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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE and IDAHO RIVERS UNITED, Plaintiffs, vs. UNITED STATES FOREST SERVICE, Defendant, and RESOURCES CONSERVATION COMPANY INTERNATIONAL, Defendant-Intervenor.	Case No. 3:13-cv-348-BLW **PLAINTIFFS' RESPONSE TO DEFENDANT-INTERVENOR'S MOTION FOR RECONSIDERATION OR STAY PENDING APPEAL, AND DEFENDANT'S MOTION FOR RECONSIDERATION** *(Docket Nos. 47 and 51)*

INTRODUCTION

Defendant Forest Service and Defendant-Intervenor RCCI's respective motions for reconsideration repeat arguments rejected by this Court regarding final agency action, the applicability of *Heckler v. Chaney* to this case, and the standard for a stay pending appeal and injunctive relief. RCCI cannot in good faith contend that the equities weigh in favor of letting it now ship further mega-loads through the Nez Perce-Clearwater National Forests and Middle Fork Clearwater/Lochsa Wild and Scenic River corridor in light of unexamined harms this Court recognized. RCCI sent its first mega-load up U.S. Highway 12 in defiance of the Forest Service's specific instruction that the load was not authorized or approved to enter U.S. Highway 12 on National Forest lands. Because the Court's September 12 ruling was correct, both motions for reconsideration and RCCI's motion for stay pending appeal should be denied.

The only new issue movants raise is the Forest Service's use of 36 C.F.R. § 261.54(a) in its September 17 closure order. That subsection alone may not support closure of U.S. Highway 12 to mega-loads. The Court, however, ordered the Forest Service to issue a closure under § 261.50, and specifically identified the area closure under § 261.50(a) as one means for doing so. Section 261.50(a) plainly covers *any area* in the National Forest over which the Forest Service has jurisdiction, which as a matter of law includes U.S. Highway 12. An area closure, in conjunction with the prohibitions set forth in the closure regulations, including §§ 261.53 and 261.58, provide the Forest Service with multiple options for closure of U.S. Highway 12. The Forest Service and RCCI have willfully ignored these provisions. Because these provisions allow the Forest Service to comply with its Memorandum Decision and Order, the Court should deny both motions for reconsideration, deny RCCI's request for a stay pending appeal, and order the Forest Service to reissue a valid closure of U.S. Highway 12 to Omega Morgan mega-loads.

STANDARD OF REVIEW

Motion for Reconsideration: Although Rule 59(e) permits a district court to reconsider and amend a previous order, it is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 James Wm. Moore et al, Moore's Federal Practice 59.30[4] (3d Ed. 2000). Indeed, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). "Upon demonstration of one of these three grounds, the movant must then come forward with 'facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Gibson v. Credit Suisse AG*, No. 1:10 cv 001-EJL-REB, 2012 WL 5354559, at *2 (D. Idaho Oct. 26, 2012) (quoting *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996)). The type of "clear error of law" justifying a district court to grant reconsideration is of the kind found where the Court did "not apply controlling Supreme Court precedent." *Smith v. Clark Cnty. Sch. Dist.*, No. 11-17398, 2013 WL 4437599, at *3 (9th Cir. Aug. 21, 2013).

Motion to Stay Injunction: As RCCI identifies, the U.S. Supreme Court has stated that the factors regulating the issuance of a motion for a stay pending appeal include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

ARGUMENT

I. THE COURT BASED ITS ORDER ON A CORRECT FOUNDATIONAL FOREST SERVICE CLOSURE REGULATION.

A. The Court Correctly Found Forest Service Closure Authority Under 36 C.F.R. § 261.50(a); if Error Occurred it was the Forest Service's Subsequent Flawed Choice When Issuing its Order.

This Court's September 12 Memorandum Decision and Order (Order) correctly ordered the Forest Service to issue an area closure of U.S. Highway 12 to Omega Morgan mega-loads under 36 C.F.R. § 261.50. The Court quoted specifically from § 261.50(a) in its analysis: "The Forest Service regulations grant authority to a Forest Supervisor to 'issue orders which close or restrict the use of described areas within the area over which he has jurisdiction.'" Order at 13. This Court then concluded and ordered the Forest Service to "issue a Closure Order to Omega-Morgan pursuant to the Forest Service's authority under 36 U.S.C. [sic] § 261.50." *Id.* at 15 (conclusion), 16 (order). The Court merely referenced provisions from § 261.54 as exemplifying certain specific use prohibitions.

The Forest Service, however, issued the September 17 Closure Order solely under 36 C.F.R. § 261.54. The Forest Service now notes that 36 C.F.R. § 261.54 is specific to "National Forest System roads" defined in 36 C.F.R. § 261.2 as "[a] forest road other than a road which has been authorized by a legally documented right-of-way held by a State, county, or other local public road authority." The Court's Order, however, was correct in finding that the Forest Service has foundational authority to close the Highway using an area closure under 36 C.F.R. § 261.50(a).

Section 261.50(a) gives the Forest Service broad authority to close or restrict the use of *any area*[1] within the Forest Service's jurisdiction, and provides in full:

> The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof.

(Emphasis added). The plain meaning of § 261.50(a) is that the Forest Service is authorized to issue a closure or restriction within any specifically delineated space over which it has jurisdiction—which this Court has already held includes U.S. Highway 12.

This Court previously ruled in its February 7, 2013 Order that a grant of an easement along U.S. Highway 12 does not remove the Forest Service's regulatory and enforcement authority over that land—indeed, the agency's retained authority is required to "ensure compliance" with the granted easement. *IRU v. USFS*, 2013 WL 474851, at *8 (D. Idaho February 7, 2013). This Court, therefore, made no error in finding that § 261.50(a), which encompasses "all areas within the area over which the [the Forest Service] has jurisdiction," provides a lawful basis for the Forest Service to issue an area closure of U.S. Highway 12 from Milepost 74 to 174 to mega-load traffic pending completion of a corridor impacts study and Nez Perce Tribal consultation.

The Forest Service now claims "the only relevant prohibitions in [Subpart B] are found in 36 C.F.R. § 261.54." Forest Serv. Mem. at 3. This is not correct.[2] Section 261.50 provides that,

[1] "Area" is defined in 36 CFR § 261.2 as "[a] discrete, specifically delineated space that is smaller, and in most cases much smaller, than a Ranger District."

[2] While courts give "substantial deference" to an agency's interpretation of its own regulations, the agency's interpretation is not given controlling weight if "it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). As discussed above, 36 C.F.R. § 260.50(a) plainly gives the Forest Service comprehensive authority to issue an order closing or restricting any area over which it has

in issuing orders which close or restrict the use of described areas over which the Forest Service has jurisdiction, the order may "appl[y] any or all of the prohibitions authorized in this subpart or any portion thereof." At least two sections of Subpart B, "Prohibitions in Areas Designed by Order," contain provisions available for use in conjunction with § 261.50 under the facts of this case and consistent with this Court's September 12 Order.

First, 36 C.F.R. § 261.53 contains multiple provisions applicable through a Forest Service closure under the foundation of § 261.50(a):

> **§ 261.53 Special closures**
>
> When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of:
>
> […]
>
> (b) Special biological communities.
>
> (c) Objects or areas of historical, archeological, geological, or paleontological interest.
>
> […]
>
> (e) Public health or safety.
>
> [. . .]
>
> (g) The privacy of tribal activities for traditional and cultural purposes. Closure to protect the privacy of tribal activities for traditional and cultural purposes must be requested by an Indian tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian tribe.

Additionally, the Forest Service could have applied the provisions of 36 C.F.R. § 261.58. Section 261.58 provides in relevant part at least two subsections the Forest Service could apply: "When provided by an order, the following are prohibited: … (g) Parking or leaving a vehicle in violation of posted instructions. … and … (z) Entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System."

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jurisdiction, which as a matter of law includes U.S. Highway 12, in conjunction with a multitude of reasonable subsidiary prohibitions in §§ 261.53 and 261.58.

RCCI's contention that 36 C.F.R. 261.50 (a) "should not be read to include *roads*" (RCCI Mem. at 3; emphasis added) is an attempt to argue that the factual situation before this Court somehow slips through the cracks of the Forest Service's comprehensive closure authority.[3] Section 261.50(b) provides that the Forest Service may issue closures or restrictions to "National Forest System roads and trails." This section merely provides clarity that the Forest Service can issue an order closing or restricting the use of a National Forest System road or trail that may have been otherwise classified as open by the Forest Service. As the Forest Service correctly states, § 261.50(a) is "broader than subsection (b)". Forest Serv. Mem. at 3. It is unreasonable to read § 261.50(a) as not authorizing the Forest Service to address any necessary prohibitions on any area within its jurisdiction, which U.S. Highway 12 is as a matter of law. And it is unreasonable to read the multiple prohibitions found in the remainder of the Subpart B as providing no applicable closure authority, or providing closure authority only under § 261.54.

By way of summary, this Court properly found Forest Service closure authority under 36 C.F.R. § 261.50(a), and properly ordered the Forest Service to issue a closure order under that authority. The Forest Service plainly has authority to issue an area closure under § 261.50(a) in conjunction with either or both §§ 261.53 and 261.58.

B. There is No Basis for Reconsideration from Lack of Notice of Forest Service Enforcement Regulations.

Plaintiffs' purported failure to provide notice to RCCI of the applicable Forest Service closure regulations does not provide a basis for reconsideration, and RCCI provides no authority otherwise. Upon inquiry by the Court as to what measures the Forest Service had at its disposal

[3] Contrary to the implications of the movants' arguments, it is notable how comprehensively constructed the Forest Service's regulations are – in this instance through the jurisdictional breadth of § 261.50(a) and the flexible applicability of the conjoined subsections of Subpart B, which allow the Forest Service to deal with unpredictable future needs and protections for the National Forest under its care. Yes, this mega-loads case is unique. But the Forest Service unsurprisingly possesses all of the regulatory authority it needs to deal with this unique situation.

to enjoin travel of mega-loads on its highway, counsel for IRU simply provided the Court with the applicable regulations. Plaintiffs had no greater access to this information or notice of its necessity than the Forest Service or RCCI. The applicable measures an agency can take with regard to an injunction request are salient in an injunction hearing and ostensibly better known by the party to whom they apply. Neither the Forest Service nor RCCI raised at the hearing or cited in briefing any authority suggesting a court's equitable remedies do not include ordering an agency to issue a closure order. Nothing precluded notice of such regulations or their logical application to the relief sought by Plaintiffs in their injunction request.

II. THE COURT CORRECTLY FOUND FINAL AGENCY ACTION.

In assessing the basis for a preliminary injunction in its September 12 Order, the Court correctly found final agency action in this case. Defendants' reconsideration arguments present no new evidence, no new controlling law, and no error by the Court. The agency action in this case, and the basis for its finality, is simple: it is grounded in the APA definition of "agency action," in Ninth Circuit precedent on finality, and in the "practical effects" of the Forest Service's August 5 denial.

On August 5, 2013, the highest official of the Nez Perce Tribe, its Tribal Chairman, telephoned the highest official of the Forest Service, its Chief, and made a request that the Forest Service exercise its authority and prohibit mega-load shipments until tribal consultation and a corridor impacts study were complete. That request for relief was denied. *See* Whitman Declaration (*Dkt. No. 10*). As found in the prior *IRU v. Forest Service* decision of this Court, a denial of a request for relief constitutes final agency action for purposes of judicial review under the APA. *See* 5 U.S.C. § 551(13) ("agency action" includes agency "relief" "or denial thereof"); *IRU v. USFS*, No. 1:11-cv-95-BLW, 2013 WL 474851, at *6 (D. Idaho February 7, 2013)

(distinguishing agency action through denial of a request, from an agency failure to act); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (distinguishing agency action through denial from a failure to act: "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.").

RCCI provides no language in the APA or case law suggesting that a denial of a request for relief made by telephone from the leader of the Nez Perce Tribe to the Chief of the U.S. Forest Service is not final agency action under the APA. This is unsurprising: there is no language in the APA or case law prohibiting a telephone conversation as the mechanism of making a request to an agency for action and/or the mechanism of an agency denying that request. *See*, *e.g.*, *John Doe, Inc. v. Gonzalez*, No. 06-966 (CKK), 2006 WL 1805685, at *13 (D.D.C. 2006) (finding ultimately that the court lacked subject matter jurisdiction over the case, but finding that both plaintiff and federal agency defendant agreed that a final agency action on a permit request had occurred during a "telephone conversation" and noting that nothing prohibited a telephone conversation from serving as a mechanism of final agency action.); *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 2:12-cv-197, 2012 WL 3060146, at *8 n.7 (W.D. Mich. 2012) (noting that a Corps telephone conversation statement was not a final agency action, as it was mere repetition of a prior judicial determination, noting nothing prohibiting a telephone statement as a mechanism of final agency action.). RCCI's citations to cases involving agency press statements (RCCI Mem. at 6) are distractions from the facts of this case.[4]

[4] The remainder of the case law cited by RCCI as to final agency action is similarly based on false premises and distraction. RCCI's telephone "policy" argument (RCCI Mem. at 7) bears no resemblance to the actual, necessary, outreach and conversation between officials that occurred in this case and that must be available for time-sensitive request and response between the Tribal Chairman of an Indian tribe and the Chief of the Forest Service. RCCI's remaining case law (RCCI Mem. at 8-9) is premised in various irrelevant ways on repeating its "failure to act" argument from prior briefing, and shies from the final agency action question squarely before

The Forest Service's denial of the Tribe's request also meets the requirements of finality under applicable Ninth Circuit precedent. "For an agency action to be final, the action must (1) 'mark the consummation of the agency's decisionmaking process' and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Ore. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). "We focus on the practical and legal effects of the agency action: "The *finality element must be interpreted in a pragmatic and flexible manner*." *Id.* (emphasis added; quotation omitted). As to the consummation prong, "[i]t is the *effect of the action* and not its label that must be considered." *Id.* at 985 (emphasis added; quotation omitted). The legal effect prong is satisfied when an agency "impose[s] an obligation, den[ies] a right, or fix[es] *some* legal relationship as a consummation of the administrative process." *Id.* at 987 (emphasis in original; quotation omitted). This prong is also satisfied where there is "a direct and immediate…effect on the day-to-day business of the subject party." *Id.* (quotation omitted).

As the Court found, the facts of this case meet this standard. On August 5, the Forest Service denied the Tribe's request to stop mega-load shipments pending completion of tribal consultation and a corridor impacts study. The first shipment moved later that day and was allowed to proceed through the Reservation, National Forest, and Wild and Scenic corridor, causing injury to Plaintiffs. Tellingly, every subsequent court filing by the Forest Service has confirmed the agency's decision not to complete the required tribal consultation and corridor study prior to allowing additional mega-load shipments. The "practical and legal effects" of the

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this Court. RCCI's particular citation to *W. Watershed Proj. v. Matejko*, 468 F.3d 1099 (9th Cir. 2006) (RCCI Mem. at 8-9) is a straw man argument twice-over: it is a "failure to act" case set in the context of the *ESA* statutory definition of "agency action," which the court found did not include a failure to act. 468 F.3d at 1110. That decision has no bearing on the facts before this Court.

Forest Service's decision, for the Nez Perce Tribe and IRU, were clearly final. *Ore. Natural Desert Ass'n*, 465 F.3d at 982.

III. THE COURT CORRECTLY FOUND THAT JUDICIAL REVIEW IS NOT PRECLUDED BY *HECKLER V. CHANEY*.

As Plaintiffs previously briefed, the "presumption of unreviewability" for nonenforcement cases established in *Heckler v. Chaney*, 470 U.S. 821 (1985) does not preclude this Court's judicial review, and the Court made no error in exercising judicial review.

First, given the Forest Service's admittedly incomplete knowledge of the potential harms of mega-load travel, this case is simply not the type of routine agency nonenforcement addressed in *Chaney*. *See* 470 U.S. at 831-32 (discussing what is "peculiarly within [the] expertise" of an agency as it deals with repeated choices over "each technical violation" of its authority). Second, this case still – the Forest Service's latest filing in fact resurrects the issue (Forest Serv. Mem. at 2) – appears to involve an agency that has decided it does not have enforcement authority, rather than one engaged in routine expertly-decided nonenforcement. *See id.* at 833 n.4. Third, as correctly found by this Court, the Forest Service's August 5 denial of relief, premised on a decision that consultation with the Nez Perce Tribe would not occur prior to the transportation of mega-load shipments across the Reservation and National Forest, amounted to an abdication of its obligation to consult with the Tribe before allowing the very activity whose harm the consultation would examine. *See id.* at 833 n.4; Order at 12–13. Fourth, this case presents claims of injury to Indian treaty rights protected under Article VI of the U.S. Constitution, and is therefore not a case in which the Forest Service is entitled to *Chaney* discretion. *See id.* at 838 (disclaiming application of the decision to cases presenting claim of injuries to constitutional rights). And fifth, the *Chaney* presumption must give way where there is "law to apply," and in this case there are "meaningful standards" to apply under NFMA, the

Clearwater Forest Plan, and the requirement that tribal consultations must occur before allowing the activity whose very harm the consultation will examine. *See id.* at 834.

RCCI's abdication argument is flawed for several reasons. First, the *Chaney* concept is not "extreme abdication" (RCCI Mem. at 9). Rather, it is an agency policy extreme enough "to amount to an abdication its statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4. Second, contrary to RCCI's suggestion (RCCI Mem. at 10), the Court did precisely "acknowledge" the *Chaney* abdication concept. Order at 10 (directly quoting from *Chaney*; it is RCCI that misstates the concept as "extreme abdication"). Third, the Ninth Circuit case law cited by RCCI in footnotes (RCCI Mem. at 10) changes nothing: the cases indicate the Ninth Circuit recognizes the *Chaney* abdication concept but has not yet found it met in a particular case. Fourth, as Plaintiffs previously briefed, and as RCCI now disputes in error (RCCI Mem. at 10 n.11), there is precedent allowing *Chaney* abdication to be "inferred" from agency action rather than requiring a type of formal policy "pronouncement" that would almost never be used by the agency.

The Second Circuit in *Riverkeeper Inc. v. Collins*, 359 F.3d 156 (2nd Cir. 2004), applied the *Chaney* "policy of abdication" not only to the question of a formally expressed policy, but to the "inference" of such a policy from agency "actions" that allow a court to "discern from them an abdication of responsibilities conferred [on an agency by statute]." *Id.* at 167 (applying the abdication exception but not finding it met in the context of nuclear regulatory decisions, based in part on finding the Nuclear Regulatory Commission had "*consulted* with military and security agencies and because it has implemented various undisclosed protective measures to address the heightened concerns of terrorist attacks." *Id.* at 161, 169 (emphasis added)).

This Court in its Order correctly linked the concept of "abdication of responsibilities" with the Forest Service's conceded decision in this case that its consultation with the Tribe would not occur prior to the very mega-load shipment activity whose potential harms that consultation will examine. The Court correctly concluded that this amounted in practical effect to the abdication of the consultation obligation – rendering it meaningless. Order at 13. The Court correctly applied Ninth Circuit case law holding that a general consultation obligation "typically" occurs prior to the subject action or activity subject to consultation (*California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072 (9th Cir. 2011); and that in the case of consultation with an Indian tribe, consultation must occur prior to the activity or action (*Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984). Order at 12.[5] Here the basis for the Forest Service's tribal consultation duty is made clear in the standards of its Clearwater Forest Plan – indeed the structural combination of NFMA, the Forest Plan, and required tribal consultation in this case would alternatively allow judicial review, regardless of *Chaney*, by providing "meaningful standards" for the Court to apply.

NFMA requires that use and occupancy of National Forest lands "shall be consistent with" Forest Plans. § 16 U.S.C. 1604(i). The Clearwater Forest Plan establishes forest-wide standards "that are considered as minimum requirements that must be met." Forest Plan, Section E at II-20. Standard E3(g) requires that the Forest Service, "[e]nsure that Forest actions are not detrimental to the *protection and preservation of Indian Tribes' religious and cultural sites and*

[5] This is consistent with the Eight Circuit case cited by Plaintiffs in their earlier Injunction Reply, which noted that tribal consultation does not mean a tribe necessarily gets the ultimate substantive outcome it wants, but that as a matter of process, the consultation must occur before the action occurs, and an agency has no discretion to do otherwise. *Oglala Tribe of Sioux Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979); Pls.' Inj. Reply Brf. at 15-16.

practices and treaty rights." *Id*. at II-23 (emphasis added).[6] As this Court found, the Forest Service recognized the potential harms of mega-load shipments and the requirement of "formal consultation" with the Nez Perce Tribe. Order at 13; June 17 Letter at 2, Dkt. No. 8.

The Forest Service contends that Plaintiffs' claims are "similar" to those the Ninth Circuit rejected in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006). Forest Serv. Mem at 4. The Forest Service misapplies that case to Plaintiffs' claims and this Court's Order. In *Gros Ventre*, tribes filed suit against the United States alleging that the government had violated specific and general trust obligations to protect tribal trust resources by authorizing and planning to expand two cyanide heap-leach gold mines located off-reservation. *Id*. at 803.[7] The court held that neither the tribes' treaties nor any of the statutes cited gave rise to acommon law claim for breach of trust against the government for failure to manage non-tribal resources for the benefit of the tribes. *Id*. at 815. *Gros Ventre* has no bearing on the facts and claims before this Court because the Nez Perce Tribe has not brought an action for breach of trust against the United States. Plaintiffs' claims are based on violations of NFMA that require the Forest Service, under its own Clearwater Forest Plan, to "ensure that Forest actions are not detrimental to the protection and preservation of Indian Tribes' religious and cultural sites and treaty practices and treaty rights." This Court correctly relied on the Clearwater Forest Plan, the agency's decision to consult with the Tribe, and Ninth Circuit precedent on the non-discretionary nature of tribal consultation before a potentially harmful activity occurs, to conclude that the

[6] Standard E1(d) of the Forest Plan also requires the Forest Service to: "Insure proposed practices and management activities *are coordinated with* other governmental entities and *Indian Tribes to insure requirements of all laws and regulations are met and terms of Indian Treaties are upheld*. Forest Plan at II-21 (emphasis added).

[7] *Gros Ventre* also involved an allegation of "failure to act" – a claim not presented in the case before this Court and (again) rejected in the discussion of agency action in Section II above.

Forest Service has a duty to consult with the Nez Perce Tribe before any further mega-loads pass through U.S. Highway 12. Order at 12-13.

IV. PRELIMINARY INJUNCTION IS AN APPROPRIATE REMEDY.

The Court correctly recognized that, even if its Order was based on the law relating to writs of mandamus under 28 U.S.C. § 1361, "the result is the same." Order at 16 n.6 (citing and applying principles of mandamus relief). The Court explained that the "duty of the Forest Service to conduct a consultation after finding that the mega-loads might affect cultural and intrinsic values is commanded by Treaty rights, NFMA, and the Forest Plans – there is no discretion to refuse consultation." *Id.* The Court also correctly found that initiating the corridor study and tribal consultation are only a "part of" the Forest Service's duty, which it fails to fulfill if it refuses to exercise its authority to close Highway 12 to mega-load shipments prior to the completion of the corridor study and tribal consultation that will examine the potential harms of those very shipments. *Id.* at 12–13.

It follows correctly from the Court's analysis that the Forest Service's abdication of its non-discretionary consultation duty may be redressed by mandatory injunction available under the Court's equitable powers. "The court has power to preserve the status quo by equitable means. A preliminary injunction is such a means." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988). The Court's power to fashion an appropriate preliminary equitable remedy for this case is not limited to the final relief available to Plaintiffs. *See*, *e.g.*, *Reebok Int'l v. Marnatech Enter.*, 970 F.2d 552, 559 (9th Cir. 1992) (upholding prejudgment asset freeze to preserve the status quo because district courts have "inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief"). Moreover, where the public interest is involved, "equitable powers assume an even broader and more

flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).[8]

The mandatory injunction issued by this Court appropriately prevents irreparable injury by preserving the status quo pending a final decision in this matter. Though mandatory injunctions are typically less favored that prohibitory injunctions, this Court's Order was correctly tailored to "preserve the status quo" pending required consultation and examination of the potential harms of mega-load shipments. Here, the status quo is that the Forest Service publicly declared that no mega-loads were authorized to travel U.S. Highway 12 through the National Forest until the completion of a corridor impacts study and tribal consultation; yet

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[8] In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Supreme Court explained:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592, 88 L.Ed. 754. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp v. Boyd*, 229 U.S. 530, 551, 552, 33 S.Ct. 785, 793, 57 L.Ed. 1317.
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508. *See also Hecht Co. v. Bowles*, *supra*, 321 U.S. 330, 64 S.Ct. 592.

Id. at 398.

RCCI stands poised to again ship a load in defiance of the Forest Service. The mandatory injunction granted by this Court is narrowly tailored to preserve the status quo by ordering the Forest Service to exercise its regulatory enforcement authority during the time necessary to examine and consult on the harms posed by mega-load shipments.

It is unnecessary given the Court's correct analysis and ruling, but if the mandatory injunction the Court granted against the Forest Service were deemed improper, this Court would still have the alternative remedy of directly enjoining RCCI from shipping mega-loads across the National Forest since RCCI is subject to the Court's broad equitable powers to craft an interim remedy appropriate to these circumstances. This would achieve the same result.

V. THE COURT CORRECTLY FOUND THAT THE BALANCE OF EQUITIES FAVORS PLAINTIFFS.

The Forest Service does not claim any potential harm from the injunction. Indeed, the agency issued its closure five days after the Court's Memorandum and Order. Only RCCI has moved for reconsideration of the balance of equities in this case, maintaining that the Court's decision is based on a "misunderstanding of the facts." Defendant-Intervenor Motion at 15.

RCCI takes issue that the Court, while not disputing RCCI's representation that it may lose over $5 million in lost transportation costs, did not expressly recite the full monetary damages RCCI asserts it may potentially lose if U.S. Highway 12 is not available for transport of its mega-loads. *Id*. But the Court's decision not to expressly recite RCCI's full monetary projection– which is speculative – does not constitute a "misunderstanding of the facts." RCCI already presented this same information to the Court for its consideration prior to the Court's decision. *See First Heins Decl.* (Dkt. 21-2) ¶¶ 14,21; RCCI Memo (Dkt. 26-1), at 19–24. Regardless of the amount RCCI asserts it may lose, the Court's equities analysis reflects a more principled calculus. The Court specifically determined that "plaintiffs are not seeking damages;

they are seeking to preserved their Treaty rights along with cultural and intrinsic values that have no price tag." Order at 15.

RCCI's other assertion, that its contracts predate the Court's February, 2013 decision and that it did not knowingly put its loads at risk, is unavailing. The controversy surrounding mega-loads on U.S. Highway 12 began in 2010 with Exxon Mobil and Conoco Phillips' proposals to ship mega-loads along that route. IRU filed its lawsuit against the Forest Service and Federal Highway Administration in 2011 challenging the transport of mega-loads on U.S. Highway 12. Even if RCCI had absolutely no knowledge of this pre-existing controversy - a claim RCCI has not made - RCCI was irrefutably on notice for at least six months from the Court's February, 2013 ruling to the time RCCI defiantly moved its first mega-load across the National Forest on August 5. The Court correctly concluded that RCCI's loss could have been avoided, noting that Plaintiffs' counsel put Omega Morgan on notice in April, 2013 that they would opposed any shipments on U.S. Highway 12. *Id*. The Court also referenced its own February, 2013 decision holding that the Forest Service has its own enforcement authority, and noted that the agency decided in June of 2013 that it needed to conduct further review before approving RCCI's mega-loads. *Id.* at 15. The Court determined that despite all of this prior notice, RCCI decided to proceed with its mega-loads in August 2013 anyway, thereby "knowingly" putting itself at risk." *Id*. The Court concluded that balance of equities "tips the other direction due to the clear command of the Tribe's Treaty rights, NFMA, and the Wild and Scenic Rivers Act." *Id*.

The inescapable fact is that RCCI's asserted monetary losses stem from RCCI presuming the availability of U.S. Highway 12 for its mega-load shipments. RCCI, which defiantly moved its first mega-load across the National Forest despite the Forest Service's repeated instruction not to - now seeks to impose its presumptuous expectations for its remaining mega-loads on the

Tribe's and IRU's rights and interests[9] in the National Forest and Wild and Scenic Corridor's scenic, cultural, esthetic, historical, religious, and recreational values. The Court committed no error: the balance of equities tips decidedly in favor of Plaintiffs.

CONCLUSION

For the foregoing reasons, this Court should deny both motions for reconsideration, deny RCCI's request for a stay pending appeal, and if necessary, order the Forest Service to reissue a valid closure of U.S. Highway 12 to Omega Morgan mega-loads.

DATED this 2nd Day of October, 2013

Respectfully submitted,

/s/

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/s/

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[9] No injunction bond is required in cases brought in the public interest. Courts routinely either waive the bond requirement or impose a minimal bond in cases where the plaintiffs seek to enforce environmental laws. *See, e.g., San Luis Valley Ecosystem Council*, 657 F.Supp.2d 1233, 1248 (D.Colo. 2009) (no bond required in case challenging mineral exploration permit); *Colorado Wild v. U.S. Forest Serv.,* 299 F.Supp.2d 1184, 1191 (D.Colo. 2004) (no bond required in case challenging timber project); *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) ($100).

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2013, I caused the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT-INTERVENOR'S MOTION FOR RECONSIDERATION, OR STAY PENDING APPEAL, AND DEFENDANT'S MOTION FOR RECONSIDERATION to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record listed below:

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