corps in the 1930's. *See* accompanying Declaration of Daryl Mullinix (former Nez Perce Forest road engineer and surveyor), ¶ 11. Today, over eight decades later, Forest Road 652 remains a short unimproved spur road that parallels the Selway River within the Wild and Scenic River corridor. *Id.*

harm as a result of the Forest Service's unlawful November 20, 2014 decision, challenged here. *Id.*

As the accompanying declarations and photographs attest, Forest Road 652 consists mostly of a muddy track which is not passable by four-wheel standard passenger cars for most of its length, other than the short stretch maintained by the Wrights to access their property. *See* Mullinix Decl., ¶¶ 11, 29-35; Wright Decl., ¶¶ 12-15; Lewis Decl., Exh. 12 (photos). Neither the Forest Service nor any other public entity maintains the road that crosses the Wrights' property, or any portion of it beyond their property. *Id.* Moreover, the Forest Service has maintained a locked gate for approximately 30 years on Forest Road 652 about a quarter mile from the Wrights' property, where it leaves the adjoining state land and enters the next private parcel. *Id.* Given these facts, it is unsurprising that Forest Road 652 has never been identified as "public road" by the Forest Service before, including on its official forest maps; and is not listed as such on the Nez Perce National Forest's 2007 Road Access Guide, which is the current road designation map for the Forest. *See* Lewis Decl., ¶¶ 22-25 & Exhs. 13-14.

The Forest Service paid \$160,000 in 1977 to obtain a Wild and Scenic easement covering Plaintiff Wrights' property. *See* Wright Decl., Exh. 1. The easement contains explicit restrictions how the Wrights' property may be developed and used, including:

- * "The lands within the easement area shall not be used for any professional or commercial activities. . . ."
- * "No mining or industrial activity shall be conducted on the lands within the easement area."
- * "The Grantee is hereby granted the right to permit the public use of the riverbank for fishing and traversing the river, but the public shall be excluded for any other purpose."

See Wright Decl., Ex. 1., pp. 2-4 (emphases added). The Wrights have adhered to the restrictions of the 1977 Wild and Scenic easement, including by having to obtain Forest

Service approval over all aspects of the design and construction of their home. The Forest Service also recently approved posting a sign at the entrance to their property that states: “Dead End. No Turn Around.” *Id.*, ¶¶ 8-9, 15.

III. DEFENDANTS’ UNLAWFUL DETERMINATION THAT FOREST ROAD 652 IS A “PUBLIC ROAD”

Because of the unimproved nature of the road and the 1977 Wild and Scenic easement, the Wrights were stunned this winter to learn the Forest Service granted IDL authorization to proceed with extensive road construction and logging activities for the planned Selway Fire sale using Forest Road 652 across the Wrights’ property, without requiring any special use permit and without any public notice, comment, or evaluation under NEPA and the Wild and Scenic River Act. *See* Wright Decl., ¶ 16. The facts of how the Forest Service made this determination were only unearthed by Plaintiff IRU using the Freedom of Information Act. *See* Lewis Decl., ¶ 19 & Exhs. 2-10.

In August 2014, the Johnson Bar fire burned portions of federal, state and private lands in the Clearwater and Selway River areas. *Id.* IDL contacted the Forest Service in September 2014 to determine whether a special use permit was needed to use Forest Road 652 to access burned state land adjoining the Wrights’ property for IDL’s planned road construction and logging. *Id.*, Exh. 2. In response, the Forest Service initially – and correctly – advised that a commercial road use permit was required under Forest Service special use permit regulations, before IDL could use the road for its timber sale. *Id.*, Exhs. 3-4. On September 3, 2014, IDL began coordinating with the Forest Service to obtain a special use permit for Forest Road 652. *Id.*, Exh. 4.

Sometime on or before October 16, 2014, District Ranger Joe Hudson received a completed commercial road use permit application for Forest Road 652 from IDL. *Id.*,

Exh. 6. On October 16, 2014, District Ranger Hudson shared the application with his staff and began assembling a team to assess NEPA and Wild and Scenic Rivers Act requirements. *Id.*, Exh. 5. In communications with the National Marine Fisheries Service, the Forest Service was also advised that ESA Section 7 consultation would be required over both the special use permit and potential impacts of the IDL road construction and logging activities, since the Selway River is habitat for ESA-listed salmon, steelhead, and bull trout. *Id.*, Exh. 8.

On November 14, 2014, however, Defendant District Ranger Hudson received guidance from his staff that a road use permit was not required for Forest Road 652, because it is supposedly a “public road.” *Id.*, Exh. 9. A staff e-mail asserted that Forest Road 652 meets the Forest Service Manual definition of “public road” with no restrictions on public use because the “1936” (sic) right-of-way was granted for a “public highway.” *Id.* This email did not consider the physical features of the road, or the fact that it is not shown as a “public road” on the Forest Service’s road access guide. *Id.*

Accepting this flawed advice, on November 20, 2014, Defendant District Ranger Hudson informed IDL that no Forest Service special use permit was required to use Forest Road 652 in connection with its timber sale because it meets the Forest Service Manual’s definition of public road. *See* Lewis Decl., Exh. 10. Based on that analysis, District Ranger Hudson concluded that there are no existing restrictions on the use of Forest Road 652, and that IDL is not proposing “any use on these roads outside what is already authorized by regulation or law.” *Id.* The Forest Service gave no public notice of this November 20th determination, and did not undertake NEPA analysis beforehand.

As underscored by its intervention motion and supporting materials, IDL has relied on District Ranger Hudson's November 20, 2014 determination that Forest Road 652 is a "public road" in proceeding with its plans to conduct its Selway Fire sale. *See Docket No. 3.*² IDL held a public auction for the timber sale on June 19, 2015, with full knowledge of Plaintiff's pending litigation and after it moved to intervene in the case; yet IDL did not mention this pending litigation in the information it provided to potential bidders for the Selway Fire sale. *See id.*, Groeschl Decl. ¶ 8 & Exs. I – K.

IDL's proposed Selway Fire sale will clearcut 142 acres of trees and build over three miles of new roads on extremely steep, unstable slopes, within one mile of the Selway River. Compl. ¶ 61. In addition to the new road building, approximately 0.39 miles of forest road 652 will be reconstructed to a sixteen-foot travel way. *Id.* Excavated materials will be used to create a large waste area within the Wild and Scenic corridor. Mullinix Decl., ¶ 40.

Because IDL intends to use Forest Road 652 as the only access road to the sale, every vehicle, every piece of heavy equipment, and every logging truck associated with the sale will pass within close proximity to Plaintiff Wrights' residence. This includes over 1,000 logging trucks needed to remove the logged trees, as well as hauling all the equipment needed to conduct site preparation and construct the new roads on IDL lands. All this traffic means the Wrights will be significantly harmed in their quiet use and enjoyment of their home. *Id.*, ¶¶ 17, 24-27. And there will be significant industrialized or commercial use of Forest Road 652 within the Selway Wild and Scenic River corridor, violating the terms of the 1977 easement as well as the 1969 River Plan. *Id.*

² Plaintiffs do not oppose IDL's intervention motion. *See Docket No. 5.*

IDL's Selway Fire sale will also have significant short and long-term impacts on recreational and scenic enjoyment of the Selway Wild and Scenic corridor for the general public and Plaintiff IRU's members. *See* Wright Decl. ¶ 27; Lewis Decl. ¶¶ 30-35. A flurry of industrial activity is likely to begin at any moment. Once the noise and dust subside after two years of road building and clear cutting, the character of the Selway Wild and Scenic corridor will be forever marred with extensive road cuts, fills, and switchbacks; and unnatural forest openings within full view from the Selway River and the Selway River road. *Id.*

Additionally, the potential impacts of IDL's Selway Fire sale may well prove to be catastrophic. The timber sale area consists of steep slopes and highly erosive soils with a history of stability problems. The road building and logging plans have been hastily assembled, are poorly detailed, and involve massive earth-moving within close proximity of the Selway River itself, and the Wright's residence. These facts create the potential for massive sedimentation, debris flow, landslide events, and threaten grave and irreversible damage to environmental resources, property, and human life. *See* Mullinix, Wright, Lewis Declarations.

These adverse impacts are likely to occur absent judicial relief because the Defendants' erroneous November 20, 2014 determination that Forest Road 652 is a "public road" has unlawfully exempted IDL's activities from the regulations which are intended to identify and evaluate these impacts. Injunctive relief is necessary because IDL has moved aggressively to auction the Selway Fire timber sale despite this litigation, and intends to begin sale work immediately using Forest Road 652.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Under Rule 65, the Court may issue a preliminary injunction pending resolution of Plaintiffs' claims on the merits. Fed. R. Civ. P. 65; *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981). To win injunctive relief, Plaintiffs must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). A sliding scale approach is used in the Ninth Circuit, where a preliminary injunction is appropriate if plaintiffs have raised serious questions going to the merits and the balance of hardships tips sharply in plaintiffs' favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

Injunctions are often appropriate to delay actions that harm to natural resources, as "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003) (quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

The Court reviews the Forest Service's November 20th determination under the APA's judicial review standards to determine whether the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This requires a "thorough, probing, in-depth review" to determine whether the agency presented a "rational connection between the facts found and the conclusions

made.” *Native Ecosystems Council v. United States*, 418 F.3d 953, 961 (9th Cir. 2005).

An agency determination is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT FOREST ROAD 652 IS NOT A PUBLIC ROAD AND THUS IDL MUST OBTAIN A SPECIAL-USE AUTHORIZATION.

Plaintiff’s IRU and the Wrights are likely to succeed on their claim challenging Defendants’ November 20, 2014 decision that deemed Forest Road 652 to be a “public road” for the first time.³

As explained below, the November 20th decision relied on the language of the 1937 easement while ignoring the facts that the anticipated “public highway” was never built; and that Forest Road 652 remains a mostly unimproved two-track road, inaccessible to normal passenger vehicles, which has a locked gate – and hence does not qualify as a “public road” under the Forest Service’s own definitions. Moreover, Forest Road 652 has never been designated as a “public road” previously by the Forest Service; and the agency has not gone through the public travel planning process necessary to

³ The November 20th determination is a final agency action which is judicially reviewable under the APA, as it consummated the agency’s decision-making process and determined rights and obligations, causing harm to Plaintiffs who were deprived of their procedural rights to participate in Forest Service travel planning and special permit processes. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

designate it as such. Finally, the 1977 Wild and Scenic easement limits the use of Forest Road 652 to preclude industrial and commercial activities, such as IDL's planned timber sale and associated road construction. By ignoring all these factors and the relevant legal definitions and procedures for designating public roads, the November 20th decision is arbitrary, capricious, an abuse of discretion and contrary to law, requiring reversal.

A. Forest Road 652 Is Not A "Public Road."

The November 20th determination that Forest Road 652 is a "public road" directly contradicts the Forest Service Manual definition of "public road," as recently confirmed by the Ninth Circuit. *See Public Lands for the People, Inc., v. U.S. Department of Agriculture*, 697 F.3d 1192, 1199 (9th Cir. 2012) (finding that the Manual definition is reasonable and supersedes previous conceptions of "public roads"). The Forest Service Manual defines "public road" as:

1. Available, except during scheduled periods, extreme weather, or emergency situations.
2. Passable by four-wheel standard passenger cars; and
3. Open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration.

See F.S. Manual, Chapter 7730 (Lewis Decl., Exh. 11).

Here, the facts show that Forest Road 652 is mostly an unimproved road not passable by a four-wheeled standard passenger car, there has been a restrictive locked gate on the road for approximately thirty years, and a Forest Service-approved sign warns potential travellers that the road dead-ends with no turn around. *See* Wright Decl., ¶¶ 3-15. Thus, Forest Road 652 does not meet the Forest Service's definition of "public road",

as confirmed by the opinion of a former Forest Service road engineer who continues to do road engineering and surveying in this area. *See* Mullinix Decl., ¶ 20-36.

Additionally, Forest Road 652 is not open for general public use. The Nez Perce National Forest has been working on a forest Travel Plan for several years now, but does not yet have an approved travel management plan or motor vehicle use map (“MVUM”). *See* Wright Decl., ¶ 25; Lewis Decl., ¶¶ 22-25; Mullinix Decl., ¶ 26. According to the Nez Perce National Forest’s website, until the MVUM is completed, road and trail designations contained in the Forest’s existing road and trail access guides “will remain in place to use until the Forest MVUM map is available to the public.” *See* Lewis Decl., Exh. 14. The existing 2007 Road Access Guide does not even list Forest Road 652, much less identify it as a “public road.” *Id.* Similarly, the 2013 Nez Perce forest map shows Road 652 as an “unimproved dirt” road without any number. *Id.*, Exh. 13. *See also* Mullinix Decl., ¶ 26 (explaining why Forest Road 652 does not qualify as a “public road” under any definition).

Because Forest Road 652 does not meet the Forest Service’s definition of a public road, and because the Forest Service has not completed the necessary public process to designate Forest Road 652 as open for general use, Plaintiffs are likely to prevail on their claim that a special use authorization is required under 36 C.F.R. § 251.50(d) for IDL’s commercial use of the road to haul equipment and logged timber for the Selway Fire sale.

B. The 1977 Wild and Scenic Easement Prohibits Industrial Activities On Plaintiff Wright’s Property, Including The Forest Service’s 1937 Easement for Forest Road 652.

In addition, the November 20th determination is arbitrary, capricious, and contrary to law because it ignores other important restrictions on uses of Forest Road 652 within the Selway Wild and Scenic River corridor.

The Forest Service obtained the 1937 easement for purposes a constructing a public highway across the Wrights' property, which was never constructed. Subsequently, the Forest Service obtained the 1977 Wild and Scenic easement covering the Wrights' entire property – including the right-of-way from the 1937 easement. *See* Wright Decl., Exhs. 1-2. As quoted above, the 1977 Wild and Scenic easement explicitly prohibits industrial and commercial activities on the entire property; while also restricting public access to the property only along the riverbank. *Id.*, Exh. 1, pp. 2-4.

Remarkably, according to the FOIA documents obtained by IRU, Forest Service staff never even considered the more recent and comprehensive 1977 Wild and Scenic easement even while they relied on the language of the 1937 easement to conclude that Forest Road 652 is a “public road.” *See* Lewis Decl., Exhs. 2-10. The Forest Service Manual provides that a “public road” has no restrictions on use; yet the 1977 Wild and Scenic easement expressly precludes industrial uses of the Wrights' property within the Wild and Scenic corridor, including where Forest Road 652 is located. Likewise, as quoted above, the 1969 River Plan calls for using Wild and Scenic easements to control access to private properties in order to preserve wild, scenic and other values. *See* Lewis Decl., Exh. 1. Yet the Forest Service also did not address the River Plan in the November 20th determination that Forest Road 652 is a “public road.”

By failing even to consider – much less enforce – the 1977 Wild and Scenic easement and the 1969 River Plan, the Forest Service's November 20th determination must thus again be reversed under the APA. *See Motor Vehicle, supra* (APA standards require reversal where agency decision is not based on a “consideration of the relevant factors” and or there has been “a clear error of judgment”).

The situation here is similar to this Court's determination that the Forest Service erred in asserting it lacked authority to regulate mega-loads on Highway 12 within the Clearwater/Lochsa Wild and Scenic River corridor. *See Idaho Rivers United v. U.S. Forest Service*, No. 1:11-CV-95-BLW, 2013 WL 474851 (D. Idaho Feb. 7, 2013). The Court there upheld that the Forest Service's authority to protect the Wild and Scenic corridor, in part because the Highway 12 easement from the federal government to the State of Idaho was expressly conditioned on protecting the corridor's scenic and esthetic values. *Id.* Here, the Forest Service has conditioned the use of its own 1937 right-of-way for Forest Road 652 through the subsequent 1977 Wild and Scenic easement; and thus the agency has full authority to enforce that easement to protect Wild and Scenic values, instead of ignoring it, as it did in the unlawful November 20th determination.

C. The Forest Service Must Evaluate IDL's Proposed Road Use Under Special Use Permit Regulations, NEPA, And The ESA.

Under Forest Service regulations, the type of written authorization required for use of a Forest Service road is determined by the proposed use and current designated use of the road. A "special-use or road-use authorization" is required when access involves "surface disturbance" or "use of a road not authorized for general public use." 36 C.F.R. § 251.110(d). Here, a special-use or road-use authorization is required because, as shown above, Forest Road 652 is neither a public road nor authorized for general public use.

The Forest Service's special-use permitting regulations control the screening and processing of permit applications. During the screening stage, the Forest Service "*shall* reject any proposal" if the proposed use would be "incompatible or inconsistent with the purposes for which the lands are managed," or "would not be in the public interest." 36 C.F.R. § 251.54(e)(5) (emphasis added). The 1977 Wild and Scenic easement on the

Wrights' property, which covers Forest Road 652, was obtained by the Forest Service in order to restrict land uses and protect the Wild and Scenic values of the Selway River corridor. Thus, IDL's proposed road use is likely "incompatible" and "inconsistent" with the purposes for which the lands are managed; however, the Forest Service has avoided making that determination by unlawfully exempting IDL from special-use permitting requirements through the November 20th decision.

Even if the Forest Service had determined that IDL's use was compatible with the Wild and Scenic River Act and resource management plans, such as the 1969 River Plan, the application would still need to clear NEPA's procedural hurdles in the application processing stage. *Id.* § 251.54(e)(5). At a minimum, the "public shall receive adequate notice and an opportunity to comment upon a special use proposal," and the Forest Service must determine whether the proposed activity is in conformance with resource management plans and does not "materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Services [NEPA] Handbook 1909.15, chapter 30." *Id.* Environmentally sensitive resources and lands include endangered, threatened, and sensitive species; floodplains; and Congressionally designated areas such as Wild and Scenic River corridors. F.S.H. 1909.15, chapter 31.2.

It is likely that a NEPA analysis would determine that issuing IDL's required special-use permit would result in "material impacts" to the "characteristics" and "functions" of the Selway Wild and Scenic corridor. The scope of the Forest Service's NEPA analysis must include the impacts of IDL's Selway Fire sale because the "project's viability is founded on the" Forest Service's issuance of the special-use authorization. *White Tanks Concerned Citizens, Inc., v. Strock*, 563 F.3d 1033, 1042 (9th Cir. 2009)

(applying NEPA's "connected action" requirement (40 C.F.R. § 1508.25(a)(1)) to the scope of an impact analysis).

Likewise, ESA Section 7 consultation is required here because the Selway River is habitat for ESA-listed salmon, steelhead and bull trout; and as the National Marine Fisheries Service has informed the Forest Service, the ESA consultation must include not only use of Forest Road 652 but IDL's road construction and logging activities that would utilize a special use permit for the road. *See* Lewis Decl., Exh. 8.

Additionally, Forest Service and IDL documents have identified serious mass erosion and landslide risks on and adjacent to IDL's timber sale area. Significant impacts are very likely to result from of the Forest Service's decision to authorize IDL's commercial use of Forest Road 652, yet they have not been analyzed because the Forest Service had failed to follow regulatory procedures. *See* Mullinix Decl., ¶¶ 37-44.

Therefore, by unlawfully designating Forest Road 652 as a public road, the Forest Service has avoided compliance with its own regulations, its own management plans, its obligations to protect the Selway River, and the procedural requirements of NEPA and the ESA, again requiring reversal of the November 20th decision under the APA.

III. IMMEDIATE RELIEF IS NEEDED TO AVOID IRREPARABLE HARM.

Injunctive relief is necessary to preserve the status quo and prevent further irreparable harm to the Plaintiffs. The Forest Service's refusal to require a special-use authorization for IDL's use of Forest Road 652 and conduct the necessary NEPA analysis has already harmed Plaintiffs' procedural interests; and threatens irreparable harm to the scenic, aesthetic, recreational and other values of the Selway Wild and Scenic River corridor, destruction or impairment of the Wrights' right to quiet enjoyment of their

property free from industrial activities, and even potentially catastrophic damage to the Wright's property. *See* Lewis Decl. ¶ 30-35; Wright Decl. ¶ 17. (discussing these harms).

Plaintiffs have abundantly established that “irreparable injury is likely in the absence of an injunction,” *Winter v. NRDC*, 555 U.S. at 22. Here, Plaintiffs have already been deprived of their procedural right to comment on the Forest Service's illegal road use authorization and participate in the NEPA process for any special use permit application. Moreover, serious environmental injury is imminent – including cutting of trees and bulldozing activities within the Wild and Scenic corridor, as well as extensive heavy equipment use of Forest Road 652 through the Wright's property. Earth-disturbing actions and tree cutting will begin as early as the week of July 6 and continue with extensive hauling of heavy equipment, logging, and use of logging truck to remove felled timber through the Wrights' property in coming weeks and months, unless an injunction is issued. Not only does this threaten irreparable harm to the Wrights' quiet enjoyment of their own property, but it constitutes impressible industrial and commercial activity that mars the scenic, aesthetic, and recreational values of the Selway Wild and Scenic River corridor. *See* Wright, Lewis Declarations.

The prospect of irreparable catastrophic harm from mass erosion caused by IDL's road construction and logging is also very real. As described in the accompanying declaration from former Nez Perce Forest road engineer Daryl Mullinix, IDL's proposed road construction plans:

appear to have been hastily assembled, are poorly detailed, and involve massive earth-moving within close proximity of the Selway River itself, and the Wright's residence. These facts create the potential for massive sedimentation, debris flow, landslide events, and threaten grave and irreversible damage to environmental resources, property, and human life. The actual likelihood of these plausible events is simply unknown, because neither IDL nor the Forest Service have

adequately analyzed the suitability, adequacy, and potential impacts of the road building in connection with IDL's timber sale in the Selway Wild and Scenic Corridor.

See Mullinix Decl., ¶41. In short, Plaintiffs' injuries are actual injuries and are likely to increase in severity, magnitude and permanence and irreparability if the Forest Service's decision to declare that Forest Road 652 is a public road is allowed to stand.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

The balance of the hardships and public interest weigh strongly in favor of enjoining the Forest Service and/or IDL from using Forest Road 652 for the Selway Fire sale. One side – Idaho Rivers United and its members, and the Wrights – will suffer irreparable harm from the immediate impacts of IDL's road construction and logging. The Forest Service's unlawful authorization of IDL's road use also undermines the public interest because the agency has failed to protect the nationally-designated Selway Wild and Scenic River corridor. On the other side, the Forest Service will experience no injury from being directed to do its job.

Likewise, IDL cannot complain of having to comply with existing federal regulations that require it to obtain a special permit to use Forest Road 652 for the Selway Fire sale. Moreover, IDL auctioned the sale on June 19 with full knowledge of this litigation – and remarkably made no mention of this pending litigation in the information available to potential bidders. The long-term environmental damage caused by IDL's imminent road building and clear-cutting in the Selway Wild and Scenic River corridor cannot be undone once it occurs.

The public interests also weigh in favor of an injunction. Congress has already mandated that the Selway River's Wild and Scenic values be protected. Moreover, the

public has a strong interest in the Forest Service correctly following its own regulations. When an agency disregards the law, “it disregards the public interest and undermines its own credibility.” *Western Watersheds Project v. Rosencrance*, No. 09-CV-298-EJL, 2011 WL 39651, at *14 (D. Idaho 2010).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this motion and enjoin Federal Defendants and/or IDL from using Forest Road 652 for the Selway Fire sale pending resolution of this case on the merits.

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Respectfully submitted,
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