UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEZ PERCE TRIBE, and IDAHO RIVERS UNITED, Plaintiffs-Appellees, vs. U.S. FOREST SERVICE, Defendant, and RESOURCES CONSERVATION COMPANY INTERNATIONAL, Intervenor-Appellant.	**Appeal No. 13-35951** D. Ct. No. 3:13-cv-348-BLW **PLAINTIFFS-APPELLEES' OPPOSITION TO RCCI'S EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee NEZ PERCE TRIBE ("Tribe") is a federally recognized Indian tribe headquartered in Lapwai, Idaho, on the Nez Perce Reservation. Since time immemorial, the Tribe and its members have used and enjoyed the lands and waters of the Clearwater Basin, including areas now encompassing the Nez Perce-Clearwater National Forests and Middle Fork Clearwater/Lochsa Wild and Scenic River. The Tribe has no corporate parent, subsidiaries or affiliates with publicly traded shares.

Plaintiff-Appellee IDAHO RIVERS UNITED ("IRU") is an Idaho non-profit conservation organization whose mission is to protect and restore the rivers of Idaho. IRU has no publicly traded shares, and no corporate parent, subsidiaries or affiliates with publicly traded shares.

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INTRODUCTION

If the Court were to grant the emergency motion for stay pending appeal, it would allow Defendant-Intervenor-Appellant Resources Conservation Company International (RCCI) to ship additional "mega-loads" of massive industrial equipment on U.S. Highway 12 through the Clearwater National Forest and Wild and Scenic corridor of the Middle Fork Clearwater and Lochsa Rivers, in defiance of the U.S. Forest Service's conclusion that the agency must first assess potential impacts of the mega-loads and consult with the Nez Perce Tribe.

Remarkably, RCCI's motion fails even to mention the key fact that the Forest Service determined that the mega-loads were not authorized to cross Forest Service lands until potential impacts on the Wild and Scenic River corridor were evaluated and the agency consulted with the Tribe. But this determination was a predicate for the preliminary injunction entered by Chief District Judge B. Lynn Winmill of the District of Idaho, as set forth in his September 12, 2013 decision (Sept. 12 Order) and confirmed in his October 10, 2013 denial of reconsideration (Oct. 10 Order). *See* Maynard Decl., Exs. K & R (Orders).

The lower court entered the injunction only after RCCI shipped one mega-load in defiance of the Forest Service's explicit instruction that RCCI was not authorized to do so, yet the Forest Service denied the Tribe's request that the agency take enforcement action to prevent the RCCI mega-load shipments. The

injunction was based on the lower court's findings that the Forest Service's denial posed irreparable harm to the Tribe and the public because the impacts of the mega-loads have neither been studied nor has the agency consulted with the Tribe over them. Judge Winmill further found an injunction appropriate because RCCI undertook a deliberate, avoidable "gamble" in choosing Highway 12 as the route for its mega-loads, refuting RCCI's claims of irreparable harm due to financial costs. Those factual findings deserve deference from this Court, and alone require denial of the motion.

The district court's legal rulings were also correct. As Judge Winmill explained, the Forest Service has a non-discretionary duty under the National Forest Management Act (NFMA), the Clearwater Forest Plan, and Ninth Circuit precedent to consult with the Tribe prior to allowing mega-load shipments. The court also correctly found that the Forest Service made a final denial of the Tribe's request that it prevent the mega-loads, which was a final agency action properly reviewable under the APA and the Supreme Court's decision in *Heckler v. Chaney*. By entering injunctive relief ordering the Forest Service to exercise its authority under its own closure regulations to prevent further unauthorized RCCI mega-loads, the district court properly acted within its broad equitable discretion to protect the procedural and substantive rights of the Tribe and the public, including IRU.

In summary, RCCI has shown neither a strong likelihood of prevailing on the merits of its appeal, nor clear error in the lower court's factual determinations that the Tribe and IRU face irreparable harms which outweigh RCCI's claimed financial harms caused by its own "gamble." And the public interest does not support allowing RCCI to further flout the Forest Service's direction that an impacts study and Tribal consultation must be completed before the mega-loads may be allowed through the National Forest and Wild and Scenic River corridor. Accordingly, the emergency motion for stay pending appeal should be denied.

STATEMENT OF RELEVANT FACTS

A. Highway 12 and the Wild and Scenic Corridor.

U.S. Highway 12 traverses the Nez Perce Reservation and the Tribe's treaty-reserved territory, including what are now the Nez Perce-Clearwater National Forests in central Idaho. Highway 12 serves as a primary route for Tribal transportation, commerce, safety, and the exercise of treaty-reserved rights and access to culturally significant sites on National Forest and other public lands in Idaho and Montana. *See* Sept. 12 Order, pp. 2-3; Whitman Decl. (Maynard Decl., Ex. D); Williamson Decl. (Lopez Stay Decl., Ex. K).[1]

[1] Because RCCI's motion omits most of Plaintiffs' declarations and exhibits filed in the district court, they are attached to the accompanying Declaration of Michael Lopez In Opposition To Motion to Stay ("Lopez Stay Decl.").

U.S. Highway 12 traverses the Clearwater National Forest along the narrow winding canyons of the Middle Fork Clearwater and Lochsa rivers, which are protected by Congress under the Wild and Scenic Rivers Act of 1968. *See* 16 U.S.C. § 1274(a)(1); Sept. 12 Order, p. 4. Because Highway 12 is located within the designated Wild and Scenic River corridor, the highway easement deed the United States granted to the State of Idaho in 1995 expressly requires that scenic and esthetic values of the corridor be protected, in accordance with the Wild and Scenic Rivers Act. *Id.*

B. The Controversy Over Efforts To Convert U.S. Highway 12 Into A "High and Wide" Corridor for Industrial Mega-loads.

The oil industry and a specialized group of shipping companies have been working to convert U.S. Highway 12 into what they term an industrial "high-and-wide" corridor for shipment of mega-loads headed to the Canadian tar sands.[2]

The shipments are called "mega-loads" because of their huge size: they typically weigh over a half-million pounds; are so wide that they entirely occupy a two-lane highway; are so long (over 250 feet) that they must slowly navigate the narrow canyons of the Clearwater/Lochsa corridor; and they require a long convoy of support vehicles, police escorts, and a rolling roadblock that prohibits passage of

[2] RCCI misleadingly claims its mega-loads are "environmentally friendly" because the equipment processes water used in tar sands mining. But tar sands mining is environmentally destructive on a massive scale, and the mega-load shipments in fact facilitate that activity.

traffic on the highway in either direction. *See* Sept. 12 Order, p. 5; Laughy Decl. (Lopez Stay Decl., Ex. D).[3]

The effort to convert Highway 12 into a "high and wide" corridor was initiated by Exxon Mobil, which planned to ship over 200 mega-loads from Korea to its Kearl tar sands project in Alberta. Exxon Mobil paid for numerous highway modifications to accommodate mega-loads, including improving turnouts, raising utility lines, and clearing tree limbs more than 30 feet above the highway, even in the Wild and Scenic corridor. *See* Complaint (Maynard Decl., Ex. A), ¶¶ 38-41.

The prospect that scenic and rural U.S. Highway 12 could become an industrial high-and-wide corridor triggered substantial public opposition and litigation. Initial state court litigation resulted in a ruling by the Idaho Supreme Court in 2010 that the Idaho Transportation Department (ITD) must conduct "contested case hearings" to evaluate state permits for the mega-loads. *See Laughy v. Idaho Transp. Dept.,* 243 P.3d 1055 (Idaho 2010). Such contested case hearings continued through much of 2011, and Exxon Mobil was finally forced to abandon its plans to ship over 200 mega-loads up Highway 12. It ended up cutting the loads down and shipping them on an alternative route; and now claims the equipment delivery delays cost it $2 billion. *See* Addendum hereto.

[3] As graphically illustrated in the Addendum to this brief, the RCCI mega-loads are larger than a Space Shuttle orbiter.

These battles over Highway 12 mega-loads generated intense media attention.[4] This controversy and public opposition – and the financial losses claimed by Exxon Mobil – belie RCCI's assertion that it conducted "extensive" analysis in identifying Highway 12 as its preferred route, and is now surprised to find that continued opposition has blocked its mega-loads. The Wall Street Journal has thus aptly termed RCCI's problem to be "self-inflicted." *See* Addendum.

C. Prior *IRU v. Forest Service* Litigation.

As the district court also found, RCCI's claims of surprise and prejudice are contradicted by the prior *IRU v. Forest Service* litigation, which Judge Winmill adjudicated. *See* Sept. 12 Order, pp. 14-15; Oct. 10 Order, pp. 4-5. That case was filed in March 2011 and garnered wide media attention. *Id.*

IRU there challenged the Forest Service's determination that it lacked authority or jurisdiction to regulate mega-loads on Highway 12 within the Clearwater National Forest and the Wild and Scenic River corridor. On February 7, 2013, Judge Winmill granted summary judgment to IRU, holding that the Forest Service has jurisdiction to regulate mega-loads on National Forest lands and within the Wild and Scenic River corridor, citing an extensive line of authority "beginning with the Property Clause and proceeding through the Organic Act, the Federal-Aid Highways Act, the Wild and Scenic Rivers Act, and finally the Highway

[4] A simple Google search reveals hundreds of newspaper articles were printed in 2010-12 on the Highway 12 mega-load controversies.

Easement's directive to protect the scenic and esthetic values of the river corridor." *See IRU v. Forest Service*, 2013 WL 474851 at * 7 (D. Idaho, Feb. 7, 2013). Notably, the Forest Service did not appeal this ruling.

D. RCCI Was On Notice That Its Mega-loads Were Opposed.

The February 2013 ruling in *IRU v. USFS* was widely publicized, so RCCI's shipping agent, Omega Morgan, immediately wrote ITD to ask whether it affected the availability of Highway 12 for its planned mega-loads. *See* Lewis & Sedivy Decls. (Lopez Stay Decl., Exhs. E & F). Counsel for IRU responded in early April 2013, advising Omega Morgan that Forest Service approval would be required, and that IRU and others would vigorously challenge any future mega-loads proposed for the Wild and Scenic River corridor. *Id.* As the district court found, this put RCCI on notice that Plaintiffs "would be attempting to block any [mega-load] shipments down Highway 12 unless Omega-Morgan obtained permission from the Forest Service." Sept. 12 Order, pp. 14-15.

E. The Forest Service Has Not Authorized RCCI's Mega-Loads.

The Forest Service responded to the *IRU v. Forest Service* ruling in June 2013 by establishing interim criteria for when a large load proposed for Highway 12 would require its review. *See* Sept. 12 Order, p. 5. Clearwater Forest Supervisor Brazell found that RCCI's mega-load proposals triggered those criteria, and found that "[t]ransport of such loads may impact visitor and traveler

experiences and affect cultural and intrinsic values associated with the corridor." *Id.* Because he noted it is "difficult to define" how these values might be affected by the mega-loads without further study, Supervisor Brazell wrote to ITD: "Until we have a clear understanding of these potential impacts, I cannot support authorization of such oversized loads through the National Forest or within the Wild and Scenic River corridor." *Id.* (emphasis added). He went on to state:

> Until such an assessment can be completed, and its findings incorporated into an MOU or other agreement between ITD and the Forest Service, I cannot agree to the current ad hoc process of authorizing such use. Any proposals meeting the interim criteria will require formal consultation with the Nez Perce Tribe which may take substantial time.

See June 17, 2013 Letter (Lopez Stay Decl., Ex. A) (emphasis added).

In a July 26, 2013 letter to ITD, the Forest Service agreed to modify one of the interim criteria triggering its review of mega-load proposals, but again "reiterate[d] that [it] does not support ITD permitting oversized loads meeting the interim criteria until the impacts of that use on the corridor values is better understood." *See* Sept. 12 Order, p. 6; July 26, 2013 Letter (Lopez Stay Decl., Ex. A). The Forest Service letter referenced the "multitude of congressionally designated areas converging in the corridor" including the Wild and Scenic River system, the Selway-Bitterroot Wilderness, the Lewis and Clark and Nez Perce National Historic Trails, the Northwest Scenic Byway, over 52 cultural resources identified under the National Historic Preservation Act, and the Tribe's 1855

Treaty. *Id.* The Forest Service again requested that "ITD not permit these loads until we complete a corridor study examining such uses and their potential impacts to the intrinsic values of the corridor. And then only if the corridor study and consultation with the Nez Perce Tribe indicates such uses can be compatible with the other uses and values of the corridor." *Id.*

Despite these pleas to wait, ITD issued a permit on Friday, August 2, 2013, allowing Omega Morgan to transport an RCCI mega-load the next Monday; and Omega Morgan also wrote the Forest Service on August 2nd saying it intended to proceed with the shipment. *See* Sept. 10 Order, p. 6. Omega Morgan's letter claimed that "[a]s a consequence of our extended interaction with the Forest Service, ITD, and local interests, we have a plan that recognizes the economic benefit we bring to the region and avoids or mitigates environmental impacts from our use of the Highway 12 corridor." *See* Lopez Stay Decl., Ex. A.

That Monday, Forest Supervisor Brazell responded to Omega Morgan in writing, stating that the agency "found [Omega Morgan's] letter troubling in many ways." *See* August 5, 2013 Letter (Lopez Stay Decl., Ex. A). Supervisor Brazell stated that the letter "gives the false impression that [Omega Morgan] and my staff have been having extended interaction," noting that the agency and Omega Morgan met only once in May, and the result of the meeting was that the Forest Service "had concerns and did not support the transport of over legal loads . . .

until further review and consultation can occur." *Id.* The Forest Service also "disagree[d]" with the company's assertions about economic benefits and mitigating environmental impacts, noting that "the effects to the Nez Perce Tribe and to the intrinsic values of the corridor are undetermined" and Omega Morgan "did nothing to address our other concerns." *Id.* The Forest Service reiterated its "determination that [its] interim criteria indicates additional review is required" and emphasized: "At this time, the Forest Service does not consent, approve or otherwise authorize Omega Morgan to transport the subject over-legal loads on US Highway 12 between MP 74 and 174." *Id.* (emphasis added); Sept. 12 Order, p. 7.

G. Forest Service Denial Of Tribe's Petition For Relief.

Upon learning that Omega Morgan had informed the Forest Service that it would ship a mega-load that day in defiance of the Forest Service's directives, the Chairman of the Nez Perce Tribe telephoned the Chief of the Forest Service and made a request for relief: that the Forest Service exercise its authority and prohibit mega-load shipments on U.S. Highway 12. That request for relief was denied. *See* Sept. 12 Order, p. 7; Whitman Decl., ¶ 16 (Maynard Decl., Ex. D). The first mega-load moved later that day, August 5, and proceeded through the Reservation, the National Forest, and the Wild and Scenic River corridor.

The Tribe and IRU then filed this action and sought an injunction ordering the Forest Service to exercise its authority and implement its interim directives of

June 2013 by preventing any further mega-loads through the Clearwater National Forest and Wild and Scenic River corridor until the study and consultation are completed, which the district court granted on September 12, 2013 and reaffirmed on October 10, 2103. *See* Sept. 12 and Oct. 10 Orders.

STANDARD OF REVIEW

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of this Court's discretion." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). The stay factors are "(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." *Id.* (emphasis added).[5]

This Court reviews an order granting a preliminary injunction for abuse of discretion; this "review is limited and deferential." *Shell Offshore v. Greenpeace*, 709 F.3d 1281, 1286 (9th Cir. 2013); *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (same). Findings of fact are reviewed for clear error, and legal findings are subject to *de novo* review. *Shell Offshore*, 709 F.3d at 1286. "Under this standard, as long as the district court got the law right, it will not be reversed

[5] RCCI misstates this standard by asserting it only need show a likelihood of prevailing on the merits, *see* RCCI Motion at 4, when a "strong showing" of prevailing on the merits is required, as quoted above.

simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id.*

ARGUMENT

I. RCCI FAILS TO SHOW AN "EMERGENCY."

Circuit Rule 27-3(a) emergency motions are only allowed where "irreparable harm relief is needed in less than 21 days." RCCI fails to establish that its remaining mega-loads must begin transport on Highway 12 within twenty-one days to avoid irreparable harm. RCCI admits it is re-routing its second mega-load, which has been sitting for several weeks at the Port of Wilma, Washington; and that alternate routes are available for its remaining 6 loads.[6] Yet RCCI provides no facts about why it cannot utilize any alternative route, other than its cursory assertion that would cost more. Because RCCI could act promptly to utilize alternative routes, it fails to make an emergency showing.

Moreover, while RCCI may incur added expense to re-route the loads, Judge Winmill found that any losses beyond that (such as its alleged $85 million potential loss from contract cancellation) are speculative; and that all losses are of RCCI's own making due to its "gamble" on Highway 12. *See* Sept. 12 Order, pp. 14-15;

[6] *See* Declaration of William Heins at 9 ("RCCI is compelled to attempt to transport the unit at the Wilma site by an alternate route"); RCCI Motion at iii ("one of the evaporators must be shipped now. If the order is not stayed pending appeal, RCCI faces . . . increased costs to ship the remaining six evaporators by an alternate route").

Oct. 10 Order, pp. 4-5. Because RCCI continues that gamble now, the Court should deny RCCI's emergency motion for stay.

II. THE LOWER COURT'S LEGAL RULINGS WERE CORRECT.

A. The District Court Properly Found Final Agency Action.

In assessing the basis for a preliminary injunction in its Sept. 12 Order, and again in its Oct. 10 Order denying reconsideration, the district court correctly found final agency action in this case. As Judge Winmill explained, the final agency action here is grounded in the APA § 551(13) definition of "agency action," Ninth Circuit precedent on finality, and the "practical effects" of the Forest Service's August 5 denial of the Nez Perce Tribe's request for relief.

On August 5, 2013, the highest official of the Nez Perce Tribe, its Tribal Chairman, telephoned the highest official of the U.S. Forest Service, its Chief, and made a request for relief: that the Forest Service exercise its authority and prohibit mega-load shipments on U.S. Highway 12 until tribal consultation and a corridor impacts study were completed, as the Forest Service itself concluded were needed. That request for relief was denied. Whitman Decl. ¶ 16 (Maynard Decl., Ex. D). As found in the district court's prior *IRU v. Forest Service* decision, a denial of a request for relief constitutes 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. Forest Service*, 2013 WL 474851, at *6 (D. Idaho

February 7, 2013) (distinguishing agency action through denial of a request, from an agency failure to act); *and see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request").

The telephonic means of the Tribal Chairman's August 5 request for relief, and of the Forest Service Chief's denial, was permissible,[7] and RCCI's argument from case law involving agency press statements (RCCI Mot. at 8) is irrelevant to the facts found by the district court.[8] RCCI's telephone "ramifications" argument (RCCI Mot. at 9) is similarly off-target: as the district court found, it bears no resemblance to the necessary telephone outreach between policy-making officials

[7] No language in the APA or case law prohibits a telephone conversation from serving as the mechanism for making a request to an agency for action or for the agency to deny that request. *See*, *e.g.*, *John Doe Inc. v. Gonzalez*, 2006 WL 1805685, at *13 (D.D.C. 2006) (ultimately finding lack of subject matter jurisdiction, but finding plaintiff and federal defendant agreed that a final agency action on a permit request had occurred during a "telephone conversation" and noting no prohibition of a telephone conversation as final agency action); *Huron Mountain Club v. U.S. Army Corps of Engineers*, 2012 WL 3060146, at *8 n.7 (W.D. Mich. 2012) (noting that Corps telephone statement was not a final agency action, as it was mere repetition of a prior judicial determination, but noting no prohibition of a telephone statement as a mechanism of final agency action).

[8] RCCI relies on "failure to act" case law to mischaracterize the present case, which challenges final agency action under APA § 706(2) not an alleged "failure to act" under APA § 706(1). RCCI's reliance on *Western Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006) is particularly inapposite, as that case was brought under the Endangered Species Act, which the Court found did not include a failure to act. 468 F.3d at 1110. Here, by contrast, the district court found that the Forest Service made a final agency decision under the APA.

that occurred in this case, that indeed must be available for emergency requests and responses between the Chairman of an Indian tribe and the Chief of the U.S. Forest Service. *See* Oct. 10 Order, p. 2.

The district court also correctly found that the Forest Service's August 5 denial met the "pragmatic" requirements of finality under 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: "[T]he 'finality element must be interpreted in a pragmatic and flexible manner.'" *Id.* (emphasis added). As to the consummation prong, "It is the effect of the action and not its label that must be considered." *Id.* at 985 (emphasis added). The legal effect prong is satisfied when an agency "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Id.* at 987 (emphasis in original). That 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).

The district court correctly found that the facts here 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 mega-load moved later that day and proceeded through the Reservation, the National Forest, and the Wild and Scenic River corridor. Tellingly, every subsequent court filing by the Forest Service has confirmed the agency's denial of the Tribe's request that it must complete the required corridor study and Tribal consultation prior to the mega-load shipments. As the district court correctly found, the "practical and legal effects" of the Forest Service's denial of relief, for the Nez Perce Tribe and IRU, were clearly final. Oct. 10 Order at 2-3.

B. The District Court Correctly Found Judicial Review Not Precluded by *Heckler v. Chaney*.

The district court correctly found that the "presumption of unreviewability" for non-enforcement cases established in *Heckler v. Chaney*, 470 U.S. 821 (1985), did not preclude judicial review in this case.

First, given the Forest Service's conceded first-impression, incomplete knowledge of the harms of mega-load shipments on U.S. Highway 12 presented in this case, this is not the type of routine "technical" agency non-enforcement to which *Chaney* applies. *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, the Forest Service's filings before the district court continue to portray an agency that has decided it does not have enforcement authority, rather than one engaged in routine, technical non-

enforcement, rendering *Chaney* inapplicable. *See id.* at 833 n.4 (disclaiming application where an agency believes it lacks enforcement jurisdiction). Third, the district court correctly found that the Forest Service's August 5 denial of the Tribe's requested relief that it stop RCCI mega-loads pending completion of Tribal consultation and a corridor impacts study amounted to an abdication of its responsibility to consult with the Tribe before allowing the very activity whose harm consultation would examine. *See id.* at 833 n.4; Sept. 12 Order at 12-13. Fourth, this case presents claims of injury to Indian treaty rights protected under Article VI of the U.S. Constitution, so *Chaney* does not apply. *See id.* at 838 (disclaiming application of the decision to cases presenting "colorable" claims of injury to constitutional rights). 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 legal precedent requiring Tribal consultation before allowing the very activity whose harm consultation will examine. *See id.* at 834-35.

Plaintiffs briefed these multiple distinctions of this case from *Chaney* below. *See* Pls.' Prelim. Inj. Reply Brf., pp. 8-21 (Maynard Decl., Ex. J). The district court relied on only one – agency abdication – in finding that the Forest Service's denial of the Tribe's request that it prevent the RCCI mega-loads prior to consultation had the practical effect of completely abdicating the agency's

consultation obligation – rendering it meaningless. *See* Sept. 12 Order, p. 13. The court properly concluded that, under the facts of this case and the consultation duty, the Forest Service position constituted an agency policy "so extreme as to amount to an abdication of its statutory responsibilities" under *Chaney*. *Id.*

In reaching this conclusion, the district court also correctly applied Ninth Circuit precedent that a consultation obligation "typically" occurs prior to the activity, *see id.,* p. 12, *citing California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072 (9th Cir. 2011); and that for consultation with an Indian tribe, consultation must occur prior to the activity. *Id.*, *citing Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984).[9] Here the basis for the Forest Service's Tribal consultation duty arises from the requirements of NFMA and its Clearwater Forest Plan, as Judge Winmill held.

As the district court correctly explained, NFMA requires that use of National Forest lands "shall be consistent with" Forest Plans. *See* 16 U.S.C. § 1604(i); Sept. 12 Order, pp. 11-12. 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

[9] This is consistent with *Oglala Tribe of Sioux Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979), which noted that tribal consultation does not mean a tribe necessarily gets the 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.

Forest actions are not detrimental to the protection and preservation of Indian Tribes' religious and cultural sites and practices and treaty rights." *Id*. at II-23 (emphasis added).[10] As the district court emphasized, the Forest Service itself recognized the potential harms of mega-load shipments and the requirement of "formal consultation" with the Nez Perce Tribe before they may be allowed. *See* Sept. 12 Order at 13, *citing* June 17 Letter at 2.[11]

RCCI's arguments establish no legal error by the district court. The Ninth Circuit case law cited by RCCI establishes nothing more than that the Ninth Circuit recognizes *Chaney* abdication but has not yet found it met in a particular case. But the Ninth Circuit has recognized the *Chaney* exception allowing judicial review where an agency disclaims jurisdiction. *See Montana Air Ch. No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753 (9th Cir. 1990) (recognizing both *Chaney* footnote 4 "exceptions," and applying the jurisdictional disclaimer to its specific facts). And there is precedent applying *Chaney* abdication to agency actions as the inference of

[10] 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). These Forest Plan provisions are readily accessible on the internet. *See* Sept. 12 Order, p. 11, n. 5.

[11] RCCI cites *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), which has no bearing here. *Gros Ventre* held that neither the tribes' treaties nor any statutes cited gave rise to a common 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. The Nez Perce Tribe has not brought an action for breach of trust here.

policy rather than solely to formal policy pronouncements. *See Riverkeeper Inc. v. Collins* 359 F.3d 156, 161, 167-69 (2nd Cir. 2004) (applying, though not finding met, *Chaney* abdication not only to the question of a formally expressed policy but to the "inference" of such a policy from agency "actions" that would allow a court to "discern from them an abdication of responsibilities conferred [on an agency by statute]"). Here the district court found, under the specific facts of this case, that the Forest Service's August 5 denial of Tribal consultation prior to allowing mega-load shipments through the Reservation and National Forest amounted to an abdication of the Forest Service's duty to consult before the mega-loads were shipped, rendering that duty meaningless. *See* Sept. 12 Order, pp. 11-14. Based on that finding, the lower court did not err in determining that the *Chaney* abdication exception applies.

C. Forest Service Regulations Allow Closure Of Highway 12 To Mega-loads.

The district court also correctly found that the Forest Service's closure regulations under 36 C.F.R. § 261.50 authorize the Forest Service to close U.S. Highway 12 specifically to mega-loads, while not interfering with other highway traffic. Judge Winmill quoted from § 261.50(a) in his September 12 Order: "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.'" *See* Sept. 12 Order, p. 13. And his October 10 Order affirmed the

agency's broad closure authority under the plain language of § 261.50(a) and in conjunction with other authorities under §§ 261.53 and 261.58 of the closure regulations. *See* Oct. 10 Order, pp. 3-4.

The plain language of Section 261.50(a) gives the Forest Service broad authority to close or restrict the use of any area within its jurisdiction:

> The Chief, each Regional Forester . . . 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.

See 36 C.F.R. § 261.50(a) (emphasis added). As Judge Winmill held in *IRU v. Forest Service,* the Highway 12 easement did not remove the Forest Service's jurisdiction over the federal lands; indeed the agency's retained authority was required to "ensure compliance" with the easement. *IRU v. Forest Service*, 2013 WL 474851, at *8. The district court made no error in concluding that § 261.50(a) provides a basis to issue a closure order for mega-loads on Highway 12 within the Clearwater National Forest and Wild and Scenic River corridor. [12]

[12] 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). A court need not defer if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Id.* (emphasis added; quotation omitted). Judge Winmill correctly followed this principle. *See* Sept. 12 Order, pp. 13-14; Oct. 10 Order, pp. 3-4.

The district court's October 10 reconsideration order also correctly rejected the Forest Service's assertion that "the only relevant prohibitions in [Subpart B] are found in 36 C.F.R. § 261.54" which allows closure only of "National Forest System Roads." Oct. 10 Order, p. 3. The court held that "the Forest Service's authority is not so limited." *Id.* The court identified plainly applicable prohibitions under the remainder of Subpart B, including closures related to "entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System." *Id.* at 4 (quoting § 261.58(z)). Additional provisions which the court found give the Forest Service the authority "to close 'any area' to protect (1) 'special biological communities,' (2) 'objects or areas of historical…[or] geological…interest,' and (3) 'the privacy of tribal activities for traditional and cultural purposes.'" *Id.* (quoting § 261.53(b), (c), (g)). Again, based on the plain language and structure of the closure regulations, the lower court was correct that "[t]hese provisions are not limited to "National Forest System Roads," and thus Judge Winmill reaffirmed his "earlier holding that the regulations give the Forest Service authority to close Highway 12 between mileposts 74 and 174" to mega-loads. *Id.*

Despite the district court's conclusion on the plain language of § 261.50(a), RCCI argues on appeal that § 261.50(a) "cannot be read to include *roads* because that would render paragraph (b) superfluous." RCCI Mot. at 15. This

unreasonable interpretation would allow a significant land area indisputably under the Forest Service's jurisdiction – U.S. Highway 12 through the Clearwater National Forest – to somehow slip through the cracks of the Forest Service's closure authority. Indeed, RCCI's interpretation would give incomplete meaning to § 261.50(a). Section 261.50(b) provides that the Forest Service may issue closures or restrictions to defined "National Forest System roads and trails," so that the Forest Service can issue an order closing or restricting the use of a National Forest System road or trail otherwise classified as open. As the Forest Service itself stated, § 261.50(a) is "broader than subsection (b)". Forest Serv. Recons. Mem. at 3 (Maynard Decl., Ex. O). It is unreasonable to read the plain language of § 261.50(a) as limiting the Forest Service from addressing *any* necessary closures or restrictions on *any* area within its jurisdiction, which U.S. Highway 12 indisputably is.

D. Injunctive Relief Was A Proper Exercise Of The District Court's Equitable Power.

In entering injunctive relief here, the district court observed that whether under normal injunction standards or writs of mandamus under 28 U.S.C. § 1361, "the result is the same." Sept. 12 Order, p. 16 n.6. 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 completion of the corridor study and tribal consultation that will examine the harm of those very shipments. *Id.* at 12–13.

It follows from the district court's findings that the Forest Service's abdication of its non-discretionary consultation duty could 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 district court's power to fashion an equitable preliminary remedy 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 status quo because district courts have "inherent equitable power to issue provisional remedies ancillary to its authority to provide final equitable relief"). Where, as here, 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); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (court has power "to do equity and to mould each decree to the necessities of the particular case").

The preliminary injunction issued by the district court was tailored to preserve the status quo pending required Tribal consultation and examination of the harms of mega-load shipments. Indeed the status quo was that the Forest Service had publicly declared that mega-loads were not authorized to travel Highway 12 through the National Forest and the Wild and Scenic River corridor until the completion of a corridor impacts study and Tribal consultation. Yet RCCI defied the Forest Service with the August 5 shipment and stands poised to ship additional unauthorized mega-loads in demanding of this Court a stay of the district court's preliminary injunction.

In summary, RCCI has failed to carry its burden of showing a strong likelihood of prevailing on the merits of its challenges to the district court's correct legal rulings, thus requiring denial of its emergency motion for stay.

III. THE BALANCE OF EQUITIES TIPS SHARPLY AGAINST RCCI, AS THE DISTRICT COURT TWICE FOUND.

Denial of the motion is also required because RCCI asks this Court to reweigh the district court's balancing of the equities. However, "[t]he assignment of weight to particular harms is a matter for district courts to decide." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (upholding denial of preliminary injunction where the "record . . . shows that the district court balanced all of the

competing interests at stake"). *See also Western Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (same).[13]

The record shows that the district court did balance the competing interests. Judge Winmill recognized it could cost RCCI $5 million dollars to reroute its mega-loads and explained: "The size of this loss weighs heavy in the Court's analysis." Sept. 12 Order, p. 14. He found, however, that "this loss could have been avoided," and "RCCI knowingly put its loads into a position" where it could incur losses while waiting for Forest Service review. *Id.* at 15. The district court also acknowledged the $85 million loss RCCI claims it could incur if its customers terminate contracts due to delay, but it found this sum to be "more speculative" and could be avoided by re-routing the mega-loads. Oct. 10 Order, p. 4.

Ultimately the district court found that RCCI's corporate "gamble" – "knowingly" putting its loads in a position where it would incur losses "if it must

[13] RCCI relies on *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987) and *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505 (9th Cir. 1988). RCCI Motion, p. 20. While these cases show that a corporation's losses may be an appropriate factor to balance, neither case supports reaching a result different from the district court here. *See Amoco*, 480 U.S. at 541–47 (faulting this Court for overturning district court's balancing of equities by mechanically granting injunction upon finding a legal violation instead of applying the "well-established" equitable principle); *Half Moon*, 857 F.2d at 507 (upholding district court's denial of plaintiffs' motion for preliminary injunction upon finding district court used proper legal standard and finding that "defendants' hardship . . . appears to outweigh the harms to the plaintiffs") (emphasis added). This Court should similarly defer, since the district court weighed the interests following the correct legal standard and did not mechanically grant a preliminary injunction upon finding the Forest Service violated the law.

wait for the Forest Service review" – did not outweigh "the clear command of the Tribe's Treaty rights, NFMA, and the Wild and Scenic Rivers Act." *See* Sept. 12 Order, p. 15. This analysis comports with the traditional principles of equity to be utilized when balancing hardships and is entitled to deference here.[14] *See*, *e.g.*, *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (giving no weight to intervenors' financial interests where they bid on leases "with full awareness of [a] suit and chose to gamble on the EIS being adequate").[15]

This Court must give substantial deference to Judge Winmill's findings that any threat of irreparable financial harm to RCCI is self-imposed by its actions taken while on notice of the Forest Service's authority over mega-load transport on Highway 12, the Forest Service's duty to complete a corridor study and Tribal

[14] Testimony on the significance of this case to the Nez Perce Tribe's sovereign, cultural, and other interests was presented in four Tribal declarations, which underscored the irreparable harms that Judge Winmill correctly found would occur from unstudied and unconsulted mega-loads. *See* Whitman Decl. (Maynard Decl., Ex. D); Smith, Picard, and Williamson Decls. (Lopez Stay Decl. Exs. K-M).

[15] *See also Wetzel's Pretzels v. Johnson*, 797 F.Supp.2d 1020, 1029 (C.D.Cal. 2011) (granting injunction, where "Defendants would suffer a loss of revenue and . . . . its employees would, in all likelihood, lose their employment" because "it is Defendants who brought on those risks"); *Conservation Congr. v. U.S. Forest Serv.*, 803 F.Supp.2d 1126, 1133-34 (E.D.Cal. 2011) (declining to factor companies' economic losses in the balance of hardships where "defendant-intervenors were on notice that the project might be enjoined, and any economic investments related to the project were made at the companies' own peril"); *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D.Cal. 1988) ("While an injunction halting the timber sale is not without risk, it is ultimately necessary to vindicate the commitment to substantive values underlying the Wild and Scenic Rivers Act").

consultation, and the strong public and legal opposition to transporting mega-loads on Highway 12. *See* Sept. 12 Order, pp. 14-15 (finding that RCCI was on notice its shipments would be contested); Oct. 10 Order, at 5 (finding that "it was clear that the route was contested" by March 2011). The Court also must defer to the lower court's findings that RCCI's purported financial losses are speculative, avoidable, and the result of continued defiance of a federal agency; whereas "plaintiffs are not seeking damages; they are seeking to preserve their Treaty rights along with cultural and intrinsic values that have no price tag." *See* Sept. 12 Order, p. 14. These invaluable harms to Plaintiffs are irreparable and tied closely to the U.S. public interest in lawful and careful management of the National Forest and Wild and Scenic River corridor, and places of unique historical and cultural importance to the Nez Perce Tribe. Because the district court's weighing of the equities was not an abuse of discretion, the Court should deny RCCI's motion.

IV. THE PUBLIC INTEREST STRONGLY WEIGHS AGAINST A STAY PENDING APPEAL.

Finally, a stay should be denied on public interest grounds. As noted above, if the stay is granted, the Court would allow RCCI to ship mega-loads across the Clearwater National Forest and Wild and Scenic River corridor in defiance of the Forest Service's directive that mega-loads are not authorized until a corridor study and Tribal consultation are completed. This is what RCCI did when it shipped one mega-load in August. Condoning further such unauthorized acts is certainly not in

the public interest.[16] Moreover, protecting the rights of the Tribe in completing consultation before the mega-load shipments occur is also strongly in the public interest. Accordingly, this Court should again deny RCCI's motion.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully pray that the Court deny RCCI's emergency motion for stay pending appeal.

Dated: October 21, 2013

Respectfully submitted,

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[16] RCCI's unclean hands in flaunting the Forest Service's instruction that its mega-loads are not authorized to cross the public lands also weigh against granting the requested stay. *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 947 (9th Cir. 2013) ("An injunction is an equitable remedy. While the *Winter* factors are pertinent in assessing the propriety of any injunctive relief, traditional equitable considerations such as laches, duress and unclean hands may militate against issuing an injunction that otherwise meets *Winter*'s requirements") (internal quotation and citation omitted).

CERTIFICATE OF SERVICE

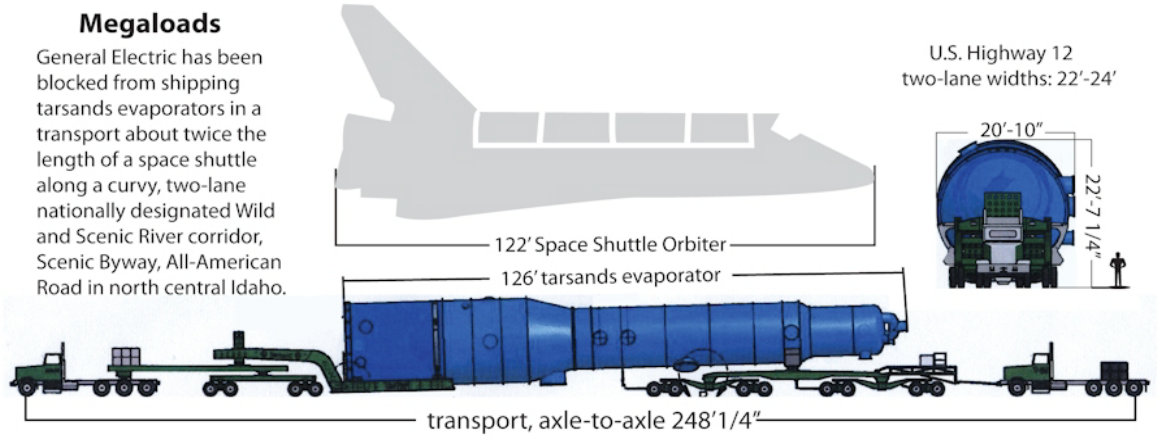
I hereby certify that on this 21st day of October, 2013, I electronically filed the foregoing PLAINTIFFS-APPELLEES' OPPOSITION TO RCCI'S EMERGENCY MOTION FOR STAY PENDING APPEAL and the accompanying DECLARATION OF MICHAEL A. LOPEZ (along with all exhibits thereto) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which sent a Notice of Electronic Filing to all counsel of record.

/s/ Laird J. Lucas

ADDENDUM

Wall Street Journal article and graphic on RCCI mega-loads
Wednesday, 16 October 2013

Road Too Far: GE Strains to Deliver Energy Colossus
By Kate Linebaugh –



General Electric Co. has a colossal problem.

The industrial conglomerate makes a machine the size of a Space Shuttle orbiter that can extract crude oil from the depths of the Canadian oil sands. But first it has to get it there, and the only way is a road a federal judge says GE can't use.

Last week, GE lost an attempt to overrule a federal injunction preventing it from using a stretch of scenic Idaho highway to haul the giant piece of equipment, called a water evaporator. It has appealed the injunction. For now, though, the evaporator is stuck near the Port of Wilma in Clarkston, Wash., without a way to get to its destination hundreds of miles away in Alberta, Canada.

For GE, which prides itself on solving the world's biggest problems, the ruling has become a headache that could cost the company as much as $75 million in sales. And it is self inflicted.

Two years ago, Imperial Oil, the Canadian unit of Exxon Mobil Corp., faced similar challenges when trying to haul 200 pieces of equipment along the same roadway. But legal challenges to its preferred route led Imperial to disassemble the equipment and move it along interstate highways instead.

The cost of disassembling them and reassembling them was significant. Final construction of its oil sands site exceeded budget by C$2 billion to C$12.9 billion.

“It would be fair to say that the cost associated with module delays was the single largest factor,” said Imperial Oil spokesman Pius Rolheiser. All of Imperial Oil’s equipment is now made in Edmonton in part to avoid the transportation headaches.

Even without the legal obstacles, transporting the evaporators would be a feat. Each weighs 322 tons, is as wide as a two-lane highway and, laying on its side, as tall as a two-story house. Moving it takes two trucks–one pulling and another pushing–with 20 axles along multiple trailers stretching the load out to 250 feet. Interstate highways aren’t an option, because the load can’t get under the overpasses.

Opponents, including the Nez Perce Tribe and conservation group Idaho Rivers United, say they are concerned the giant convoys will change the character of the national park and infringe on tribal values.

The holdup is an unneeded hassle for GE as it leans on its oil business for growth as core areas like power generation remain stalled.

The company has been building up its oil field services businesses for the past decade, and GE Chief Executive Jeff Immelt has invested to expand its offerings in unconventional fields like shale gas and the oil sands.

GE’s Resource Conservation Company International has delivered about 20 evaporators to projects in the oil sands since 2002 but used different travel routes. This time it contracted a producer in British Columbia to make the evaporator after getting the order from an undisclosed client in early 2012.

It mapped out a transport route that follows 100 miles of U.S. Highway 12, which cuts through Idaho’s National Forest along switchbacks up to the Bitterroot Range’s Lolo Pass. The loads would only travel at night to reduce the disruption because they block the entire road. The convoy planned to pull over every 15 minutes to let traffic pass. An ambulance would travel with the convoy in case of an emergency along the highway. And the lights were to be turned off when passing campgrounds.

GE did a trial run a year ago sending an evaporator over the same pass without incident and secured permits from state highway officials. That made the company think there wouldn’t be problems.

The fact that GE had the full support from Idaho Transportation Department "gave us a very high degree of confidence," said William Heins, chief operating officer of RCCI.

But despite 15 months of detailed planning, GE failed to get approvals from the Nez Perce Tribe, which lives on the land around the scenic highway, or from the Forest Service, which has authority over the 100 mile long stretch of highway.

The Nez Perce Tribe and Idaho Rivers United objected and in August went to court winning an injunction to stop the megaload shipments pending a review of how the traffic would impact the environment.

GE tried to get the court to reconsider the injunction noting that the delay would be burdensome. Mr. Heins told the court the injunction could cost the company $3.6 million in damages from liquidated contracts, $5 million in increased transportation and equipment costs, and up to $75 million in potential lost revenue over the next year. The judge found GE had made an informed gamble given that the legal troubles that had preceded it and declined to stay the injunction.

How long the review will take is unclear. For now, GE is in a holding pattern, according to Mr. Heins, thinking about alternatives like different routes or modifying the equipment.

The delay is a headache as well for GE's unnamed customer. Costs are already an issue for producers in the oil sands. Canadian crude oil prices are cheaper than those from the U.S. because of constraints in getting the oil to refineries. Some producers have had to cut spending. Suncor Energy Inc., the biggest oil sands producer, and France's Total SA this year scrapped a C$11.6 billion refinery project.

Transport limits are a known problem. Even the highway from Edmonton to the oil sands enforces restrictions. During the spring thaw, authorities frequently put in weight limits, and large loads can't travel on holiday weekends, said Ross Krill, head of facilities for Cenovus Energy Inc., a Canadian oil sands producer. Cenovus ships its equipment in pieces that will fit on the back of a regular truck, what Mr. Krill, calls the standard "shipping envelope."

The Calgary-based company had struggled with third party manufacturers and eventually decided to manufacture all its own equipment in Alberta to limit the risks.