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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED, Plaintiff, vs. UNITED STATES FOREST SERVICE, UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, Defendants.	)	No. 01:11-cv-095-BLW **PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Idaho Rivers United ("IRU") brings this partial summary judgment motion to resolve the key legal issue which remains outstanding after the Court's March 9, 2012 Memorandum Decision and Order (*Docket No. 32*) ("March 2012 Decision"), namely:

Did the U.S. Forest Service and Federal Highway Administration ("FHWA") err as a matter of law in determining that they lack jurisdiction or authority to regulate mega-loads using U.S. Highway 12 within the Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor?

As explained below, the Forest Service's determination that it lacks authority or jurisdiction to regulate mega-loads on Highway 12 is legally erroneous and must be reversed, because the Forest Service has multiple sources of authority to regulate uses of highway easements that pass through the National Forest lands and the Wild and Scenic River corridor, particularly when those uses threaten harm to federal lands, as the Highway 12 mega-loads do here.

First, the Forest Service retains the power and authority of a landowner to enforce the Highway 12 easement. *See United States v. Gates of the Mountain Lakeshore Homes*, 732 F.2d 1411 (9th Cir. 1984) (Forest Service action to enforce easement across federal lands). Here, the Easement Deed granted by the federal government to the State of Idaho for Highway 12 expressly requires protection of scenic and esthetic values, which mega-loads threaten; yet the Forest Service has ignored its authority to enforce the easement terms and prevent harm to the servient estate.

Moreover, as a sovereign, the Forest Service enjoys broad authority to regulate the use and occupancy of the federal lands within the Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor. *See Kleppe v. New Mexico*, 426 U.S. 529, 539-41 (1976) (addressing federal government's broad authority under the Property Clause). This authority includes the ability to regulate conduct on state highway rights-of-way over National Forest land. *Lauran v. U.S. Forest Service*, 141 Fed. App'x 515, 519 (9th Cir. 2005). Because U.S. Highway 12 is located within the boundaries of both the Wild and Scenic River and the Clearwater National Forest, the Forest Service retains jurisdiction and authority to ensure that new uses of Highway 12 – such as the transport of mega-loads – do not impair the scenic, esthetic, recreational, or other values of the underlying federal lands.

The Court should also reverse FHWA's separate determination that it lacks jurisdiction to regulate mega-loads on Highway 12. Pursuant to federal law, the Highway 12 easement is a "project" over which FHWA retains authority to ensure it is maintained in accordance with federal law; and FHWA has a Memorandum of Understanding with the Forest Service providing that FHWA will enforce the terms of the highway easement deed if ITD fails to comply with it. The FHWA thus retains authority and jurisdiction over administration of the highway under federal law, and erred in determining that it lacks jurisdiction over mega-loads on Highway 12.

Accordingly, the Court should grant partial summary judgment to Plaintiff IRU on its remaining claims, and rule that that the Forest Service and FHWA erred in determining that they lack jurisdiction or authority to regulate the transport of mega-loads

on U.S. Highway 12 within the Clearwater National Forest and Wild and Scenic River corridor.

STATEMENT OF RELEVANT FACTS[1]

The Middle Fork Clearwater/Lochsa Corridor and Highway 12.

The Middle Fork Clearwater/Lochsa Wild and Scenic River corridor is a "national recreational resource," in which U.S. Highway 12 plays a "vital part." SOF ¶¶ 3, 15. The scenic beauty and recreational opportunities of the river corridor led Congress to include the Middle Fork Clearwater and Lochsa rivers among the original rivers designated under the Wild and Scenic Rivers Act of 1968. *Id.* ¶ 6.

The Idaho Transportation Department ("ITD") manages the day-to-day operation of Highway 12 under the authority of a highway easement deed granted in 1995 (and amended in 1997) by the Forest Service and FHWA. SOF ¶¶ 41-42. The easement deed allows the State of Idaho to use certain lands in the Clearwater National Forest "for highway purposes," but the Forest Service made clear to the public at the time that it consented to the easement transfer that the deed was limited to the highway uses and practices in place as of 1995 – which did **not** include massive shipments such as the mega-loads proposed recently. *Id.* ¶¶ 33-39, 40. Moreover, consistent with the Wild and Scenic Rivers Act, the easement deed expressly requires the State to "protect and preserve" the river corridor's "scenic and esthetic values." *Id.* ¶ 41.

[1] The accompanying Statement of Material Facts in Support of Plaintiff's Motion for Partial Summary Judgment ("SOF"), filed herewith, lays out the relevant facts in great detail with citations to the administrative record and other materials. Accordingly, this opening brief summarizes the relevant facts with citations to the SOF.

The Forest Service and FHWA have entered into a Memorandum of Understanding concerning the transfer of Forest Service lands to states for highway purposes ("the 1998 MOU"). *See* Declaration of Natalie J. Havlina, August 31, 2012 Ex. 4 ("Havlina Decl.").[2] Under the 1998 MOU, the Forest Service is charged with monitoring the State of Idaho's use of the easement for Highway 12. ¶¶ 44-45. If the State fails to comply with the easement or correct its noncompliance after notice from the Forest Service, the 1998 MOU provides that FHWA will step in and take enforcement action. *Id.*

Proposed Mega-loads On Highway 12.

The first proposed use of Highway 12 for shipment of massive oversized loads came in 2008, when Exxon Mobil and its subsidiary, Imperial Oil (collectively, "Exxon-Imperial") decided to use Highway 12 to ship over 200 "mega-loads" of industrial oil equipment from the Port of Lewiston to the Montana border on their way to the Kearl tar sands project in Alberta. *See* SOF ¶¶ 47-50. Exxon-Imperial's proposed mega-loads varied in size, with the largest being twenty-four feet wide, thirty feet tall, and 162 feet long. *Id.* ¶ 48. Due to their massive size, the mega-loads would block both lanes of the highway; and they could not even travel on Highway 12 until Exxon-Imperial had raised utility lines, reinforced turnouts, and trimmed hundreds of trees to allow a vertical clearance of over thirty feet. SOF ¶ 51-52, 54-55.

[2] Because Federal Defendants have refused to include all relevant documents in the Administrative Record, including the 1998 MOU, Plaintiff is submitting additional documents with the accompanying Havlina Declaration, and moves the Court to include these materials. *See* Motion For Leave to Supplement Administrative Record, filed herewith.

Exxon-Imperial made such modifications to the Highway 12 corridor with permission from ITD– modifications which could convert Highway 12 into a new "high load" industrial transportation corridor that other mega-loads could use. *See* SOF ¶¶ 50, 52, 54, 57. Forest Service employees coordinated with ITD, communicated directly with Exxon-Imperial's contractor, and even imposed requirements on how the tree trimming must be conducted. *Id.* ¶¶ 67-68.

In July 2009, the Forest Service learned that a second company, ConocoPhillips, was seeking ITD's permission to transport four mega-loads of oil refinery equipment on Highway 12 that would be thirty feet wide, thirty feet high, and 250 feet long. SOF ¶ 56. Because the Conoco mega-loads exceeded eighteen feet in height, their transport (like that of the proposed Exxon-Imperial mega-loads), was dependent on the utility line relocations and tree trimming conducted by Exxon-Imperial. Also like the proposed Exxon-Imperial mega-loads, Conoco's proposed mega-loads would block both lanes of the highway, necessitating the use of a rolling roadblock during their transport. SOF ¶ 57.

Loads with these characteristics came to be referred to as "mega-loads" in order to differentiate them from normal oversize traffic which neither requires the use of a rolling roadblock nor exceeds the clearance available on Highway 12 prior to 2009. SOF ¶¶ 57-58.

Adverse Impacts of Mega-Loads On Highway 12.

Numerous members of the public – including many IRU members, such as local residents and business owners Linwood Laughy and Peter Grubb, voiced concerns to the Forest Service and ITD about the proposed Exxon-Imperial and Conoco mega-loads and the conversion of Highway 12 into an industrial high-and-wide corridor. *See* FS, 8-15

(comments to ITD advocating denial of Exxon-Imperial and Conoco's requests for permits to transport mega-loads); Declaration of Linwood Laughy, August 31, 2012 ¶ 15 ("Laughy Decl.")[3] (Summarizing his contacts with the Forest service). As the Clearwater National Forest's Wild and Scenic Rivers Administrator explained, "Now that Exxon has made the investment, I predict that the Exxon and Conoco loads are just the beginning." SOF ¶ 59.

Members of the public and federal employees identified numerous concerns associated with transporting the Exxon-Imperial and Conoco mega-loads on Highway 12 and converting the Wild and Scenic River into a high-and-wide corridor. *See* SOF ¶¶ 59-66, 71-72. FHWA's Right of Way Program Manager for Idaho, the Forest Service's Region 1 land use specialist, and the Wild and Scenic Rivers Administrator all questioned whether the transport of mega-loads such as Exxon-Imperial's and Conoco's was a proper use of the Highway 12 easement. SOF ¶¶ 65-66, 74.

Both Exxon-Imperial and Conoco planned to park their mega-loads in turnouts along Highway 12 during the day between multiple nights of travel. The public and the Forest Service agreed that parking in the Wild and Scenic River corridor would degrade the corridor's scenic and esthetic values by blocking views of the river and "introducing overtly industrial elements into an otherwise pastoral environment." SOF ¶¶ 89, 94. There were also concerns voiced that blocking turnouts would interfere with recreation,

[3] The accompanying Sedivy, Lewis, Laughy, and Grubb Declarations are submitted by IRU members and/or staff in order to demonstrate Plaintiff's Article III standing here, and are thus appropriately considered by the Court. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 168-69 (2000) (upholding consideration of standing declarations). To a limited extent, the declarations provide additional facts that are not included in the Administrative Record, but are properly considered by the Court for reasons set forth in the accompanying Motion To Supplement Administrative Record.

including from IRU's board member Peter Grubb, who runs a lodge and whitewater outfitting business on the Lochsa River. *See* SOF ¶ 91, 103; Declaration of Peter Grubb, August 29, 2012 ¶¶ 7, 16 ("Grubb Decl.").

The Exxon-Imperial and Conoco mega-loads would also take up both lanes of the highway and thus necessitate the use of rolling roadblocks to allow traffic to pass at intervals. The public as well as Forest Service staff raised concerns that blocking the highway in this manner would cause traffic delays, interfere with recreation, and impede the Forest Service's ability to manage the forest and the Wild and Scenic River. SOF ¶¶ 90-91, 95. In addition, the public and the Forest Service questioned the impacts to public safety. SOF ¶ 62, 65, 71, 73.

IRU's Initial Petitions for Relief.

In July 2010, IRU members petitioned the Secretary of Transportation to stop the transport of mega-loads on Highway 12. SOF ¶ 77. The task of responding to the letters was delegated to FHWA, whose employees assumed that the transport of mega-loads is merely an issue of size and weight regulation and failed to consider the concerns of its realty staff about proper use of the Highway 12 easement. *Id.* ¶¶ 78, 83-84. The Department of Transportation denied the public's requests for relief through a letter sent to U.S. Representative DeFazio, stating, "Permit issuance for the movement of oversize or overweight loads and the conditions under which the permits are issued . . . is the responsibility of the States, not the Federal government." *Id.* ¶ 85.

On August 11, 2010, IRU sent a letter through counsel advising the Forest Service that the transport of the Exxon-Imperial and Conoco mega-loads would violate multiple legal authorities and petitioning the agency to require ITD to obtain special use permits

from the Forest Service. SOF ¶¶ 86-87. The Forest Service denied this second request for relief through a September 2011 letter to ITD from Clearwater Forest Supervisor Rick Brazell. SOF ¶ 92. Supervisor Brazell's letter reiterated the Forest Service's concerns about the use of Highway 12 to transport mega-loads, particularly if Highway 12 became a high-and-wide corridor. SOF ¶¶ 93-96. Nevertheless, Supervisor Brazell concluded that the Forest Service could not take action as requested by IRU, stating: "We both recognize the Forest Service's limited jurisdiction with regard to what travels the highway within the existing right of way, even across the National Forest." *Id.* ¶ 97.[4]

Mega-Load Shipments Up Highway 12.

By the end of 2010, two additional companies had requested permits from ITD to use Highway 12 to transport mega-loads, confirming that Exxon-Imperial's highway modifications had paved the way for additional mega-loads and indeed threatened to turn the Wild and Scenic River into a "high-and-wide" industrial corridor. SOF ¶ 98.

In early February 2011, Conoco transported its first mega-load up Highway 12, which was the first mega-load ever authorized to use the highway. This initial mega-load violated its ITD permit numerous times by delaying traffic for more than fifteen minutes, validating the concerns of the public and the Forest Service that the transport of mega-loads on Highway 12 could cause substantial delays. SOF ¶¶ 90, 101. The Conoco mega-loads were also parked, sometimes for days at a time, on turnouts along Highway 12, and members of the public were prevented from using turnouts during the mega-loads' transport. SOF ¶ 101; Laughy Decl. ¶ 18.

[4] The Forest Service evidently based this "no jurisdiction" conclusion on the opinion of its Regional Solicitor. *See* email from C. Trulock to C. Bradbury (Jan. 21, 2011) (FS 6-6, 70) (presenting edits to draft letter prepared by Regional Solicitor in response to concerns about mega-loads expressed by the Nez Perce Tribe).

Exxon-Imperial began transporting its first mega-load – the so-called "test validation module" ("TVM") – in April 2011. SOF ¶¶ 51, 107. On its second night of transport, the TVM collided with a guy wire, cutting off power to 1300 local residents for several hours and necessitating an almost two-week interruption in the TVM's transport. The TVM was parked in a Highway 12 turnout during this period, where it blocked public access to a boat ramp. SOF ¶ 107.

While the TVM was idled in the Wild and Scenic River corridor, Exxon-Imperial determined that further tree trimming was needed to ensure that the TVM and other mega-loads could pass; and thus its contractor Asplundt conducted extensive additional tree trimming, including within the Wild and Scenic River Corridor, to provide a clearance envelope of thirty by thirty-two feet through the Clearwater National Forest. SOF ¶ 108.

The April 2011 tree trimming irreparably damaged the scenic values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor by creating a box-shaped tunnel that has altered the natural appearance of the corridor. *Id.* ¶¶ 109-110. The hundreds of comments[5] that private citizens submitted to the Forest Service in April 2011 reflect the visual impact of the tree trimming. As one local resident expressed it:

> I was sick to my stomach when I saw the picture of the sheared trees along Hwy 12. By what right were these trees pruned? Would you have sat back and done nothing had one of the residents pruned the trees like this? These trees are years old, are part of the beauty of this by-way, part of the draw for the tourism industry. What has been destroyed can never be replaced. I have cause to drive this highway many times each month and am heartsick over what you have sat back and allowed to happen.

[5]Unlike the form letters agencies often receive, each of the comments submitted to the Forest Service about the tree trimming was unique. *See* Havlina Decl. Ex. 3.

See Havlina Decl., Ex. 3 at 23. Another commenter explained, "Much of the wild and scenic nature of Hwy 12 along the Lochsa is the adjacent forest, MUCH of which overhangs the highway significantly in places. It is one of the few highways left in the US that has this feel, and it is a gem that needs to be protected for all." *Id.* at 19. *See also* SOF ¶ 111 (summarizing additional comments).

IRU's Petition To Halt Tree Trimming.

IRU petitioned the Forest Service to halt all tree trimming activities within the corridor until the present litigation could be resolved. *Id.* ¶ 112. The Forest Service again denied IRU's petition on the grounds that the Highway 12 easement deprived it of jurisdiction, stating, "The Idaho Transportation Department owns an easement for operation and maintenance of Highway 12. This easement includes the right to manage vegetation within the construction limits of the highway. The tree trimming that was proposed and being implemented is within the scope of the easement." SOF ¶ 113.[6]

PROCEDURAL BACKGROUND

Based on the Forest Service's September 2010 letter declining to take action to regulate mega-loads on Highway 12, IRU initially filed this lawsuit on March 10, 2011. (*Docket No. 1*). IRU later amended its complaint to include FHWA as a defendant and challenge the Forest Service's denial of its request for relief regarding the tree trimming in April 2011. (*Docket No. 10.*) The Defendants subsequently moved to dismiss this action on August 18 and September 14, 2011, respectively. (*Docket Nos. 16 & 21*).

[6] Again, it appears that the Forest Service relied on advice from the Regional Solicitor in reaching this conclusion. *See* Email from C. Trulock to E. Murphy (FS, 7-14)("Here is a 'canned' statement regarding the tree trimming on US Hwy 12. Heather and I did consult with Alan Campbell and incorporated his edits.")

In its March 2012 Decision, the Court granted the motions to dismiss in part, and denied them in part. March 2012 Decision at 27. Relying on the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)("*SUWA*"), the Court dismissed IRU's claims to the extent that they challenged the Defendants' failures to act under Section 706(1) of the Administrative Procedure Act ("APA"). In reaching this conclusion, the Court found that the Wild and Scenic Rivers Act imposes mandatory duties on the Forest Service to protect Wild and Scenic values, but that duty "lack[s] the specificity requisite for agency action." *Id.* at 14-15. Likewise, the Court found that FHWA's duty to take enforcement action under the Federal Aid Highways Act has not been triggered because the agency did not make an official finding that the State of Idaho is improperly maintaining the Highway 12 easement. *Id.* at 23-24. The Court thus dismissed portions of IRU's Second, Third, and Fourth Claims for Relief.

But the Court denied the Defendants' motion to dismiss IRU's claims challenging final agency action, explaining that the Defendants' letters denying IRU's requests for relief constitute final agency action subject to judicial review under Section 706(2) of the APA. *Id.* at 8-10. Accordingly, IRU now moves for partial summary judgment on its remaining claims, which center on whether the Forest Service and FHWA erred as a matter of law in determining that neither agency has jurisdiction or authority to regulate mega-loads on Highway 12.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

As a result of the Court's March 2012 Decision dismissing Plaintiffs' "failure to act" claims under APA Section 706(1), the remaining claims challenge the Forest Service

and FHWA determinations that they lack jurisdiction or authority to regulate mega-loads on Highway 12 under Section 706(2) of the APA. Those determinations, as the Court previously held, are final agency actions subject to judicial review under Section 706(2). March 2012 Decision at 8-10.

Under APA Section 706(2), a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Federal Defendants' determinations here that they lack jurisdiction to regulate mega-loads on Highway 12 present a legal issue that the Court reviews *de novo* under the APA standards. As the Ninth Circuit has noted, "The 'arbitrary or capricious' standard is appropriate for resolutions of factual disputes implicating substantial agency expertise . . . Purely legal questions are reviewed de novo." *Akiak Native Community v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) (internal citations omitted).[7]

II. THE FOREST SERVICE HAS AUTHORITY TO ENFORCE THE HIGHWAY 12 EASEMENT.

The Forest Service erred, first, in determining that it lacks jurisdiction to regulate mega-loads on Highway 12 through the Clearwater National Forest and the Wild and Scenic River corridor, because it ignored its authority to enforce the terms of the Highway 12 easement as the owner of the servient estate, and its right to object to any use

[7] The March 2012 Decision questioned whether the Supreme Court's decision in *SUWA v. Norton* affects the prior rulings in *Heckler v. Chaney* and *Montana Air*. *See* March 2012 Decision at 21. The short answer is "no." *SUWA* itself distinguished between an agency's "failure to act" and an agency's "denial" of a request for relief, stating: "A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request – for example, the failure to promulgate a rule or take some decision by a statutory deadline." *SUWA*, 542 U.S. at 63. Because IRU here challenges the Defendants' denials of relief, *SUWA* does not affect those claims.

of Highway 12 that exceeds the scope of the highway easement. The Forest Service may exercise that authority in this case because the transport of mega-loads violates the Highway 12 easement in multiple ways.

A. The Forest Service May Enforce the Highway 12 Easement.

An easement is a "right to use the land of another for a specific purpose **not inconsistent with the general use of the property owner**." *U.S. v. Spah*i, 177 F.3d 748, 754 (9th Cir. 1999), *citing* 7 Thompson on Real Property, Thomas Edition § 60.02(a) (David A. Thomas ed., 1994)(emphasis added). As one treatise explains:

> Easements do not carry any title to the land over which the easement is exercised, and work no dispossession of the owner. Since the interest itself is nonpossessory, the holder of the easement does not have the degree of control over the burdened property that is enjoyed by the owner of the servient estate; **complete dominion is inconsistent with a claim of easement.**

28A C.J.S. Easements § 144, at 347 (emphasis added).

The Highway 12 easement thus gives the State of Idaho the right to use National Forest land to operate a highway; it does **not** give the State ownership of the affected National Forest lands. As the Forest Service itself is well aware, the public still owns the land underlying Highway 12. *See* SOF ¶ 53 ("Remember that Hwy 12 is different in that we still own underlying land below highway."); *id.* ¶ 64 ("[T]he state may hold the easement, but because we still own the land we (and not the state) are responsible for ensuring that NHPA consultation happens.")

The federal government exercises the rights of a private landowner over public lands. *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). As multiple cases illustrate, federal agencies charged with managing public lands may enforce the terms of rights-of-way across those lands. For instance, in *United States v. Gates of the Mountain*

Lakeshore Homes, 732 F.2d 1411 (9th Cir. 1984), the Forest Service successfully sued for trespass after the Montana Power Company put a utility line along the State's easement for a road through the Helena National Forest. *Id.* at 1414. *See also Denver v. Bergland*, 695 F.2d 465, 480 (10th Cir. 1982) (Forest Service had authority to halt the unauthorized construction of steel conduits on a new alignment within the City of Denver's right-of-way for certain canals); *United States v. Jenks*, 22 F.3d 1513, 1518 (10th Cir. 1994)(As owner of the servient estate, the Forest Service had authority to impose reasonable limitations on use of an express easement); *City of Baker City, Oregon v. U.S.*, No. 08-717-SU, 2011 WL 4381534, at *4 (D. Or. 2011)(same).

The Forest Service thus has authority to enforce the Highway 12 easement against uses, such as mega-loads, which violate or exceed the scope of the easement. Yet, the Forest Service never recognized this authority in determining that it lacks jurisdiction to regulate the transport of mega-loads on Highway 12 – a clear error requiring reversal.

B. The Transport of Mega-Loads Violates the Highway 12 Easement.

At the time that they denied IRU's requests for relief, the Forest Service and FHWA knew, or had reason to believe, that the use of Highway 12 to transport mega-loads violates the highway easement.

Easements over public land are strictly construed in favor of the Government. *Coosaw Mining Co. v. State of South Carolina*, 144 U.S. 550, 562 (1892); *Gates of the Mountain*, 732 F.2d at 1413. "Nothing passes except that which is conveyed in clear language and . . . if there are doubts, they are resolved for the Government, not against it." *United States v. Union Pac. R. Co*, 353 U.S. 112, 116 (1957).

The Highway 12 easement deed from 1995 grants the State of Idaho a right-of-way across the Clearwater National Forest "for highway purposes." The term "highway purposes" is not defined in the easement. Highway Easement Deed (June 30, 1995)(FS, 1-27, 645). When a deed contains an ambiguous term, courts may look beyond the four corners of the deed to aid in its interpretation. *U.S. v. Park*, 536 F.3d 1058, 1061 (9th Cir. 2008). The extrinsic evidence that may be considered in determining the intent of the parties includes the circumstances and use of the property at the time of the conveyance. *See* G. Korngold, Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes § 4.02 (1990); Restatement (First) of Property § 483 (1944).

The Highway 12 easement was intended to formalize existing management of the highway as of 1995. SOF ¶¶ 33-38. In fact, the Forest Service reassured the public that the "**Forest Service has retained management and jurisdiction of the designated river corridor** which is one quarter of a mile on each side of the river **and will also review highway activities within the easement area**." *Id.* ¶ 34 (emphasis added).

At the time of the easement transfer, there were no mega-loads proposed for transport or traveling on Highway 12. SOF ¶ 39. In fact, Exxon-Imperial had to modify the Highway 12 corridor in numerous ways before mega-loads would fit on Highway 12, including by trimming trees and moving utility lines. SOF ¶¶ 52, 54-56. The transport of mega-loads thus does not fit within the "highway purposes" authorized in the deed.

The transport of mega-loads also violates the express terms of the easement deed, which requires the State of Idaho to "protect and preserve soil and vegetative cover and scenic and esthetic values on the right of way outside of construction limits." SOF ¶ 41.

This condition incorporates protection of the Wild and Scenic River's outstandingly remarkable values into the Highway 12 easement. As the Forest Service reassured the public at the time of the easement transfer, "[i]t is through the easement clauses that we will continue to protect the values of these designated rivers." SOF ¶ 34.

Moreover, the conditions in the Highway 12 easement must be read to support the protection of the Wild and Scenic River and its "immediate environment[] . . for the benefit and enjoyment of present and future generations" and "to fulfill other vital national conservation purposes," as provided in the Wild and Scenic Rivers Act, 16 U.S.C. § 1271. *See* 16 U.S.C. § 1284(g) (Any condition precedent[8] to an easement through a Wild and Scenic River corridor must relate to the policy and purpose of the Wild and Scenic Rivers Act); Restatement of the Law of Property: Servitudes § 4.1 (2) (2000) (easements should be interpreted to avoid violating public policy).

As explained above, the modifications to Highway 12 necessary to accommodate the passage of mega-loads irreparably damaged the corridor's natural appearance and scenic values. SOF ¶¶ 109-111. At the time that it denied IRU's requests for relief, the Forest Service was likewise aware that the transport of mega-loads could damage the scenic and recreational values of the corridor. SOF ¶¶ 59-61, 89, 93-94. The use of Highway 12 to transport Exxon-Imperial and Conoco's mega-loads and the highway modifications necessary to make those transports possible thus violated the conditions of the easement deed.

Finally, the use of Highway 12 to transport mega-loads unduly burdens the servient estate of the Clearwater National Forest and the Wild and Scenic River. It is

[8] The Forest Service conditioned its consent to the transfer of the easement on this limitation. SOF ¶ 40.

well established that "the easement holder may not use it in such a way as to interfere unreasonably with enjoyment of the servient estate." Restatement (Third) of Property § 4.10 cmt. h (2000). It follows that "an increase in the use of a general easement must be reasonable and not unduly burdensome to the servient estate." *McFadden v. Sein*, 88 P.3d 740, 743 (Idaho 2004).

By definition, the transport of a "mega-load" requires the use of a rolling roadblock. This impedes the public's access to and interferes with the Forest Service's management of the Clearwater National Forest and the river corridor. *See* SOF ¶¶ 57-58. An easement over National Forest land does **not** include the right to "prevent the Forest Service or any other member of the public from using the portion of [the road] that lies on Forest Service land." *Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993).

In addition, the damage caused by trimming over 500 trees has unreasonably damaged the Clearwater National Forest. SOF ¶¶ 109-111. An easement holder is not entitled to cause unreasonable damage to the servient estate. Restatement (Third) of Property § 4.10 cmt. h (2000).

These bedrock principles of property law underscore that the Forest Service has authority and jurisdiction to enforce the Highway 12 easement against the transport of mega-loads approved by ITD in contravention of the easement deed's purpose and terms, and to prevent harm to public lands. By ignoring or misunderstanding these basic legal principles, the Forest Service's determination that it lacks such authority or jurisdiction is clearly erroneous as a matter of law, and hence must be reversed by the Court.

III. AS A SOVEREIGN, THE FOREST SERVICE MAY REGULATE ACTIVITIES WITHIN THE HIGHWAY 12 RIGHT-OF-WAY.

In addition to ignoring basic property law principles, the Forest Service further erred in determining that it lacks authority to regulate the transport of mega-loads on Highway 12 because, as the delegatee of Congress, the Forest Service has broad authority to regulate activities on highway rights-of-way that cross National Forest land. The exercise of this jurisdiction would be appropriate in this case because the transport of the mega-loads violates multiple legal authorities, yet the Forest Service again ignored or misunderstood these legal points in determining it lacks jurisdiction to regulate the mega-loads across federal lands.

A. The Forest Service Has Broad Authority to Regulate Activities on Easements Over National Forest Land.

The Property Clause of the U.S. Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. This power is "without limitation," *Kleppe*, 426 U.S. at 539, and allows Congress to regulate areas traditionally reserved to the states when necessary to protect the designated purpose of federal lands. *Id.* at 541-542.

For instance, in *Kleppe*, the Supreme Court held, "In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." 426 U.S. at 540-541. The Court rejected the State's argument that the ability to regulate wildlife on public lands "violates traditional state power over wild animals." *Id.* at 541-542. Similarly, in *State of Minnesota by Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), the Eighth Circuit upheld Congress's ability to

regulate boating in the Boundary Waters Canoe Area Wilderness even though the State of Minnesota "owns the beds of all the lakes and rivers within the BWCAW." *Id.* at 1244.

Congress has exercised its authority under the Property Clause in establishing the U.S. Forest Service to manage public lands and resources within the National Forest system. Through the Organic Administration Act of 1897 (codified as amended at 16 U.S.C. §§ 473-82, 551), the National Forest Management Act ("NFMA") of 1976, 16 U.S.C. 1600 et seq., and other legislation, Congress has vested the Forest Service with broad authority to regulate activities on and occupancy of the National Forests. 16 U.S.C. § 551.

Congress has also delegated authority over management of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor to the Forest Service. 16 U.S.C. § 1274(a)(1). In fact, as this Court has found, Congress imposed a mandatory duty on the Forest Service to protect and enhance the rivers' outstandingly remarkable values. *See* March 2012 Decision at 13-14 (analyzing 16 U.S.C. § 1281(a) & 16 U.S.C. § 1283(a)).

Consistent with this duty, the Forest Service regulates rafting outfitters on the Middle Fork Clearwater/Lochsa Wild and Scenic River, including by designating which turnouts outfitters may use along Highway 12. *See* Grubb Decl., ¶¶ 5, 7, 21 (describing the Forest Service's regulation of Mr. Grubb's outfitting business). Likewise, the Forest Service monitors activities on private land in the Wild and Scenic River corridor and brings enforcement actions when those activities violate scenic easements. *See Park,* 536 F.3d 1058 (9th Cir. 2008) (Forest Service action to enforce terms of scenic easement within the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor).

The Forest Service's authority over National Forest lands generally includes the

ability to regulate conduct on transportation easements. *See Adams*, 3 F.3d at 1259 (Forest Service may regulate use of easement created by Alaska National Interest Lands Conservation Act); *Montana Wilderness Ass'n v. United States Forest Serv.*, 496 F.Supp. 880, 889 (D. Mont. 1980) (Forest Service may regulate railroad's use of easement created by necessity).

More specifically, the Ninth Circuit has held that the Forest Service has authority to regulate activities within state rights-of-way for highways that travel through the National Forests. *Lauran*, 141 Fed. App'x at 519. *Lauran* concerned the Forest Service's Enterprise Project, which required vehicles parked on state highways within certain National Forest boundaries to display an Adventure Pass. *Id.* The Ninth Circuit rejected the plaintiffs' argument that the Forest Service lacks authority to impose this requirement, explaining that the Forest Service's authority under the Property Clause and the Organic Act "applies to established state rights-of-way located within the National Forests." *Id.*

Thus, the Forest Service has jurisdiction to regulate the use of Highway 12 consistent with the Property Clause powers Congress has delegated to it; but again, the agency ignored these legal authorities in determining it lacks jurisdiction to regulate mega-loads on Highway 12.

B. The Transport of Mega-Loads Violates Applicable Legal Authorities.

As discussed above, the Forest Service recognized when it denied IRU's petitions for relief that the Exxon-Imperial and Conoco mega-loads, and indeed conversion of Highway 12 into a "high-and–wide" transportation corridor, could violate multiple legal authorities by damaging the scenic and esthetic features of the river corridor, interfering

with recreation, and restricting access to the Wild and Scenic River and the Clearwater National Forest. *See* SOF, ¶¶ 59-61, 72, 88-89, 91, 93-95, 109-111. The Forest Service even has a mandatory duty to protect and preserve these "scenic and esthetic" values under the Wild and Scenic Rivers Act, as this Court held (even though that duty is not enforceable). March 2012 Decision at 14.

The Forest Service's planning and policy documents reveal that the Forest Service itself has recognized in the past that the mandates of the Wild and Scenic Rivers Act apply to the management of Highway 12. *See* SOF ¶¶ 12, 16, 18-22. Thus, the Forest Service knew that the transport of mega-loads on Highway 12 could violate the Act by degrading the scenic, esthetic, recreational, and other values of the river corridor,

Sacrificing the scenic values of the river corridor for the benefit of mega-loads also violates NFMA. Under NFMA, the Forest Service must manage the Clearwater National Forest consistent with the governing forest plan. 16 U.S.C. § 1604(i). The Clearwater Forest Plan directs the Forest Service to maintain a "rural or roaded natural-appearing setting**"** in the Wild and Scenic River corridor. SOF ¶ 21. Introducing "overtly industrial elements," *id.* ¶ 94, into the river corridor in the form of mega-loads is inconsistent with this direction and consequently violates NFMA.

Likewise, the Clearwater Forest Plan mandates that, "[v]egetation management **within the right-of-way** should allow for the removal of only those trees and vegetation which create maintenance or safety problems." SOF ¶ 22 (emphasis added). The record shows that Exxon Imperial's contractor trimmed hundreds of trees that created neither maintenance nor safety problems to make room for Exxon-Imperial's test validation

module. SOF ¶ 55. *See also id.* ¶ 67 (Exxon-Imperial sought permission to trim trees that were "in the way").

The Forest Service was also aware, at the time that it denied IRU's August 2010 petition for relief, that the transport of mega-loads could interfere with recreation. SOF ¶¶ 59, 61, 89, 93, 95. The Middle Fork Clearwater and Lochsa Rivers were designated under the Wild and Scenic Rivers Act—specifically as "recreational" rivers —because of their "outstandingly remarkable recreation qualities" and because they "offer unique availability of access for boating, fishing, and sightseeing." SOF ¶¶ 5, 9. Consistent with these findings, the Forest Service's planning and policy documents for the rivers focus on the preservation and enhancement of recreation in the corridor. SOF ¶¶ 16, 18-22.

Likewise, the Clearwater Forest Plan directs the Forest Service to "[c]oordinate with State Highway Department on design of improvements and maintenance of Highway 12 to enhance recreational and viewing opportunities." SOF ¶ 21. The many ways in which the mega-loads interfere with recreation constitute further violations of the Wild and Scenic Rivers Act and NFMA.

In addition, the Forest Service knew that the transport of mega-loads could disturb individuals using the campsites along Highway 12, SOF ¶¶ 89, 91, 95, in violation of the Forest Service's regulations, which prohibit using any "device" that makes noise near a campsite "in such a manner and at such a time so as to unreasonably disturb any person." 36 C.F.R. § 261.10(i).

Finally, the use of a rolling roadblock to transport mega-loads threatens to interfere with the public's and the Forest Service's use of Highway 12. SOF ¶¶ 90-91, 95. Impeding access in this manner violates the Forest Service's regulations, which

prohibit "[b]locking, restricting, or otherwise interfering with the use of a road, trail, or gate." 36 C.F.R. § 261.12(d). The safety concerns raised by blocking Highway 12, SOF ¶¶ 28, 62, 65, 71, 96, also violate the prohibition against "[p]lacing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person." 36 C.F.R. § 261.10(f).

Individually and together, the Property Clause and the statutes, regulations, and management provisions that the Forest Service has adopted for the Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor afford the Forest Service ample and multiple sources of authority to regulate mega-loads on Highway 12 that may adversely affect the public lands and resources. Yet again, the Forest Service ignored all these authorities in concluding that it lacked jurisdiction to regulate the transport of mega-loads on Highway 12 and thereby prevent or redress the legal violations described above. By failing even to acknowledge these legal authorities, much less heed and implement them, the Forest Service has thus acted in a clearly erroneous manner, requiring reversal by this Court.

III. FHWA ALSO ERRED IN DETERMINING THAT IT LACKS JURISDICTION TO ENFORCE THE HIGHWAY 12 EASEMENT.

The Court should reverse FHWA's determination that it also lacks jurisdiction to regulate mega-loads on Highway 12.

Congress has delegated authority to FHWA to ensure that federal highway projects are properly maintained. The Highway 12 easement is one such "highway project." FHWA may exercise its authority in this case because the transport of mega-loads on Highway 12 violates the highway easement.

The Federal Aid Highways Act sets forth a process FHWA may use to ensure that the States maintain highway projects in a manner consistent with federal law. 23 U.S.C. § 116(a). When a state fails to comply with its responsibility to maintain a federal highway project, FHWA must call the noncompliance to the attention of the state transportation department. FHWA may then take enforcement action if the noncompliance has not been corrected within ninety days. 23 U.S.C. § 116(c).

FHWA interprets the term "project" to include, "[a]n undertaking by a State highway department for highway construction, including . . . **acquisition of rights-of-way.**" 23 C.F.R. § 1.2(b)(emphasis added). FHWA's regulatory definition also includes "any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways." *Id.*

ITD and the Forest Service negotiated the transfer of the Highway 12 easement "to carry out the provisions" of 23 U.S.C. § 317. Section 317 is a "federal law[] for the administration of federal aid highways," 23 C.F.R. § 1.2(b), codified among the other "General Provisions" that govern the administration of federal aid to state highway departments codified in Title 23, Chapter 3.[9] Thus, under FHWA's regulatory definition, the issuance of the Highway 12 easement is a "highway project."

FHWA's 1998 MOU with the Forest Service further demonstrates that FHWA has authority to enforce the Highway 12 easement. The 1998 MOU acknowledges that

[9] For example, under 23 U.S.C. § 302, states must establish state transportation departments in order to receive federal aid. *See also* 23 U.S.C. § 305 (states may use federal highway funds to comply with the Antiquities Act); *id.* § 318 ("federal highway funds" shall not be used to reconstruct or relocate any highway that may be closed).

FHWA's responsibilities for Chapter 1 Highways[10] include "ensuring compliance with Federal requirements." SOF ¶ 44.

The 1998 MOU further provides that FHWA "will secure compliance informally or, if necessary, take action pursuant to 23 CFR 1.36" if a state highway department fails to comply with the conditions of a highway easement deed. SOF ¶ 45. This reference to 23 C.F.R. § 1.36 confirms that easements are highway "projects" under the Federal Aid Highways Act, because Section 1.36 describes the enforcement action FHWA may take "with respect to a project." *See* 36 C.F.R. § 1.36.

FHWA therefore has jurisdiction to enforce the terms of the highway easement.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff Idaho Rivers United partial summary judgment on its remaining claims for relief and reverse the Federal Defendants' erroneous determinations that they lack jurisdiction or authority to regulate the transport of mega-loads on U.S. Highway 12.

Dated: August 31, 2012

Respectfully submitted,

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[10] Highway 12 is a Chapter 1 Highway because it is a "federal aid highway," 23 U.S.C. 101(a)(5), that is part of the National Highway System. 23 U.S.C. § 103(b)(1).