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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO RIVERS UNITED, and	)	
MORGAN and OLGA WRIGHT,	)	No. 3:15-cv-00169-BLW
	)	
<i>Plaintiffs,</i>	)	PLAINTIFFS’ COMBINED
	)	RESPONSE/REPLY BRIEF ON
vs.	)	CROSS-MOTIONS FOR
	)	SUMMARY JUDGMENT
DISTRICT RANGER JOE HUDSON	)	<i>(Docket Nos. 24, 27, 28)*</i>
in his official capacity, and UNITED	)	
STATES FOREST SERVICE,	)	
	)	
<u><i>Defendants.</i></u>	)	

* This combined brief is Plaintiffs’ response brief opposing the Forest Service Defendants’ and Intervenor’s cross-motions for summary judgment (*Docket Nos. 27 & 28*) and Plaintiffs’ reply brief in support of their motion for summary judgment (*Docket No. 24*).

INTRODUCTION

Respondents do not contest Plaintiffs' showing that Road 652 – which is less than a mile and a half in its entirety – fails to qualify as a “public road” because it was inaccessible to standard passenger cars beginning at the IDL land, and is gated and locked at the Ruby Neil property. Rather, their argument that Road 652 is a “public road” hinges on analyzing only the 765-foot portion of the road that crosses the Wrights' property. See FS Brief (*Docket No. 28-1*), p. 8-12; IDL Brief (*Docket No.27-1*), p. 5-7.

They seek to justify looking only at this portion of Road 652 by saying that IDL is entitled to use this section to access its parcel pursuant to ANILCA and implementing Forest Service regulations at 36 C.F.R. § 251.50(d)(1), under which landowners do not need a special use permit to access private inholdings using Forest Service roads that are “generally available for public use.” *Id.* The Forest Service also contends that Defendant Hudson's “public road” determination can be read as finding that Road 652 was “generally available for public use” under § 251.50(d)(1), even though he said no such thing and never considered that regulation. Respondents further argue that the November 20th determination constituted a “written authorization” for IDL's proposed commercial use under the Regional Forester's May 2014 closure order, when Hudson said the exact opposite – that no closure order existed, which was flatly wrong.

As explained in more detail below, these arguments are fundamentally flawed and do not prevent entry of summary judgment for Plaintiffs. First, Respondents wrongly ignore that Road 652 is a “forest road” only because it provides access to National Forest lands across the private properties owned by the Wrights, IDL, and the Ruby Neil trust. Analysis of whether it qualifies as a “public road” thus cannot be limited to one tiny

segment of this already short road, which would divorce the road from any relevance as a “forest road.” They also ignore that Road 652 is only accessible across the Wrights’ property by standard passenger vehicles because the Wrights themselves graded and graveled it – not the Forest Service, and not IDL. The Forest Service has not maintained Road 652 including on the section across the Wrights’ property, and hence even this section does not qualify as a “public road” under the statutory definition, thus requiring reversal of Defendant Hudson’s November 20, 2014 decision.

Moreover, Respondents’ argument that IDL is entitled by ANILCA and the Forest Service’s regulations to use Road 652 across the Wrights’ property for ingress and egress to its parcel is mistaken. ANILCA does not apply here – the IDL parcel is not an inholding surrounded by Forest Service lands; it is part of what was a larger state land section out which Idaho sold lots to other private parties, including the Wrights’ predecessor. Idaho failed to reserve an easement or right-of-way across the Wrights’ lot to ensure access to its own parcel. Idaho cannot now correct that error by claiming ANILCA rights of access across the private property it previously sold.

Respondents’ attempt to invoke the Forest Service’s inholding ingress/egress regulations also fails because Defendant Hudson never addressed these in his November 20th decision, so the Forest Service cannot now supply a different after-the-fact rationale. And the Forest Service wrongly ignores the second portion of the regulation it cites – 36 C.F.R. § 251.50(d)(2) – which requires a special use permit to use Forest Service roads if there is a closure order in place, irrespective of whether the road is “generally available for public use.” The Regional Forester’s May 2014 closure order is just such an order, again confirming that a permit was required here. AR 312.

The key facts are that the Forest Service has never designated Road 652 as being either a “public road” or “generally available to public travel,” so Defendant Hudson erred in contending otherwise in his ad hoc November 20th determination. He also erred in saying no closure order restricted commercial hauling on the road. And he erred by failing even to consider, much less analyze, how the 1977 scenic easement applies to IDL’s proposed commercial use of Road 652, when that easement bars such activities and when Section 10(a) of the Wild and Scenic Rivers Act commands that the Forest Service place a “primary emphasis” on preserving scenic values of the corridor.

Accordingly, the Court should grant summary judgment for Plaintiffs, and reverse and set aside the factually erroneous and legally defective November 20, 2014 determination challenged here.¹

¹IDL has filed a motion to dissolve or modify the injunction (*Docket No. 26*), in which IDL states that it has irrevocably given up its plan to construct a 3-mile road on its parcel and instead will use helicopter logging to remove timber. This is welcome news. As Plaintiffs already showed, the proposed road threatened serious irreparable harm to the Selway River, its fisheries, and its scenic values. Helicopter logging is less impactful, even if more expensive; and will save IDL considerable expense and effort that likely would have been required to rectify the damage caused by its poorly-designed road.

However, it appears that IDL now plans to land and unload the helicopters on private lands within the Wild and Scenic corridor that are encumbered by the same 1977 scenic easement as the Wrights’ property – and that easement prohibits use of the lands for commercial or industrial purposes. On August 3, 2015, Defendant Hudson gave approval of this plan without considering the easement’s prohibition of commercial and industrial uses of the lands. *See Docket No. 26-7*. Plaintiffs have voiced their concerns about this violation of the scenic easement; and are also concerned that IDL used the opportunity of a recent culvert failure on its land to substantially improve Road 652 for purposes of facilitating the Selway Salvage project, in possible violation of the preliminary injunction. *See Second Wright Declaration*, filed herewith.

Plaintiffs are thus opposing IDL’s motion to modify or dissolve the injunction; and suggest that the Court should first decide the pending cross-motions for summary judgment, and then evaluate appropriate remedies or equitable relief. *See Plaintiffs’ Response Opposing IDL Motion To Dissolve Or Modify Injunction*, filed herewith.

ARGUMENT

I. THE NOVEMBER 20TH DETERMINATION ERRED IN ASSERTING THAT ROAD 652 IS A “PUBLIC ROAD.”

The facts of this case are relatively simple, but they have caused obvious confusion about legal requirements regarding IDL’s proposed use of Road 652 for its Selway Salvage project. That confusion is evident not only in the Administrative Record, culminating in Defendant Hudson’s November 20, 2014 determination that IDL did not need any permit to use the road; but also in the subsequent briefings from Respondents. The following discussion hopefully clarifies the situation for the Court and underscores the errors in Defendant Hudson’s November 20th determination that IDL needed no permit because Road 652 is a “public road” having no closure order.

A. “Public Road” Definition.

Based on his November 17th memo to the Regional NEPA coordinator laying out his analysis (AR 329), Defendant Hudson’s November 20th decision (AR 116) deemed Road 652 a “public road” by citing the Forest Service Manual definition at FSM § 7730.5. As previously briefed, that definition has three requirements that the road be: (a) “available, except during scheduled periods, extreme weather, or emergency conditions,” (b) “passable by four-wheel standard passenger cars,” and (c) “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* FSM § 7730.5 (AR 285, p. 8).

FSM 7730.5 cites three authorities for this definition: 23 U.S.C. § 101(a)(27); 23 C.F.R. § 460.2(c); and 23 C.F.R. § 660.103. *Id.* Each of these is addressed in turn.

The first reference is to the Surface Transportation Act (“STA”), which authorizes appropriations for federal and non-federal public highways and defines forest roads. *See*

23 U.S.C. § 101(b). The FSM citation to §101(a)(27) is erroneous: the correct citation (as stated in the Preliminary Injunction Order) is § 101(a)(21). Here, the STA defines a “public road” 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).

The FSM Manual definition thus omits the first portion of the STA statutory definition requiring that a public road be “under the jurisdiction of and maintained by a public authority,” as noted in Plaintiffs’ prior briefings. Obviously, that omission in an internal Forest Service guidance document cannot somehow eliminate the full statutory requirements of the STA for a “public road.”²

The other citations in FSM 7730.5 are to federal regulations adopted pursuant to the statutory definition of “public road.” 23 C.F.R. § 460.2(c) first repeats and then fleshes out the STA statutory definitions, including by providing the definition for “open to public travel” which is used in the Forest Service Manual definition above. *Id.* The other regulation citation, 23 C.F.R § 660.103, similarly follows the STA in defining “public road” as “any road or street under the jurisdiction of and maintained by a public authority and open to public travel,” and defines “open to public travel” in the same terms as 23 C.F.R. § 460.2(c) and FSM 7730.5.

² Contrary to IDL’s argument, the Ninth Circuit’s decision in *Public Lands for the People, Inc., v. U.S. Department of Agriculture*, 697 F.3d 1192, 1199 (9th Cir. 2012), does not somehow elevate the Forest Service Manual’s partial definition of “public road” over the STA’s full definition. The Ninth Circuit there addressed miners’ challenges to a Forest Service travel plan decision that closed some forest roads and required them to obtain Forest Service authorization in the future to use the roads, under 36 C.F.R. § 228. *See* 697 F.3d at 1194-98. The Court rejected the miners’ attempt to sidestep § 228 by arguing the Forest Service could not redefine previously “public roads,” holding that the Manual definition is reasonable. *Id.* at 1199. The Ninth Circuit thus had no reason to – and did not – address whether the FSM definition fully comports with the broader statutory definition from the STA, as is the case here.

By only referencing the FSM Manual definition of “public road,” Defendant Hudson thus failed to address the other statutory requirements under 23 U.S.C. § 101(a)(21) for a public road – including that the Forest Service must both have jurisdiction over and maintain Road 652.

B. Forest Service Designation Of Open Public Roads.

The Forest Service regulations regarding the designation of National Forest roads for public use are found at 36 C.F.R. Part 212. These regulations were comprehensively revised in 2005 to adopt Travel Planning requirements to designate National Forest roads, trails, and off-road areas that are open (or closed) to motor vehicle use. *See* 70 Fed. Reg. 68264 (Nov. 9, 2005) (AR 279).

Subpart A of 36 C.F.R. Part 212 is entitled “Administration of the Forest Transportation System,” and begins by defining relevant terms, including “Forest road,” “National Forest System road,” and “designated road.” *See* 36 C.F.R. § 212.1. A “forest road” is a road “wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.” *Id.* (emphasis added). A “designated road” is a “National Forest System road . . . that is designated for motor vehicle use pursuant to § 212.51 on a motor vehicle use map.” *Id.* (emphasis added).

The underscored portions of these definitions are important, because they show that the Forest Service must make the determination that a road is needed for the Forest System in order to be a “forest road,” and must further designate a forest road as open for motorized use on a motor vehicle use map. Notably, the definitions in 36 C.F.R. § 212.1

also include “forest transportation atlas,” which means a “display of the system of roads, trails and airfields of an administrative unit,” and “travel management atlas,” which means an “atlas that consists of a forest transportation atlas and a motor vehicle use map or maps.” *Id.*

Working from these definitions, the Subpart A regulations specify that each unit of the National Forest System “must develop and maintain a travel management atlas, which is to be available to the public at the headquarters of that administrative unit.” *See* 36 C.F.R. § 212.2(a). Further, each National Forest “must identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands” – which “must incorporate a science-based roads analysis,” “involve a broad spectrum of interested and affected citizens” and governments, and “ensure that the identified system minimizes adverse environmental impacts,” among other requirements. *See* 36 C.F.R. § 212.5(b)(1).

Plaintiffs flag these definitions and requirements from Subpart A because there is noticeably missing from the Administrative Record any “forest transportation atlas,” “motor vehicle use map,” or “travel management atlas” – and it is clear from the record that Defendant Hudson did not consult any such documents in making his November 20th determination that Road 652 is supposedly a “public road” freely open to all motorize use without requiring any permit.

Indeed, Hudson’s second declaration filed with the Forest Service’s summary judgment motion states that he “had access” to the following maps in making his November 20th decision: AR documents 128, 131, 133 and 343. *See* 2nd Hudson Decl., ¶ 2 (*Docket No.* 28-4). According to the AR Index, these are respectively a draft motor

vehicle use map for the entire forest (discussed further below); a “relief map on the wall at Kooskia ranger station,” which barely shows Road 652 as a two-track road but is unnumbered, so Road 652 is not actually identified on that map; a “scan of NPNF visitor map showing Swiftwater bridge area,” which likewise shows Road 652 as a two-track road going mostly through private land (in white) and without any identifying number; and a Forest Service topographical map which shows Road 652 as a two-track road and its road number is barely visible if one looks hard.³

None of these documents reflects any Forest Service determination that Road 652 is necessary for the Forest System or has been designated as open to motor vehicle use. Thus, there is no support in the record for Hudson’s November 20th determination that Road 652 is a “public road” open to all motorized use, since the Forest Service has never made any such determination in accordance with the requirements of 36 C.F.R. Part 212. The truth is that Defendant Hudson simply made an ad hoc decision that Road 652 is supposedly a “public road” without following any of the processes or evaluating the criteria provided under Forest Service regulations in Part 212.

Moreover, Defendant Hudson’s attempt to rely on the draft motor vehicle use map for the Nez Perce National Forest is unavailing, for the simple reason that it is a draft, not a final document. The regulations at 36 C.F.R. Part 212 specify that the Forest Service must go through a process that considers numerous factors before designating any road as open to motor vehicle use. *See* 36 C.F.R. § 212.50 to 212.57; AR 279. The regulations emphasize that the “public shall be allowed to participate in the designation of National

³ Document 343 was added into the Supplemental Record submitted by the Forest Service with its summary judgment motion, and is dated 2015 – so could not possibly have been considered by Hudson in November 2014. Evidently he means this map was available, but clearer road numbers for Road 470 and 652 were added later to that map.

Forest System roads,” including through public notice and comment using NEPA procedures. 36 C.F.R. § 212.52(a). Criteria for designating roads for motorized use include “effects on National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs” and others, plus “compatibility of vehicle class with road geometry and road surfacing.” *Id.*, § 212.55(a) & (c). Once this evaluation is completed, “[d]esignated roads . . . shall be identified on a motor vehicle use map,” which “shall be made available to the public” and “shall specify the classes of vehicles, and, if appropriate, the times of year for which use is designated.” *Id.*, § 212.56.

Again, these procedures and the evaluation of the specified criteria have not been completed for the Nez Perce National Forest; and hence Road 652 has never been designated as an open public road for all motorized uses in accordance with the Forest Service’s regulations and requirements. Defendant Hudson’s attempt to rely on a draft motor vehicle use map to justify calling Road 652 a “public road” fails, including because the public had no notice or involvement in his attempt to turn a draft MVUM into a final decision prematurely. Thus, again, the Administrative Record does not support the November 20th determination that Road 652 is a “public road.”

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

Under the first part of the STA statutory definition above (which Hudson failed to consider), the Forest Service must both have “jurisdiction” over and “maintain” Road 652 for it to qualify as a “public road.” The Administrative Record, as discussed in Plaintiffs’ opening summary judgment brief, reflects the fact that the Forest Service has not maintained the road over the last few decades; and the accompanying Second Declaration of Morgan Wright confirms this.

Plaintiffs' opening brief explained that the Administrative Record has records only of the Forest Service replacing a culvert along the road, near the Swiftwater Bridge, in 1987. *See* Plaintiffs' SOF (*Docket No. 24-5*), ¶ 13, 17-19. The only Forest Service annual maintenance reports in the Administrative Record are from 2002-11 (AR 336-41). They do not show any maintenance during this time; and since the records do not extend through 2014, it must be presumed no maintenance occurred since 2011 either. *Id.*⁴

Notably, the Administrative Record lacks any documentation showing how and when Road 652 was graveled across the Wrights' property, although the record includes many photographs illustrating this fact, *see* AR 226-39; and Respondents rely on the fact that the road has been graveled to claim it qualifies as a "public road." Yet Respondents studiously ignore the fact that it is the Wrights who have maintained and improved Road 652 across their property, at their own expense.

As described in the accompanying Second Wright Declaration, Road 652 across the Wrights' property was a native dirt track that was deeply rutted when the Wrights purchased the land in 1990. *See* 2nd Wright Decl., ¶ 2.⁵ Its condition deteriorated

⁴ The Forest Service cites the Johnson Bar fire BAER report from October 2014 to assert that the Forest Service intended to conduct maintenance on Road 652 following the fire, without any agreement with the Wrights. *See* FS Brief, pp. 10-11. But no such maintenance was actually done. Moreover, the proposed maintenance was to protect the Wrights' property from damage – damage which has now occurred following an intense rain event on July 13, 2015, leading to a culvert blowout on the IDL parcel and flooding onto the Wrights' property. *See* 2nd Wright Decl., ¶9-13. Contrary to the assertion in the Forest Service's brief, the Wrights did not ask the Forest Service to conduct maintenance of the road – they contacted IDL first about the problem since it arose on IDL land. *Id.*

⁵ The Court may properly consider the 2nd Wright Declaration to explain the Administrative Record, because the record fails to include any information about Road 652's prior condition or the Wrights' improvements, even though it has many photos of the improved state of the road and Respondents rely on those improvements to argue IDL can use the road without any permit. *See National Audubon Soc. v. U.S. Forest Serv.*, 46

thereafter, without maintenance by the Forest Service. *Id.*, ¶ 3-4 & Ex. A. In 2006, Mr. Wright paid for minor gravelling and grading of Road 652 to a new southern ingress to his property; and in 2010, he paid to have Road 652 graded and graveled because it was rutted and eroded due to increased traffic after he built his house in 2008. *Id.*, ¶ 7. No road engineering was done, and no improvements were made to the hard-pack dirt base of the road, as Mr. Wright was just improving the road to meet his minimal transportation needs. *Id.* The graveled portion ends at the southern egress from his property, and does not extend to the boundary with the IDL property. *Id.*

These minor improvements to Road 652 do not mean it is now capable of handling any and all motor vehicle traffic, such as IDL's logging trucks. Illustrating this fact is that IDL recently moved large bulldozers up Road 652 which caused the Wrights' home to shake – the home is located just a few feet away from the road, and Road 652 “is not engineered to withstand heavy loads as would be expected by logging trucks carrying timber.” *See* 2nd Wright Decl., ¶ 13.

Yet Defendant Hudson blithely asserted in his November 17th analysis memo that the “risks associated with road or resource damage involved with the [IDL's] use of the Forest Service segments of the road are minimal,” and the “proposed use or action involves existing roads and there will be no changes in the road design standards, road prism (reconstruction) or departures from road traffic rules that are currently in effect.” *See* AR 329, p. 3. How could Hudson possibly make this determination without even knowing that it was the Wrights who graveled the road across their land?

F.3d 1437, 1447 (9th Cir. 1993); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988) (both holding courts may consider extra-record materials “where necessary to explain” agency's actions or record).

The truth is Hudson had no clue about the status of Road 652, because the Forest Service has largely ignored it for decades. The record thus confirms Plaintiffs' showing, and the Court's Preliminary Injunction Order analysis, that Road 652 does not qualify as a "public road" under the STA statutory definition above, because it has not been maintained by the Forest Service, even on the stretch across the Wrights' property. Accordingly, the Court should affirm its Preliminary Injunction Order, and reverse and set aside the November 20th determination on this ground.

D. The Record Further Indicates That The Forest Service Does Not Have Jurisdiction Over Road 652.

Plaintiffs have focused on the "maintained by" portion of the STA statutory definition of "public road," but Respondents' submissions and the Administrative Record also indicate that Road 652 is not even "under the jurisdiction" of the Forest Service as defined under the STA and regulations. This is a further reason why Defendant Hudson's "public road" determination was erroneous.

IDL previously pointed out, and the Forest Service now concurs, that Idaho never granted any easement or right-of-way over its parcel to the Forest Service for Road 652. *See* IDL Injunction Brief (*Docket No. 14*), p. 6; FS SJ Brief (*Docket No. 28-1*), p. 4. *See also* AR 61, pp. 1, 4. IDL thus insists that it can do whatever it wants on Road 652 across its land – as evidenced by the fact that IDL recently expanded and improved the road on its parcel, without any review or approval by the Forest Service. *See* 2nd Wright Decl., ¶13-16 & Ex. D (photos of IDL recent road work on Road 652).

In other words, this alleged "forest road" only exists on the two private properties flanking either side of the IDL parcel – and hence probably does not even qualify as a "forest road." *See* 23 U.S.C. § 101(a)(10) ("The term 'forest road or trail' means a road

or trail wholly or partly within, or adjacent to, and serving the National Forest System that is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources”) (emphasis added); 36 C.F.R. § 212.1 (same definition). How could Road 652 possibly be deemed a “forest road” when one landowner (Idaho) denies it is a Forest Service road at all, and claims exclusive jurisdiction over that road across its property? At a minimum, the fact that the Forest Service does not have jurisdiction over Road 652 across the IDL parcel shows further that the road does not meet the STA statutory definition for a “public road,” and again demonstrates that the November 20th determination was in error and must be reversed.

II. ANILCA AND THE INGRESS/EGRESS REGULATIONS DO NOT ALLOW IDL TO USE ROAD 652 FOR COMMERCIAL ACTIVITIES WITHOUT A PERMIT.

As noted above, Respondents seek to justify focusing only on the 765-foot stretch of Road 652 across the Wrights’ property by arguing that IDL is entitled to access its parcel under ANILCA and the special use permit ingress/egress regulations at 36 C.F.R. § 251.50(d), without requiring any permit. These arguments are in error, as explained below; and do not salvage Defendant Hudson’s erroneous November 20th decision.

A. ANILCA Does Not Apply Here.

First, IDL claims that it is guaranteed access to its state parcel under the provisions of ANILCA, 16 U.S.C. § 3210, and hence cannot be prevented from using Road 652 for its Selway Salvage project. *See* IDL Brief, p.8. This reflects a fundamental misunderstanding of ANILCA and the facts here.

ANILCA directs that the Forest Service must provide reasonable access to private land inholdings within National Forests, as follows:

(a) Reasonable use and enjoyment of land within boundaries of National Forest System: Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to the National Forest System.

See 16 U.S.C. § 3210(a). IDL thus must comply with Forest Service regulations, whether it likes it or not, even if ANILCA applies here.

But ANILCA does not apply here. IDL ignores the fact that it seeks to cross private property – not federal land – in using Road 652 to access its parcel. Idaho originally sold off the land now owned by the Wrights, and failed to reserve any easement across the land to access its parcel. *See* AR 132, 134. And the IDL parcel is bordered on at least two sides by private lands, not National Forest land, as the maps in the record show. *See* AR 127, 130, 134.

Because the IDL parcel is thus not an inholding surrounded by Forest Service lands, ANILCA does not apply here. *See Adams v. U.S.*, 255 F.3d 787, 790 (9th Cir. 2001) (defining “inholding” as surrounded by National Forest lands); *Friends of the Columbia Gorge v. U.S.F.S.*, 546 F.Supp.2d 1088, 1093 (D. Or. 2008) (private land not an ANILCA inholding where not bordered on all sides by Forest Service land); *Bunyard v. U.S. Dept. of Ag.*, 301 F.Supp.2d 1052, 1058 (D.Ariz.2004) (agreeing with Forest Service that ANILCA only applies to inholdings surrounded by Forest Service land).

B. The Forest Service Cannot Rely On 36 C.F.R. § 251.50(d) To Justify Defendant Hudson’s Decision That No Permit Was Required.

Respondents’ reliance on the Forest Service special use regulations regarding landowner ingress/egress is likewise misplaced because the IDL parcel is not an

inholding – and further, Respondents ignore the fact that IDL is seeking to use Road 652 for commercial activities.

As the Forest Service’s brief notes, the special use permit regulations at 36 C.F.R. Part 251 provide that landowners may have rights to access their inholdings without obtaining a permit, where their “ingress and egress will require the use of existing Government-owned roads . . . which are open and available for general public use.” *See* 36 C.F.R. §§ 251.50(d)(1) & 251.110(e). But where the landowners’ ingress and egress “would require surface disturbance” or use of roads “not authorized for general public use,” the landowner must apply for a special use permit. 36 C.F.R. § 251.110(d).

Here, IDL’s proposed use of Road 652 was not simply to access its property, even assuming that property qualifies as an inholding (which it does not, as explained above). It sought to use the road for commercial purposes – to move in heavy equipment and remove some 1,400 logging truck loads of timber. Yet Respondents fail to acknowledge this key fact in claiming that 36 C.F.R. § 251.50(d)(1) justifies Defendant Hudson’s November 20th determination that IDL required no permit to utilize Road 652 for its Selway Salvage project.

Moreover, the Forest Service’s brief wrongly argues that Defendant Hudson’s “public road” determination equates to a determination that that Road 652 is “authorized for general public use” under § 251.50(d)(1). The term “authorized for general public use” is not defined anywhere in statute or regulation; and as explained above, the Administrative Record contains no forest transportation atlas, travel management atlas, or final motor vehicle use map which might provide such a designation. And Defendant Hudson did not even address whether Road 652 was “authorized for general public use”

in his November 20th decision anyway – he never considered the requirements of 36 C.F.R. § 251.50(d)(1) at all. Such an attempt to manufacture an after-the-fact rationale which the November 20th decision never articulated is improper, and fails under the APA. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself”).

C. A Permit Was Required For IDL’s Proposed Commercial Use Of Road 652.

Surprisingly, the Forest Service brief fails to address the second part of 36 C.F.R. § 251.50(d), which confirms that a permit was required of IDL for its proposed commercial use of Road 652. 36 C.F.R. § 251.50(d)(2) establishes that a special use permit is required for use of a forest road whenever “[a]uthorization of that use is required by an order issued under § 261.50 or by a regulation issued under §261.70 of this chapter.” *See* 36 C.F.R. § 251.50(d) (2).

There was such “an order issued under § 261.50” in place here – the May 2014 Regional Forester closure order, which specifically requires a permit for commercial hauling. *See* AR 283. That closure order was issued under the authority of 36 C.F.R. § 261.50. *Id.* Thus a special use permit was required of IDL under § 251.50(d)(2).

While failing to cite this relevant regulation, Respondents assert that the Regional Forester closure order was complied with here, since it prohibits “[u]sing a National Forest System road for commercial hauling without a permit or written authorization from the Forest Service.” *See* AR 283, p. 1 (emphasis added). Respondents contend that the November 20th determination constituted such a “written authorization” under the closure order, so Defendant Hudson was supposedly correct in concluding that IDL

required no permit. *See* FS Brief, p. 14; IDL Brief, p. 11. But there are two fatal flaws in this argument.

First, as Plaintiffs showed in their opening brief, Hudson's November 20th decision did not purport to be a "written authorization" approving IDL's proposed road use under the closure order. To the contrary, Hudson did not even know there was a closure order in place. Hudson wrote in his November 17th analysis memo 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, p. 3. He repeated this conclusion in the November 20th decision, which stated: "There are no traffic use restrictions or orders associated with these roads." AR 116. Where Hudson did not even know of the closure order, Respondents cannot claim his November 20th decision somehow magically complied with it.

Further, Respondents' argument disregards the Forest Service Manual's direction that such a "written authorization" can only be issued instead of a permit where the proposed commercial haul "[i]nvolves a small number of trips," the costs of issuing a permit outweigh the value of potential cost recovery, and the "risks of road or resource damage involved in authorizing the commercial hauling by issuance of a letter are minimal." *See* FSM § 7731.17 (AR 281, p. 19). Again, Hudson made none of these determinations. Nor could he have done so – IDL's plan to haul over 1,400 logging trucks of timber alone shows that the proposed haul did not "involve a small number of trips" for which a written authorization could be issued instead of a permit. Hence, his November 20th decision remains arbitrary and capricious.

In summary, IDL was required to obtain a Forest Service permit to use Road 652 for its proposed commercial activities, even under the special use permit regulations regarding ingress/egress to inholdings. Because the November 20th decision wrongly determined that no Forest Service permit was required for IDL's proposed uses, the Court should enter summary judgment for Plaintiffs and reverse and set aside that decision.

III. DEFENDANT HUDSON ERRED BY FAILING TO CONSIDER THE SCENIC EASEMENT AND THE WILD AND SCENIC RIVERS ACT.

Finally, Respondents argue that Hudson had no duty to consider the 1977 scenic easement on the Wrights' property, because it supposedly has no relevance to use of Road 652 under the 1937 easement. They repeat their argument from the injunction briefings that "under black-letter property law . . . the property owner lacks the power to grant rights to later purchasers that are inconsistent with rights granted earlier." *See* FS Brief, at 16 (citing Restatement (Third) of Property (Servitudes), § 4.12).

As Plaintiffs previously pointed out, this is not a situation where different easements have been granted to different buyers, as contemplated in the Restatement (Third). Instead, the Forest Service acquired both the 1937 and 1977 easements covering the same property, now owned by the Wrights. The broadly-framed terms of the 1977 easement were drafted by the Forest Service expressly 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. This is particularly true since the underlying purpose of the 1937 easement (*i.e.*, building a "public highway" to connect to the Goddard Point #286 project) was never undertaken.

Moreover, the Forest Service's action in purchasing the 1977 easement was consistent with its 1969 River Plan for the Selway Wild and Scenic River, which established that the Forest Service would use scenic easements to control access to private properties within the Wild and Scenic corridor to help protect wild and scenic values. *See* AR 344, p. 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”). Respondents repeatedly emphasize that Road 652 is needed for IDL access to its private property. The 1977 scenic easement is thus directly applicable here under the 1969 River Plan; and underscores that Defendant Hudson erred in failing to consider the easement at all in his ad hoc determination that Road 652 is a “public road.”

The ad hoc nature of Hudson's November 20th decision also underscores that he violated the Wild and Scenic Rivers Act. As quoted in Plaintiffs' opening brief, Section 10(a) of the Act imposes the duty upon the Forest Service to administer the Wild and Scenic rivers system “to protect and enhance” wild and scenic values, and specifically requires that “[i]n such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.” 16 U.S.C. § 1281 (emphasis added). Likewise, 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).

As the District of Oregon has held, the Forest Service must consider impacts of private land logging upon scenic values, and cannot approve activities that violate terms

of a scenic easement. *See U.S.A. v. Hanton*, 500 F. Supp. 188 (D. Or. 1980). By wholly ignoring the scenic easement here, and failing to address how IDL's proposed commercial activities may impact scenic values or violate terms of the 1977 scenic easement, Defendant Hudson has violated that statutory duty here, and acted in an arbitrary and capricious manner, again requiring reversal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment; deny Respondents' cross-motions for summary judgment; and reverse and set aside the November 20th decision.

DATED: August 17, 2015. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17rd day of August, 2015, I caused the foregoing PLAINTIFFS' COMBINED RESPONSE/REPLY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the counsel of record listed below:

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