Laurence ("Laird") J. Lucas (ISB# 4733)
Marc A. Shumaker (ISB # 9606)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
mshumaker@advocateswest.org
Attorneys for Plaintiff Idaho Rivers United

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED, and MORGAN and OLGA WRIGHT, *Plaintiffs,* vs. DISTRICT RANGER JOE HUDSON in his official capacity, and UNITED STATES FOREST SERVICE, *Defendants.*	)	No. 3:15-cv-00169-BLW **PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs Idaho Rivers United and Morgan and Olga Wright respectfully seek entry of summary judgment in their favor reversing and setting aside the November 20, 2014 decision by Defendants U.S. Forest Service and District Ranger Joe Hudson, which determined that Nez Perce National Forest Road 652 is supposedly a "public road," and hence the Idaho Department of Lands ("IDL") need not obtain a Forest Service permit to utilize the road as part of IDL's Selway Salvage project.

As explained below, the Administrative Record shows that the Forest Service initially – and correctly – advised IDL in September 2014 that it would need a Forest Service permit to utilize Road 652 for its planned salvage activities following the August 2014 Johnson Bar wildfire. But as they pursued the permit process, it became clear that the Forest Service would have to engage in NEPA analysis and ESA consultation over the impacts of IDL's proposed road construction and clear-cutting on state lands. To avoid those potential roadblocks, Defendant District Ranger Joe Hudson took over the project from his staff; and developed a strategy to sidestep all NEPA and ESA obligations by newly declaring Road 652 to be a "public road" requiring no permit for IDL's use, as reflected in his November 20th decision challenged here.

The Administrative Record confirms the Court's conclusion in the July 10, 2015 Preliminary Injunction Order (*Docket No. 19*) that this determination was flawed, first, because the underlying statute requires that a "public road" be maintained by a public entity: the record shows no Forest Service maintenance of Road 652 beyond the single culvert replacement in 1987 addressed in the Court's order. Moreover, the record demonstrates that Road 652 also does not qualify as a "public road" under regulatory

definitions, because it has never been designated as being a publicly available road; it is not accessible to standard passenger vehicles; and it is gated and locked past the IDL parcel – all factors that Hudson failed to address. The Court should thus enter summary judgment for Plaintiffs reversing the November 20th decision on these grounds.

The record reveals another fatal flaw in Defendant Hudson's rationale – his November 20th determination asserted that Road 652 had no closure order for commercial hauling, such as IDL's proposed use. In fact, the Regional Forester issued a closure order in May 2014 prohibiting commercial hauling on Nez Perce National Forest roads without a permit. *See* AR 283 (Attachment A hereto). Defendant Hudson simply ignored this closure order in his zeal to facilitate IDL's salvage operations – a classic example of arbitrary and capricious action, which again requires reversal.

Finally, the Court should grant summary judgment for Plaintiffs because the November 20th decision wholly ignored the 1977 scenic easement covering Road 652, and violated the Wild and Scenic Rivers Act itself. Section 10(a) of the Act expressly requires the Forest Service to place a "primary emphasis" on protecting scenic values. *See* 16 U.S.C. § 1281(a). Instead of fulfilling that statutory duty, the record reveals that Defendants studiously ignored Wild and Scenic values, and instead bent over backwards to facilitate IDL's project while sidestepping their NEPA and ESA obligations.

Accordingly, the Court should enter summary judgment for Plaintiffs; reverse and set aside the November 20th decision under the APA; and rule that the Forest Service must issue a valid permit that complies with the Wild and Scenic Rivers Act, NEPA, and the ESA before IDL may utilize Road 652 in connection with its Selway Salvage project.

STATEMENT OF FACTS

As set forth in more detail in Plaintiffs' accompanying Separate Statement of Undisputed Material Facts ("SOF"), the Administrative Record (*Docket No. 22*) ("AR") confirms the key facts relevant to this motion:

The Johnson Bar wildfire burned mostly federal lands along the Selway and Middle Fork Clearwater rivers in August 2014. SOF ¶ 28. The fire also burned portions of the IDL state land parcel along the Selway River, which neighbors the Wrights' property there. *Id.*

On September 2, 2014, IDL contacted the Forest Service about using Forest Roads 470 and 652 in connection with its planned salvage logging on the state parcel. SOF ¶ 29 (AR 38). Road 470 is an improved Forest Service road maintained jointly by the Forest Service and the Kidder Harris Highway District, which crosses the Selway River over the Swiftwater Bridge. SOF ¶ 19. Road 470 is unquestionably a public road.

By contrast, Road 652 is the short spur road that intersects Road 470 just after the Swiftwater Bridge, and is unimproved past the 765-foot section that provides access to the Wrights' private property. SOF, ¶ 7-16. The Wrights paid to improve the native dirt track through gravel surfacing of the road across their property in 2010. *Id.* After the Wrights' property, Road 652 is a rough two-track road through the IDL parcel, and is gated and locked where it enters the Ruby Neil private land, and then continues on to Forest Service lands. *Id.*; *see also* Preliminary Injunction Order, pp. 1-3.

Road 652 has <u>not</u> been designated as a "public road" or as being open to all motorized use in any Nez Perce National Forest official document. SOF, ¶ 24-27. The National Forest's Road Access Guides have not even listed Road 652 as a forest road

since at least 1995, much less designated it as open to all motor vehicle use. *Id.* This includes the 2008 Road Access Guide, which remains the official Forest Service guide to open and closed roads until the Nez Perce National Forest completes its ongoing Travel Planning process and adopts a final Motor Vehicle Use Map ("MVUM"). *Id.*

Because Road 652 has never been designated as an open public road, it is unsurprising that IDL's September 2nd inquiry to the Forest Service voiced uncertainty about the status of Road 652, stating:

> There is an old USFS road #652 that leaves the Swiftwater road 470 on the west side of the river and provides access to the bottom of the parcel. I have not ever been given a clear answer on who the road truly belongs to and the roads current status. *[sic]* Private individuals think it is not public and the USFS seems to think it is. To expedite an answer I was wondering if you could look into this so we can move forward with timber sale preparation.

SOF ¶ 29; AR 38.

This request sparked a series of emails between Forest Service staff which reveal the Forest Service's own internal confusion about the status of Road 652. SOF, ¶ 30-34. In response to IDL's request, the Nez Perce Forest's fisheries biologist asked the Forest's realty specialist "if you could tell me who has jurisdiction for maintenance on Forest Road 652. . . who has overall maintenance responsibilities and do any of the others involved have easements or responsibilities[?]" SOF, ¶ 31 (AR 39). The specialist in turn wrote to Forest engineers, asking if they had information on the road. *Id.* She noted that the Forest Service had no easement over the IDL parcel; and opined that "NEPA may not apply to the State if the road across State is considered a State Road." *Id.*

On September 8, 2014, a meeting was held with IDL and the Forest Service's interdisciplinary team addressing post-fire rehabilitation from the Johnson Bar fire. SOF, ¶ 32 (AR 61). Meeting notes reflect the parties' discussion that the:

> State will complete and submit to Forest Service, an application for Road Use Permit across segments of NFS Road 470 and 652, along with Operation and Maintenance Plan, for review and approval by Forest Service. NEPA for permit will be completed by FS Johnson Fire BAER Team. . . State does not have an easement across Roads 470 or 652 and will need a permit to haul commercially.

Id. The notes also show that the Forest Service advised IDL that the "area is within W&S [Wild and Scenic] corridor and proposals will be reviewed for compliance under FS Rules and Regulations." *Id.*

On October 10, 2014, IDL followed up by submitting a permit application to the Forest Service for use of Roads 470 and 652 in connection with its Selway Salvage project. SOF, ¶ 35 (AR 15). The application sought a permit for "commercial use of roads restricted by order," and explained that IDL sought to "haul approximately 6,150 MBF of sawlogs associated with the sale and salvage of State of Idaho burnt timber during the Johnson Bar fire in the summer of 2014 across the existing graveled portion of the 652 road to the 470 road and then out to the Selway River Road." *Id.* A map showing the road network that IDL planned to construct on its land for the salvage logging was attached. *Id.*

By seeking a permit for "commercial use of roads restricted by order," IDL evidently knew that the Regional Forester, Faye Kruger, issued a closure order in May 2014 which prohibited "[u]sing a National Forest System road for commercial hauling without a permit or written authorization from the Forest Service." SOF, ¶ 20 (AR 282) (Attachment A). This two-year regional closure order covered the Nez Perce National Forest. *Id.* Remarkably, Defendant Hudson and his staff never once mentioned this closure order in any of the communications contained in the Administrative Record.

In response to IDL's permit application, Defendant Hudson sent an email to his staff on October 16, 2014, stating "I am going to need an ID [interdisciplinary] team to assess and analyze the situation and figure out exactly what our NEPA responsibilities are." SOF, ¶ 36 (AR 63). The ID team included the Forest's fisheries biologist, NEPA specialist, and Wild and Scenic coordinator. *Id.*

The NEPA specialist then wrote the Region's NEPA coordinator, asking for assistance in determining what NEPA compliance was necessary – but advising that "[w]e would like to use a CE [Categorical Exclusion] category for the permit if possible." SOF, ¶ 37 (AR 64). A call was conducted on October 27, 2014 between Forest and Regional Staff to address whether a road use permit could be issued using a CE, in which regional counsel apparently advised (according to notes of the call) that the permit could be issued under a road management CE category but noting: "Possible we could get litigated but let that happen." SOF, ¶ 38 (AR 66; *see also* AR 67).

Meanwhile the Forest's fisheries biologist contacted the National Marine Fisheries Service ("NMFS," also called NOAA Fisheries) to discuss potential Endangered Species Act consultation requirements associated with the permit application. SOF, ¶ 39 (AR 20). Following standard ESA consultation procedures, NFMS advised (and the Forest fisheries biologist concurred), that ESA consultation would be needed over the potential impacts of IDL's road construction and logging activities upon steelhead habitat in the Selway River and tributaries, and could not be covered by prior ESA programmatic road maintenance consultation. *Id.*

This information was communicated to IDL at a site meeting conducted on October 29, 2014, and by email. SOF, ¶ 40 (AR 273 & 22). IDL immediately wrote to

Defendant Hudson to complain about the Forest Service conducting NEPA analysis and ESA consultation over IDL's road construction and logging in connection with the road use permit application. *Id.* Acceding to IDL's opposition, Defendant Hudson wrote his staff on October 31, 2014, instructing that only he (and two other higher level officials) would deal with NMFS in the future, and directing that ESA consultation would not occur over IDL's proposed activities. SOF, ¶ 41 (AR 22). Hudson also stated that: "As the responsible line officer for the road use permit, I will determine how I proceed with NEPA." *Id.*

Following a meeting between Hudson and NMFS on November 4, 2014, NMFS wrote Hudson to confirm its position that ESA consultation would be required over IDL's proposed activities in conjunction with the requested permit. SOF, ¶ 42 (AR 23). After Hudson protested that the permit could be approved under a prior programmatic road maintenance consultation, NFMS disagreed; and reiterated that a site-specific consultation was required. *Id.* (AR 025).

The record shows that Defendant Hudson then embarked on a strategy to avoid having to issue any Forest Service permit – and thus avoid NEPA and ESA compliance – by determining that Road 652 is a "public road" open to public use and has no closure order. He developed this theory in a private email to the Regional NEPA coordinator dated November 17, 2014. SOF, ¶ 43 (AR 329) (Attachment B). Hudson set forth the reasons why he believed that no permit was necessary, writing that:

> FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. . . . The proposed activity continues the existing use of the involved land and no change in physical environment or facilities are proposed. Therefore there is no requirement for the Forest Service to issue a road permit.

Id. The Regional NEPA coordinator responded approvingly, saying: "Joe, A+ work from where I sit." *Id.* Neither Hudson nor the Regional NEPA coordinator mentioned the May 2014 closure in this email exchange; nor is there any indication that either person reviewed the existing Nez Perce National Forest Road Access Guide before determining that Road 652 is supposedly a "public road." *Id.*

Defendant Hudson then had a call with IDL on November 19, 2014, in which he relayed his new position that no permit was required. SOF, ¶ 4 (AR 117). IDL asked for confirmation in writing, to which Hudson replied: "I need to carefully word." *Id.* The next day, November 20, 2014, Hudson sent a written confirmation to IDL, stating:

> After reviewing your road use permit application for Forest Roads 652 and 470, I have determined that it is not necessary to issue Idaho Department of Lands (IDL) a road use permit for these roads in order for IDL to haul commercial timber from IDL lands. Forest Service managed portions of these roads are recognized as "public roads"; available, except during scheduled periods, extreme weather, or emergency conditions; passable by four-wheel standard passenger signs; and 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. Forest Roads 652 and 470 meet the definition of a public road. There are no traffic use restrictions or orders associated with these roads, nor does IDL propose any use on these roads outside what is already authorized by regulation or law. Forest Service Policy in FSM [Forest Service Manual] 7700 does not require a road use permit under these conditions. By this e-mail I am simply acknowledging that IDL has such authorization for their prescribed use and is not required to obtain a road use permit.
>
> As we have previously discussed, The Forest and IDL will need to agree upon a level of road maintenance that IDL will perform commensurate with their use.

AR 116 (Attachment C). This November 20th decision made no mention of the regional closure order; nor of the Wild and Scenic Rivers Act or 1977 easement.

The Forest Service gave no public notice of this November 20th decision; and it only came to light after Plaintiff IRU submitted a Freedom of Information Act requesting

Forest Service documents relating to IDL's proposed project. *See* Lewis Declaration (*Docket No. 3*).

After Plaintiffs filed this action in May 2015, the Forest Service scrambled to try to justify the November 20th decision. The Administrative Record includes a large number of documents generated in May and June 2015 regarding Road 652, including internal memos that sought to pull together all information in Forest Service files about the past history of the road. SOF, ¶ 46-47. The record materials show that Forest staff, even then, could not figure out whether Road 652 had ever previously been designated in any official Forest map or access guides as being open to motorized use. *Id.*

Rather than being able to point to any Forest Service document that previously designated Road 652 as being open to all motorized use, the agency instead seeks to rely on its draft Motor Vehicle Use Map ("MVUM"), which the Nez Perce National Forest has been working on through its Travel Planning process since 2008. SOF, ¶ 21-23. But that draft MVUM cannot justify the November 20th decision, since it is not yet final. Accordingly, the November 20th decision stands without support in the Administrative Record; and Hudson's attempt to newly designate Road 652 as a "public road" that requires no permit for IDL's proposed commercial hauling activities must be rejected by the Court upon summary judgment.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

This Court reviews the Forest Service's November 20th determination under the APA 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); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002).

Under these standards, a court "will not vacate an agency's decision unless it 'has relied on factors which Congress had 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.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). *See also Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (requiring "a rational connection between the data before [the agency] and its conclusion").[1]

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT, FIRST, BECAUSE ROAD 652 DOES NOT QUALIFY AS A "PUBLIC ROAD".

In granting injunctive relief, the Court found that Plaintiffs were likely to prevail in challenging the November 20th decision because Road 652 does not qualify as a "public road" under the statutory definition. *See* Preliminary Injunction Order, pp. 5-6. That ruling was correct, and should be confirmed upon summary judgment.

The term "public road" is defined by statute as "any road or street under the jurisdiction of and maintained by a public authority and open to public travel." *See* 23 U.S.C. § 101(a)(21) (emphasis added). This definition thus imposes two requirements relevant here: (a) the road must be under the jurisdiction of and maintained by the Forest

[1] The Court has already determined that the November 20th decision is a final agency action subject to judicial review under APA Section 706(2). *See* Preliminary Injunction Order, p. 5. Accordingly, Plaintiffs will not repeat their injunction briefings establishing this point.

Service; and (b) it must be "open to public travel." *Id.* As explained below, neither of these two statutory prongs is met here.

A . The Record Confirms That The Forest Service Has Not Maintained Road 652.

The Administrative Record confirms the Court's injunction ruling that Road 652 does not qualify under the first part of the statutory definition, as the Forest Service has not maintained the road. *See* SOF, ¶ 17-19.

Plaintiffs have already demonstrated that the first 765 feet of Road 652, across the Wrights' property, was improved by the Wrights in 2010 – at their own expense – to gravel surface from the native dirt track that was originally created by the Civilian Conservation Corps in the 1930's. *See* SOF, ¶ 13. The only evidence of maintenance the Forest Service submitted during the injunction briefing was that it replaced a single culvert along the road back in 1987. *See* Hudson Decl., Ex. 14 (*Docket No.15-15*). The Court cited this lack of evidence of maintenance in concluding that Plaintiffs were likely to prevail on this issue. Preliminary Injunction Order, pp. 5-6.

The Administrative Record does not show any further maintenance of Road 652 by the Forest Service, other than this single culvert replacement. *See* SOF, ¶ 17-19. The only new information in the record are annual maintenance reports for the Moose Creek District (where Road 652 is located), for years 2002 through 2011. *Id.* (AR 336 to 341). These reports show regular maintenance by the Forest Service and the Kidder Harris Highway District of Road 470 – the improved road that crosses the Selway River over the Swiftwater Bridge. But only the first three years' reports even mention Road 652; and those three reports say only that the Forest Service might look at the road to evaluate work that might need to be done. *Id.* There is no record of the Forest Service actually

looking at the road or doing any maintenance whatsoever. *Id.*

Because it was the Wrights that improved the short section of Road 652 across their property – not the Forest Service – and because the Forest Service has not maintained Road 652 over many decades, the Court should confirm its injunction ruling and enter summary judgment for Plaintiffs, reversing Defendant Hudson's "public road" determination under the first prong of the statutory definition above.

B. Road 652 Does Not Qualify As A Public Road Under The Second Part Of The Statutory Definition Either.

In addition, the Court should rule for Plaintiffs that Defendant Hudson's "public road" determination was arbitrary and capricious under the second prong of the statutory definition, which requires that a public road be "open to public travel." *See* 23 U.S.C. § 101(a)(21).

The "open to public travel" component of this statutory definition has been fleshed out in federal regulations, which have three requirements. 23 C.F.R. § 460.2. To meet those three requirements, the road must be:

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.

Id. These same three requirements are repeated in the Forest Service Manual definition of "public road." *See* F.S. Manual, Chapter 7730.5 (AR 281, p. 12).

The Administrative Record confirms Plaintiffs' injunction submissions showing that Road 652 is not "open to public travel" under these requirements. The following facts from the record show that none of these three requirements is met here:

First, Forest Road 652 has never been designated as "available" for public travel on any official Forest Service travel map, transportation atlas, or road access guide. No such official designation appears anywhere in the Administrative Record. To the contrary, the record confirms that Road 652 is not listed at all in the Nez Perce National Forest's Road Access Guides for any year from 1995 (earliest reference in the record) through 2008 (the latest official Access Guide). *See* SOF, ¶ 25-28.[2]

Second, Road 652 is not "passable by four-wheel standard passenger cars," under the second requirement above. *See* SOF, ¶ 10-15. Beyond the short stretch that was improved by the Wrights across their property, Road 652 is a rough track that cannot be driven by standard passenger cars, as illustrated by the Forest Service's own photographs in the record. *Id.* The Forest Service's internal records likewise show that most of Road 652 is designated only for "high clearance" vehicles. *Id.*

Third, Road 652 is not "open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restriction based on size, weight, or class of registration" under the third requirement of 23 C.F.R. § 460.2. The Forest Service itself approved a sign placed by the Wrights at the beginning of their property warning

[2] Although the Administrative Record contains materials from the Nez Perce National Forest's ongoing Travel Planning process, these are all draft materials that do not represent any final determination about whether Road 652 is a public road or not. *See* AR 324-28. To date, the Forest has only issued a draft EIS and a draft MVUM. *Id.* According to the Forest Service, road and trail designations contained in the Forest's existing 2008 Road and Trail Access Guides "will remain in place to use until the Forest MVUM map is available to the public." *See* SOF, ¶ 24. Again, the 2008 Road Access Guide does not even list Forest Road 652, much less identify it as an open public road. *Id.*

that Road 652 is a dead end road with no turn around. *See* SOF, ¶ 14. The road is also gated and locked where it enters the Ruby Neil property. SOF, ¶ 16. Although the Forest Service wrote a couple letters in the 1990's complaining about the locked gate, it never took action to remove the gate; and in fact installed its own lock on the gate. *Id.* Where the Forest Service thus agreed to Road 652 being blocked by a locked gate for over 20 years, it cannot now contend it is an ungated road open to public motor use.

In summary, the Court should confirm its Preliminary Injunction Order and enter summary judgment for Plaintiffs, holding that Defendant Hudson's November 20th "public road" determination regarding Road 652 was arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA and the legal authorities above.

II. DEFENDANT HUDSON ALSO PLAINLY ERRED IN ASSERTING THAT NO CLOSURE ORDER APPLIES TO ROAD 652.

On top of these flaws, the Administrative Record reveals another fatal defect in Defendant Hudson's November 20th decision: his plainly erroneous assertion that no closure order prohibits commercial use of Road 652.

As described above, Defendant Hudson first developed his theory that no permit was required for IDL to use Road 652 in a confidential email with the Regional NEPA coordinator, in which Hudson wrote that "FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. . . ." *See* AR 329 (Attachment B). He repeated this conclusion in the November 20th email to IDL, in which he stated: "There are no traffic use restrictions or orders associated with these roads. . . ." *See* AR 116 (Attachment C).

This assertion that Road 652 had no closure order, including "no restrictions on commercial hauling," was flatly wrong. As shown above, the Regional Forester issued a

closure order prohibiting commercial hauling without a permit on all Forest Service roads in Region One, including the Nez Perce National Forest, in May 2014 – just six months earlier. *See* AR 282 (Attachment A). That closure order meant that Road 652 was closed to commercial hauling without a Forest Service permit. Defendant Hudson got it exactly wrong when he concluded that no closure order existed on Road 652, and thus allowed IDL to use Road 652 for commercial hauling without requiring a permit. This obvious error thus compels entry of summary judgment for Plaintiffs, reversing and remanding the November 20th determination on this ground as well.

III. THE NOVEMBER 20TH DECISION FAILED TO ADDRESS THE 1977 SCENIC EASEMENT AND VIOLATED THE WILD AND SCENIC RIVERS ACT.

The final reason why the Court should enter summary judgment for Plaintiffs is that the November 20th decision wholly failed to consider the implications of the 1977 Wild and Scenic easement on the Wrights' property, and violated the Forest Service's duties to protect the Selway river corridor under the Wild and Scenic Rivers Act.

The Selway River was one of the original rivers protected by Congress when it enacted the Wild and Scenic Rivers Act in 1968. 16 U.S.C. § 1274(a)(1); SOF, ¶ 1. Sections 10(a) and 12(a) of the Act direct the Forest Service to ensure its management actions protect Wild and Scenic values within and adjacent to the designated Wild and Scenic corridor. *See* 16 U.S.C. §§ 1281(a) & 1283(a). Section 10(a) imposes the specific duty that the Forest Service must place "primary emphasis" on protecting scenic values:

> Each component of the wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.

16 U.S.C. § 1281(a) (emphasis added). Similarly, Section 12(a) mandates that the Forest Service "shall take such action respecting management policies, regulations, contracts, plans, affecting such rivers . . . as may be necessary to protect such rivers in accordance with the purposes of this Act." 16 U.S.C. § 1283(a)(emphasis added).

Pursuant to the Wild and Scenic Rivers Act, the Forest Service has acquired numerous scenic easements to protect the Selway River's wild and scenic corridor. This includes the 1977 scenic easement that covers all of the Wrights' property, including where Road 652 crosses it. *See* SOF, ¶ 4-6 (AR 11). The 1977 easement prohibits industrial and commercial activities on the entire property, while also restricting public access to the property only along the riverbank, as reflected in the following provisions:

* "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."

AR 11; *see also* Preliminary Injunction Order, pp. 2-4.

The Administrative Record shows that some Forest Service staff debated internally about the potential implications of the 1977 scenic easement in early discussions about IDL's proposed use of Road 652. *See* SOF, ¶ 31-32. However, after Defendant Hudson took over control of the project and developed his decision path in November, 2014, there is no evidence in the record that he considered the 1977 scenic easement or his duties under the Wild and Scenic Rivers Act at all. Certainly the key decision documents – his November 17th email to the Regional NEPA coordinator, and his November 20th decision itself – make no mention of the easement or the Act. *See* AR 116 & 329 (Attachments B & C).

The Forest Service adopted a 1969 River Plan for management of the Selway as well as the Lochsa and Middlefork Clearwater rivers after they were designated as Wild and Scenic Rivers. *See* SOF, ¶ 2. 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. Ex.1 (*Docket No. 3-1*) at 9 ("Access 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"). This provision applies here, since IDL is seeking access to its property via Road 652; and the 1977 scenic easement is in place for the Wrights' entire property. Yet again, Hudson never considered the 1969 River Plan nor did he evaluate whether allowing IDL to undertake industrial and commercial activities using Road 652 would be consistent with the 1969 River Plan, the 1977 easement, or the Wild and Scenic Rivers Act itself.

By failing even to consider, much less enforce, the 1977 scenic easement – which is certainly a vital consideration in light of the fact that Congress designated the Selway as a Wild and Scenic River in 1968 and directed the Forest Service to protect it – the November 20th determination must again be reversed under the APA. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29*,* 43 (1983) (agency determination is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem" 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 lacks authority to regulate industrial 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 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. The broadly-framed terms of the 1977 easement were drafted by the Forest Service to protect scenic, recreational and other values of the Selway Wild and Scenic River corridor. It cannot be simply ignored and unenforced now, as the Forest Service has done.

In short, the Forest Service has violated its statutory duty under the Wild and Scenic Rivers Act to place a "primary emphasis" on protecting scenic values; and the 1977 scenic easement acts as a "restriction on public use" of Road 652 across the Wrights' property, which demonstrates that even this portion of the road does not qualify as a "public road" under relevant definitions. At a minimum, the Forest Service erred by not even considering the impacts of the 1977 Wild and Scenic easement on whether Forest Road 652 qualifies as a "public road" in the November 20, 2014 determination, requiring reversal pursuant to the APA.

IV. THE FOREST SERVICE MUST EVALUATE IDL'S PROPOSED ROAD USE UNDER NEPA, THE WILD AND SCENIC RIVERS ACT, AND THE ESA.

In light of the facts, the appropriate remedy for Defendants' legal violations in this case should include not only reversing and setting aside the November 20th decision, but ordering that the Forest Service must issue a valid special use permit that complies with NEPA, the Wild and Scenic Rivers Act, and the ESA before IDL may utilitize Road 652 in connection with its Selway Salvage project. *See NRDC v. Southwest Marine*, 236

F.3d 985, 1000 (9th Cir. 2000)(district courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong," including ordering measures "consistent with, and complementary to, existing permit requirements").

The Wild and Scenic Rivers Act violations demonstrated here support this requested relief – a court order directing the Forest Service to adhere to its Wild and Scenic River Act duty to place a "primary emphasis" on protecting scenic values of the Selway River's protected corridor is necessary to remedy its violation of this duty.

Moreover, as the discussion above shows, (NMFS) repeatedly advised that ESA consultation would be necessary over IDL's proposed use of Forest Road 652, including potential impacts of its planned road construction and logging upon ESA-listed steelhead in the Selway River and tributaries. *See* SOF, ¶ 39, 42. NMFS rejected the Forest Service's attempt to claim that a prior ESA programmatic consultation over road maintenance would be adequate. *Id.* NMFS's concerns about potential adverse impacts of IDL's activities are reinforced by the Forest Service's own Johnson Bar Draft EIS, which concluded that "there could be measurable cumulative effects to fisheries" due to sedimentation impacts and landslide risks associated with IDL's proposed road building and post-fire logging. *See* Johnson Bar Draft EIS, pp. 69-70 & 226-227 (*Docket No. 16-1*). The Johnson Bar Draft EIS underscores the need for the Court to direct the Forest Service to comply with its ESA consultation duties here in evaluating whether to issue a permit to IDL.

Similarly, based on the record, the Court should direct that the Forest Service must employ adequate NEPA procedures to fully disclose to the public the proposed action and potential impacts. Even before Defendant Hudson avoided NEPA entirely by

saying no permit was required, his staff were seeking to sidestep NEPA public disclosure through use of a Categorical Exclusion ("CE"). *See* SOF, ¶ 37-38. In light of the national significance of the Selway River Wild and Scenic corridor, and the Forest Service's duty under the Wild and Scenic Rivers Act to ensure its management actions protect scenic values, the agency must fully assess IDL's proposed action under NEPA to evaluate consistency with the 1969 River Plan and other resource protections. *See* 36 C.F.R. § 251.54(e)(5) & Forest Service Handbook 1909.15, chapter 31.2 (providing that the "public shall receive adequate notice and an opportunity to comment upon a special use proposal" under NEPA, and that Forest Service must determine whether the proposed activity conforms with resource management plans and does not "materially impact" environmentally sensitive resources or lands, including Wild and Scenic River corridors).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter summary judgment in their favor; reverse and set aside the November 20th decision; and order that the Forest Service must issue a valid permit that complies with NEPA, the Wild and Scenic Rivers Act, and the ESA before IDL may utilize Road 652 in connection with its Selway Salvage project.

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/s/ Laird J. Lucas
Laurence ("Laird") J. Lucas (ISB 4733)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

/s/ Deborah Ferguson
Deborah A. Ferguson (ISB 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright