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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.	CIV. 1:13-cv-00348-CWD **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs Nez Perce Tribe (Tribe) and Idaho Rivers United (IRU) seek immediate injunctive relief ordering the U.S. Forest Service to recognize and enforce its authority to regulate the transportation of mega-loads within the Nez Perce-Clearwater National Forest, and ensure that no transportation of mega-loads occurs on U.S. Highway 12 between Milepost 74 to Milepost 174 (bounding the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and Nez Perce-Clearwater National Forest) until the Forest Service has completed the corridor impacts study and consultation with the Nez Perce Tribe it has already determined to be necessary prior to the transport of any additional mega-loads[1].

This Court has already held, in its declaratory judgment issued on February 7, that the Forest Service has the "authority and jurisdiction to enforce" multiple legal authorities against the transport of mega-loads on U.S. Highway 12 where it passes through the Nez Perce-Clearwater National Forest. The Forest Service has exercised initial jurisdiction by issuing interim criteria defining what a mega-load is and by requiring study of corridor impacts and tribal consultation prior to the transport of additional mega-loads on U.S. Highway 12.

Yet, when faced with the actual transport of a mega-load on U.S. Highway 12, the Forest Service is once again standing down and claiming, yet again, that it lacks the authority to enforce its own directives. Shipper Omega Morgan has multiple mega-loads waiting to travel on U.S. Highway 12. The Idaho Transportation Department ("ITD") has authorized the transport of Omega Morgan's first load and is poised to approve the rest. Although the Forest Service advised Omega Morgan that it did not have permission to transport any of its mega-loads, the

[1] A new mega-load is presently located at the Port of Wilma. Current news articles indicate Omega Morgan intends to transport 10 more loads "by January." Declaration of Silas C. Whitman ("Whitman Decl.") ¶ 7.

Forest Service denied the Nez Perce Tribe's petition for relief from the transport of Omega Morgan's mega-loads. Whitman Decl. ¶ 16.

The Forest Service's renewed abdication of its authority to regulate mega-loads, under multiple federal laws intended to protect the National Forest and Wild and Scenic River corridor, is depriving the Nez Perce Tribe of its right to consultation with the Forest Service and will irreparably harm the outstandingly remarkable values of the Middle Fork Clearwater/Lochsa Wild and Scenic River, and the unique resource values of the surrounding corridor. Unless this Court corrects the Forest Service's determination that it lacks any authority to *enforce* its jurisdiction to regulate use of U.S. Highway 12 on the National Forest, mega-loads will be free to traverse the Wild and Scenic corridor without being subject to the Forest Service's regulatory oversight recently recognized by this Court. The Forest Service's determination in fact invites precisely the sort of increased mega-load traffic and magnified harm that the Forest's Service's interim criteria and initial exercise of jurisdiction were surely aimed to prevent. This will render meaningless the authorities Congress has delegated to the Forest Service to manage and protect, for the U.S. public, the values inherent in the National Forest and Wild and Scenic River corridor.

The Plaintiffs accordingly request a preliminary injunction to prevent further irreparable harm to their members, the Nez Perce-Clearwater National Forest, and the Middle Fork Clearwater/Lochsa Wild and Scenic River.

STATEMENT OF FACTS[2]

1. This Court's February 7, 2013 Judgment. Home to the Nez Perce people since time immemorial, the corridor surrounding the Middle Fork of the Clearwater River and the Lochsa River possesses a combination of resource values found nowhere else in the United States. For

[2] The documents described in this section are attached to the Declaration of Michael A. Lopez.

the last three years, these values have been under threat as commercial interests have increasingly focused on the conversion of this unique area into an industrial high-and-wide corridor where shipments of massively oversized equipment called "mega-loads" take precedent over all other uses and the Nez Perce Tribe's access to and exercise of its treaty rights.

The U.S. Forest Service, charged with the management of both the Nez Perce-Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River, found that the creation of a such a high-and-wide corridor would interfere with its management of the National Forest and damage the scenic and esthetic values of the corridor in a manner inconsistent with the Wild and Scenic Rivers Act. The Forest Service denied requests from IRU and many concerned citizens that it take action to prevent the transport of mega-loads, claiming that it had no jurisdictional authority to regulate activities on the State of Idaho's right-of-way for U.S. Highway 12.

IRU accordingly filed suit. This Court, in its February 7, 2013 Judgment in *IRU v. USFS*, 11-CV-0095-BLW, issued Declaratory Judgment providing that it is:

> Adjudge[d] and declare[d] that the Forest Service has authority and jurisdiction to *enforce* all relevant legal authorities, including, but not limited to, the Wild and Scenic Rivers Act, the Forest Service Organic Act, the National Forest Management Act, and implementing regulations, policies, agreements, and MOUs, as identified above, with respect to mega-load shipments proposed or approved within the right-of-way for U.S. Highway 12 held by ITD;

Id., Docket #64[3] (emphasis added).

2. Forest Service's June 17, 2013 letter to Idaho Transportation Department. On June 17, 2013, the U.S. Forest Service communicated to the Idaho Transportation Department that "since Judge Wynmill's [sic] ruling we have not had to address proposals for transport of what has been deemed by the media as a 'megaload'," but the Forest Service understood that "it is

[3] This Judgment was based on this Court's Opinion, Docket #63.

important to identify criteria for oversized loads that would require additional review." The Forest Service – noting its receipt of a Traffic Control Plan from Omega Morgan provided to it by ITD – identified the criteria the Forest Service will use to determine which oversized loads require additional Forest Service review. Loads that require this review:

1. Require traffic to be fully stopped (either on or adjacent to the highway) to allow passage of the oversized load, or
2. Require longer than 12 hours to travel through the Wild and Scenic River Corridor and National Forest (MP 74 to 174), or
3. Require physical modification of the roadway or adjacent vegetation to facilitate passage beyond normal highway maintenance.

The Forest Service found that Omega Morgan's proposed Traffic Control Plan "triggers all of these criteria", stating:

> Transport of such loads may impact visitor and traveler experiences and affect cultural and intrinsic values associated with the corridor. How these values are affected by oversized loads is difficult to define. 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.

The Forest Service noted its desire to work with the Federal Highway Administration and the Nez Perce Tribe "to define the physical and intrinsic values associated with the U.S. Highway 12 corridor that may be affected by oversized loads," and went on to state:

> Clearly defining the intrinsic values is most difficult and where we need to gather the most information. We believe that can be accomplished using social science methodologies and look forward to discussing that opportunity and timelines with you. 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.

The Forest Service concluded by emphasizing that:

> [T]he U.S. District Court has ruled that my agency has full authority to protect the Wild and Scenic corridor and its values notwithstanding the States [sic] easement for U.S. 12.

3. Nez Perce Tribe's June 27, 2013 letter to the Forest Service. On June 27, 2013, the Nez Perce Tribe expressed its support for the Forest Service's letter informing ITD that the Forest Service could not authorize Omega Morgan's proposal to transport mega-loads on U.S. Highway 12 without the Forest Service first conducting – in consultation with the Nez Perce Tribe, Federal Highway Administration, and State of Idaho – a full evaluation of the impacts of these oversized loads on the cultural and intrinsic values associated with the corridor. The Tribe noted that the interim criteria for evaluation of mega-loads on U.S. Highway 12 are "an appropriate starting point" but as the Forest Service acknowledged "do not address the cultural and intrinsic values of the highway corridor that are important to the Tribe." Accordingly, the Tribe stated, "the Forest Service's determination not to authorize the Omega Morgan mega-loads on U.S. Highway 12 constitutes an appropriate and timely exercise of the Forest Service's authority."

4. ITD's July 18, 2013 and July 24, 2013 letters to the Forest Service. One month after the Forest Service's letter to ITD, in a letter dated July 18, 2013 from ITD to the Forest Service, ITD outlined its current permitting process as it relates to over legal loads on U.S. Highway 12 in an effort "to further develop and refine" the Forest Service's criteria. On July 24, 2013, ITD requested that the Forest Service reconsider the criteria regarding the stopping of traffic.

5. Forest Service's July 26, 2013 letter to ITD. On July 26, 2013, the Forest Service responded to ITD that it had developed Interim Criteria #1 to answer the question "How big is a megaload" and had used the effect to traffic as a proxy for size and was intended to address the physical presence of an oversized load in the corridor. Consequently, the Forest Service agreed to replace Interim Criteria #1 and replace it by adopting ITD's standard, such that Criteria #1

would be "loads greater than 16 feet wide or 150 feet also trigger additional review by the Forest Service."

The Forest Service "reiterate[d] that the Forest Service does not support ITD permitting oversized loads meeting the interim criteria until the impacts of that use on the corridor values is better understood." The Forest Service noted that this is "challenging given the magnitude of congressionally designated areas converging in the corridor", stating that these include:

> The Middle Fork of the Clearwater Wild and Scenic River system, including 64 miles of the Lochsa River and 24 miles of the Middle Fork Clearwater River, designated by Congress in the 1968 Wild and Scenic Rivers Act. The Outstandingly Remarkable Values potentially affected include Scenery, Recreation, Fisheries, Wildlife, Botany, Water Quality, History, and Cultural.
>
> The Selway-Bitterroot Wilderness designated by Congress in the 1964 Wilderness Act. Values potentially affected include Solitude and Naturalness.
>
> The Lolo Trail, designated a National Historic Landmark (1962) and listed on the National Register of Historic Places (1993); portions of the Lewis and Clark National Historic Trail, designated by Congress in 1978; and the Nez Perce National Historic Trail, designated by Congress in 1986. The values here are Historical, Cultural, and Spiritual as well as the emotional connection the Nez Perce People have with the events associated with the trails.
>
> The Northwest Passage National Scenic Byway (2002) and All-American Road (2005), from Lewiston to Lolo Pass. Highway 12 is one Idaho's oldest state scenic byways, designated in 1989. This All-American Road designation was based primarily on its outstanding cultural and historic qualities of national significance.
>
> Nez Perce and Salish Indian ceded lands with reserved treaty rights under the Nez Perce Treaty of 1855 and the Treaty of Hells Gate, 1855. The US has government-to-government and trust responsibilities to the tribes, including protection of and access to reserved treaty-right resources.
>
> Over 52 cultural resource sites identified under the National Historic Preservation Act, including Nez Perce and Salish religious and cultural sites significant to the tribes. Two sites, Powell and Lochsa Historic Ranger Stations, are listed on the National Register of Historic Places.

The Forest Service then emphasized that "The State's current position that permits will be issued regardless of the potential for such impacts seems to be in direct conflict with the

Federal Court Ruling. . . . The Federal Court Ruling made that clear by confirming the Forest Service's role in reviewing permits in light of all laws governing National Forest Lands and the physical and intrinsic values associated with these lands."

The Forest Service further advised ITD that Omega Morgan's traffic control plan does little to abate the concerns outlined in the Forest Service's June 17, 2013 letter or the revised criteria suggested above, noting that "the proposal involves a load that exceeds 16 feet wide and 150 feet long (revised Criteria 1) and would take 2 nights to traverse the highway between MP 74 and 174 (Criteria 2)."

The Forest Service emphasized: "We again request 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."

The Forest Service also noted that ITD had indicated that it "may issue the permits and then send the shipper to the Forest Service to obtain permission" and responded that "[y]ou [ITD] are aware the Forest Service has no mechanism to issue a permit for such uses and the concept is disingenuous to the Federal Court Ruling putting the Forest Service in a review role, not a permitting one." The Forest Service summarized that "The State is responsible for permitting and the Forest Service is responsible for reviewing prior to the State issuing permits."

The Forest Service noted: "We are having on-going discussions with the Nez Perce Tribe and have a meeting scheduled with them August 20 to discuss the proposed interim criteria, what may be involved with additional Forest Service review and to begin conversations regarding sideboards for the proposed corridor study. These are challenging discussions which will take

time and we have no timeline for completing a corridor study but are seeking funding opportunities and evaluating internal capacity to complete such a study."

6. ITD's August 2, 2013 permit provided to the Forest Service. On Friday, August 2, 2013, ITD provided the Forest Service with a copy of the permit it had issued to Omega Morgan for the transport of a mega-load on U.S. Highway 12. The permit states: "Please be advised that pursuant to an order of Federal Judge Lynn Winmill, the United States Forest Service and Federal Highway Administration also have jurisdiction to review overlegal permits issued for travel on Highway 12. A copy of the attached permit has been forwarded to these Federal Agencies to allow them an opportunity to review."

7. Forest Service's August 5, 2013 letters to ITD and Omega Morgan. On Monday, August 5, 2013, the Forest Service acknowledged its receipt of the ITD's August 2 permit issued to Omega Morgan to transport an over legal-sized load over U.S. Highway 12 on August 5-August 9, as well as an August 2, 2013 letter from Omega Morgan indicating that they planned to proceed on August 5. The Forest Service states that it is "disappointed that ITD would proceed with issuing a permit given the constructive communication we have been having regarding interim criteria, consultation with the Nez Perce Tribe, and initiation of a corridor study." The Forest Service then stated that "the Omega Morgan load triggers two of the three criteria and more time is needed to conduct our review." The Forest Service emphasized that the February 7, 2013 Federal Court decision "clearly gave the Forest Service authority to review ITDs permits for mega-loads and we have informed you that we are still in the process of reviewing. At this time, the Forest Service does not consent, approve or otherwise authorize over legal loads meeting the interim criteria on US Highway 12 between MP 74 and 174."

The Forest Service's August 5, 2013 letter to Omega Morgan also emphasized this conclusion: "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." The Forest Service expressed some frustration with the Company's "surmise[e] that less than one (1) business day would be adequate for our review", noting that Forest Service review should be conducted prior to ITD issuing a permit for any over legal load to avoid transporters from being put in this awkward position. "That said, our interim criteria indicates additional review is required and 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." It also stated: "I understand your company transported a similar over legal load on Idaho State Highway 20 recently" and noted that at a May 15, 2013 meeting Omega had indicated a route analysis of potential routes to Canada had been completed.

8. The Tribe's Request to the Forest Service For Relief. On Monday, August 5, Nez Perce Tribal Chairman Silas C. Whitman called the Chief of the United States Forest Service, Tom Tidwell, to discuss what appeared to the Tribe to be indications that Omega Morgan was going to begin moving its mega-load on U.S. Highway 12 that evening. Whitman Decl. ¶ 16. In that afternoon telephone conversation, Chairman Whitman petitioned Chief Tidwell for relief from the mega-load transport by Omega Morgan by stopping its unauthorized entry into the National Forest on U.S. Highway 12. *Id*. Chief Tidwell declined, responding that "the Forest Service does not have the authority to close the State highway." *Id*.

9. Transport of a Mega-load. On the night of August 5, 2013, Omega Morgan began transporting a mega-load from the Port of Wilma on U.S. Highway 12/95. Transport of this

mega-load was slowed by public demonstrations, involving both non-Indians and members of the Nez Perce Tribe. Whitman Decl. ¶ 17.

The mega-load entered the Nez Perce-Clearwater National Forest and the Wild and Scenic River corridor in the early hours of August 8. As of this filing, the mega-load has left Idaho. Declaration of Kevin Lewis, August 9, 2013. ¶ 13.

10. More Mega-loads on the Way. Another mega-load is parked at the Port of Wilma and awaiting transport. Lewis Decl. ¶13. Declaration of Borg Hendrickson, August 9, 2013 ¶ 13. On information and belief, Omega Morgan is currently working with ITD and ITD intends to issue a permit for this load in the near future. Omega Morgan has been engaging in discussions with ITD for months and plans to transport at least eight additional mega-loads on U.S. Highway 12 over the next few months. *See* Lewis Decl. ¶ 13. Att. 1.

PRELIMINARY INJUNCTION STANDARD

Under Rule 65, the Court may issue a preliminary injunction pending resolution of Plaintiffs' claims on the merits. Fed. R. Civ. P. 65; *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981). The test for injunctive relief under Rule 65 balances considerations of plaintiffs' likelihood of prevailing on the merits, the respective harms to the parties, and the public interest. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

A Plaintiff seeking injunctive relief must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Id.* at 24.

Actions that cause harm to natural resources are often the subject of injunctive relief, as "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003) (quoting *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987)).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS: AS THE COURT RULED IN *IRU V. USFS*, THE FOREST SERVICE HAS THE AUTHORITY TO ENFORCE MULTIPLE CONGRESSIONAL DELEGATIONS OF AUTHORITY TO REGULATE THE TRANSPORT OF MEGA-LOADS ON U.S. HIGHWAY 12 WITHIN THE WILD AND SCENIC RIVER CORRIDOR AND THE NEZ PERCE-CLEARWATER NATIONAL FOREST.

This case essentially revisits, with slight variation, the issue presented to and decided by this Court in *IRU v. USFS.* As a result, for nearly identical reasons, and based on the additional statutory violations described below, Plaintiffs are likely to succeed on the merits in their present case against the Forest Service.

As explained above, this Court held in *IRU v. USFS* that the Forest Service has jurisdiction and authority to *enforce* all relevant legal authorities to the transport of mega-loads on U.S. Highway 12. The Court observed as well the real-world consequences of the Forest Service's decision, an observation which applies identically here:

> This agency stand-down makes it likely that more mega-loads will be planned and approved…[t]he lack of federal oversight may encourage Idaho to be less rigorous in its analysis and shippers to be more willing to send mega-loads down Highway 12. This is not idle speculation by the Court. The Forest Service itself feared that the ITD's approval "will ultimately lead to future additional proposals."

Docket #63, at 9.

The Forest Service's denial of the Tribe's request for relief is contrary to this Court's February 7, 2013 ruling in *IRU v. USFS*. Where the Forest Service in *IRU v. USFS* had decided it lacked *jurisdiction* to review state permitting of mega-loads on the Highway 12 Wild and Scenic River corridor, in the present case it has exercised initial jurisdiction but continues to insist that it lacks the authority to *enforce* its jurisdiction. The February 7 ruling did not only establish that the Forest Service has authority to *review* a mega-load permit, however; the Court specifically adjudged, "that the Forest Service has authority and jurisdiction to *enforce* all relevant legal authorities." *IRU v. USFS*, Docket #64 (emphasis added).Moreover, the Forest Service's position that it cannot enforce its directives would render meaningless Congress' multiple delegations of jurisdictional authority to the Forest Service over U.S. Highway 12, the Nez Perce-Clearwater National Forest, and the Wild and Scenic River corridor. This is demonstrated by the fact that Omega Morgan's initial mega-load was allowed to traverse the Nez Perce Reservation and the National Forest and Wild and Scenic River corridor in complete disregard of Forest Service directives to both ITD and Omega Morgan.

The likelihood of success on the merits in this case, supporting Plaintiff's motion for preliminary injunction, is further supported, but not limited to, the following two specific federal statutory violations.

A. The Forest Service Is Specifically Violating NFMA.

One of the key provisions of NFMA is the requirement that the Forest Service develop Forest Plans, and act consistently with those plans. 16 U.S.C. § 1604(a), (i). Specifically, the statute requires that all permits, contracts, and other instruments for the use and occupancy of National Forest lands "shall be consistent with" Forest Plans. *Id*. at 1604(i). *See Idaho Sporting*

Congress v. Rittenhouse, 305 F.3d 957, 966 (9th Cir. 2002) ("[a]ll site specific actions must be consistent with adopted Forest Plans").

The Forest Service's denial of the Tribe's petition for relief from the transport of Omega Morgan's mega-loads is an agency action regarding the use and occupancy of the Clearwater National Forest. *See IRU,* Dkt #32 at 8-9 (the Forest Service's denial of IRU's August 2010 request for relief from the transport of Exxon-Imperial's mega-loads constituted final agency action). Thus, this decision must be consistent with the Clearwater Forest Plan.

The Clearwater Forest Plan was adopted in 1987. The Plan invoked the 1982 regulations, stating that "the Forest Plan is in compliance with . . . the regulations for National Forest Land and Resource Management Planning (36 C.F.R. 219)." These implementing regulations provide, among other requirements, that Forest Plans must be "based on . . . [p]reservation of important historic, cultural, and natural aspects of our national heritage" and "[p]rotection and preservation of the inherent right of freedom of American Indians to believe, express, and exercise their traditional religions." 36 C.F.R. 219.1 (b) (5), (6).

The Clearwater Forest Plan incorporated this regulation through, among other provisions, Section E, which identifies several forest-wide standards "that are considered as minimum requirements that must be met." Forest Plan at II-20. Among these forest prescriptions is General standard E1(d):

> 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. Another prescription is Cultural Resources standard E3(g):

> [e]nsure[s] that 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.

The Forest Service is not acting consistently with either this Forest Plan direction or with the regulatory requirements of § 219.11. By denying the Tribe's request that the Forest Service take enforcement action against the transport of mega-loads on the National Forest based on the agency's erroneous determination that it lacks authority to do so, the Forest Service has allowed the mega-load to cross the National Forest without first conducting its corridor impacts study and consultation with the Tribe. As a result, the Tribe has been deprived of the required opportunity to explore, through a preliminary government-to-government consultation between the Tribe and Forest Service that was scheduled to occur on August 20, its myriad concerns about the mega-load impacts with the Forest Service and to have the Forest Service in turn evaluate and address those concerns based on the consultation, thereby assuring compliance with the Forest Service's duty under the Forest Plan to "insure [Forest Service]…management activities and…terms of Indian treaties are upheld," and to "ensure that the "Forest action[] [is] not detrimental to the protection and preservation of [the Nez Perce] Tribe's religious and cultural sites and practices and treaty rights." Forest Plan at II-21, 23. This failure accordingly violates NFMA.

B. The Forest Service Is Specifically Violating WSRA.

The Forest Service's denial of the Tribe's petition for relief from the transport of Omega Morgan's mega-loads also violated the Wild and Scenic Rivers Act.

As this Court found in *IRU v. USFS*, the Wild and Scenic Rivers Act imposes a mandatory duty[4] on the Forest Service to protect Wild and Scenic values. *IRU v. USFS*, Dkt #32 at 14-15. Specifically, the Wild and Scenic Rivers Act requires the Forest Service to administer Wild and Scenic Rivers "in such manner as to protect and enhance the values which caused it to be included in said system." 16 U.S.C. § 1281(a). The Act also directs the Forest Service "shall

[4] The fact that this duty "lack[s] the specificity requisite for agency action" to be compelled under Section 706(1) of the APA, *id.,* has no relevance to the present motion because the present case does not seek relief under 5 U.S.C. 706(1).

take such action respecting management policies, regulations, contracts, plans, affecting such rivers . . . as may be necessary to protect such rivers in accordance with the purposes of this Act." 16 U.S.C. § 1283.

In this case the Tribe appealed to the Forest Service, as the agency responsible for administering the Middle Fork Clearwater/Lochsa Wild and Scenic River, for relief from the transport of Omega Morgan's mega-loads. The Forest Service's denial of this petition was thus an administrative decision that implicates the policies the Forest Service established in its letters of June 17 and July 26. The transport of Omega Morgan's mega-loads resulted and will continue to result in the degradation of the scenic, esthetic, and cultural values of the Wild and Scenic River. The Forest Service's decision to deny the Tribe's petition for relief thus violated Sections 1281(a) and 1283 of the Wild and Scenic Rivers Act.

II. IMMEDIATE RELIEF IS NEEDED TO AVOID IRREPARABLE HARM.

The entry of an injunction is necessary to preserve the status quo and prevent further irreparable harm to the Plaintiffs. Specifically, the Forest Service's refusal to enforce its established authority has resulted and will continue to result in the loss of the Tribe's procedural right of consultation and irreparable harm to the scenic, esthetic, and recreational values of the Wild and Scenic River corridor.

For purposes of establishing that "irreparable injury is likely in the absence of an injunction," *Winter v. NRDC*, 555 U.S. at 22, the appropriate focus is whether a threatened harm would impair the court's ability to grant an effective remedy, meaning that an irreparable harm must be likely to occur "before a decision on the merits can be rendered" and that the likely harm could not be remedied by money damages or some form of relief other than injunction. *See* 11A Wright and Miller *Federal Practice & Procedure* § 2948.1.

Actions that are likely to cause harm to environmental and natural resources are often the subject of injunctive relief because environmental damage is rarely suitable for monetary remedy: "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Earth Island Institute*, 351 F.3d at 1299 (quoting *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987)).

A. The Tribe Has Suffered and Will Continue to Suffer Irreparable Harm to its Procedural and Treaty-Reserved Rights from the Forest Service's Refusal to Exercise its Enforcement Authority.

The Forest Service's unlawful denial of the Tribe's petition for relief from the transport of mega-loads has irreparably injured and will injure the Tribe by depriving it of the opportunity to consult *prior* to the mega-load's transport on U.S. Highway12, and, as a result fails to ensure protection of Nez Perce treaty rights, religious and cultural sites and practices.

The Forest Service's responsibility to comply with its own Forest Plan standards regarding the protection of treaty rights and cultural rights and practices is not a hollow commitment from a bygone era. Those standards reflect solemn and ongoing obligations that are deeply rooted in the unique, government-to-government relationship between the United States and Indian Tribes. Since before its formation, the United States has recognized Tribes as sovereign governments. The treaties in which many Tribes, including the Nez Perce Tribe, ceded lands to the United States in exchange for protection and provisions for their Tribal citizens were based on the premise of two sovereign governments interacting on an equal basis. This relationship is incorporated into the Constitution, and has been expressed through numerous treaties, statutes, executive directives and court decisions.

On November 6, 2000, President Clinton issued Executive Order 13175, which establishes guidelines for all Federal agencies to, among other responsibilities, (1) establish regular and meaningful consultation and collaboration with Tribal officials in the development of federal policies that have Tribal implications; and (2) strengthen the government-to-government relationship with Tribes. EO 13175 directs each executive department and agency to consult with Tribal governments prior to taking actions that would have substantial direct effects on Tribes. On November 5, 2009 President Barack Obama issued a Presidential Memorandum to the heads of executive departments and agencies wherein the President stated that "[m]y Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.". The Memorandum further directed each Federal agency to develop a plan of action to implement EO13175.

Responding to the President's order, the United States Department of Agriculture adopted, on January 18, 2013, a Departmental Regulation on the subject of Tribal Consultation, Coordination, and Collaboration (Regulation). The Regulation requires, among other responsibility, each USDA agency to provide Tribes with the opportunity for timely and meaningful government-to-government consultation regarding policy actions which may have tribal implications. Tribal implications are defined as substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Where the United States has government-to-government consultation obligations and policies with respect to a federally-recognized Indian tribe, a federal agency's failure to meaningfully consult before making a decision that is likely to affect the tribe represents the loss of a procedural right guaranteed by federal law and policy can establish irreparable harm.

Yankton Sioux Tribe, et al. v. Kempthorne, 442 F. Supp. 2d 774, 781–785 (D.S.D. 2006) (finding that federal law, Presidential Executive Order 13175 (2000), and BIA policy adopted pursuant to P.E.O. 13175 "requires meaningful consultation before taking action that affects Indian schools. If the restructuring occurs without meaningful consultation, plaintiffs will lose a procedural right guaranteed by federal law and BIA policy. The court finds there is a threat of irreparable harm to the plaintiffs, which weighs in favor of granting a preliminary injunction."

The Tribe and its members hold treaty-reserved rights to hunt, fish and gather throughout the corridor. *Treaty of June 9, 1855, with the Nez Perce Tribe*, 12 Stat. 957 (1859), Article III. The Tribe and its members regularly, year-round, and through travel from their directly adjacent Reservation, derive subsistence, recreational, aesthetic, commercial, cultural, and spiritual benefits from the land and resources of the Nez Perce-Clearwater National Forest accessed via the U.S. Highway 12 Wild and Scenic River corridor.

The Forest Service has determined that consultation with the Nez Perce Tribe is necessary and appropriate before the transport of any additional mega-loads. It has commenced the process of consulting with the Tribe. As a result of the Forest Service's decision that it lacks authority to enforce its own agency directives, a mega-load has travelled through the Clearwater National Forest without the completion of the required consultation.

Absent an injunction from this Court, additional mega-loads will be authorized and travel without the completion of consultation. The Forest Service's unlawful decision has thus deprived the Nez Perce Tribe of a procedural right to consultation guaranteed by federal law and as such constitutes irreparable harm for purposes of injunctive relief. *Yankton Sioux, supra; See also Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010)(enjoining a BLM-approved solar energy project on lands containing 459

identified cultural resources and archaeological sites because the agency failed to consult with the affected tribe as required under the National Historic Preservation Act).

The Forest Service's decision in this case to stand down from its protective enforcement authority over U.S. Highway 12 has also immediately impacted and will continue to impact the ability of tribal members to access and enjoy its treaty-reserved rights and cultural resources in the corridor.

The Tribe and its members' injuries in this case are actual injuries and are likely to increase in severity, magnitude and permanence and irreparability if the Forest Service's decision that it lacks protective enforcement authority over the use of U.S. Highway 12 by mega-loads is allowed to stand.

B. The Forest Service's Refusal to Enforce its Directives Regarding Mega-loads Has Irreparably Harmed and will Continue to Harm the Scenic, Recreational, and Cultural Values of the U.S. Highway 12 Corridor.

The Forest Service's unlawful refusal to grant relief from the transport of mega-loads has irreparably injured, and will continue to irreparably injure, the Tribe, IRU, and their members by damaging the scenic, esthetic, and cultural values of the corridor.

The Forest Service has found repeatedly that the transport of mega-loads through the Wild and Scenic River corridor degrades the scenic, esthetic, recreational and cultural values. *See* June 17 letter; Letter from R. Brazell, Supervisor, Clearwater National Forest, to J. Carpenter, Idaho Transportation Department, District 2 Engineer (Sept. 10, 2010). IRU's members and staff have experienced these impacts and have submitted declarations describing their injuries. *See* Declaration of William B. Sedivy August 9, 2013 ¶¶ 12, 16; Declaration of Kevin L. Lewis ¶¶ 14-19; Declaration of Peter Grubb, August 9, 2013 ¶¶ 16-20,; Declaration of Linwood Laughy, August 9, 2013 ¶¶ 14-19, 26-28.

The full scope and magnitude of impacts to federally-protected resources from mega-loads will not be known until the Forest Service has completed both its corridor impacts study and consultation with the Nez Perce Tribe. As the Forest Service stated to ITD:

> We again request that ITD not permit these loads until we complete a corridor study examining such [mega-load] uses and their potential impacts to the 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.

Forest Service's July 26, 2013 letter to ITD (emphasis added). It is vital to preserve the status quo and prevent impairment to the corridor's multitude of resource values until the Forest Service can complete its consultation and studies.

Beyond immediate impacts to members' experiences, the transport of further mega-loads will effectively convert U.S. Highway 12 into the industrial high-and-wide corridor first envisioned by the shipping industry in 2008.[5] As the Forest Service first determined in 2010, such a high-and-wide corridor is impermissible under the Wild and Scenic Rivers Act.

> It is my opinion that authorizing these loads will ultimately lead to future additional proposals, and while one or two projects might be tolerated, more frequent occurrences of such loads are not the experience people traveling, living, working, and recreating on US Highway 12 expect. I do not believe this was the intent when Congress passed the Wild and Scenic Rivers Act which did allow states to retain certain right of way rights.

2010 Brazell letter at 2.

The Forest Service may argue that the transport of the next Omega Morgan mega-load will not, alone, establish Highway 12 as a high-and-wide corridor. But, as in *IRU v. USFS*, "This [Forest Service] stand-down makes it likely that more mega-loads will be planned and

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5 The conversion of Highway 12 began, to the best of Plaintiffs' knowledge, in the fall of 2008 when a Dutch shipping company called Mammoet contacted ITD on behalf of Imperial Oil, a subsidiary of Exxon Mobile and sought permission to modify the Wild and Scenic River corridor in order to facilitate the transport of over 200 mega-loads, with the hope of creating a new "high load" corridor through Idaho and Montana on Highway 12. *See* Lewis Decl. Att. (Validation Module Survey and Route Plan 5 (2009)).

approved." Docket #63, at 9. The authorization of the first mega-load — one of Conoco Phillips' – was quickly followed by the authorization of Exxon-Imperial's Test Validation Module, which was followed by the Nickel Bros loads, which were followed by Selway Corporation, which has now been followed by Omega Morgan. *See* Laughy Decl. ¶¶ 22-23, 25.

This flow of mega-loads that started in 2011 must be stopped here and now.

The Forest Service has now issued directives to ITD and a mega-load shipper prohibiting the transport of mega-loads until a corridor impacts study and tribal consultation are completed. Both ITD and the shipper have defied the Forest Service and pushed a mega-load through. If the Forest Service is allowed to sit by in the face of this defiance, its ability to regulate mega-loads on U.S. Highway 12 will be perceived as meaningless and the flow of mega-loads will continue.

III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

The balance of hardships and public interest weigh strongly in favor of enjoining the mega-loads' transport through the Nez Perce-Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor. On the one side, as explained above, the Nez Perce Tribe, Idaho Rivers United, and their members will suffer irreparable harm from further mega-load transport in the corridor. Mega-load transport on U.S. Highway 12 also undermines the public interest by endangering public safety and damaging North Central Idaho's tourism economy. On the other side, the Forest Service will experience no injury from being directed to do its job and any inconvenience that might be experienced by the commercial interests seeking to use U.S. Highway 12 is outweighed by the harms to the Plaintiffs and to the public interest.

As explained above, allowing mega-loads to travel through the highway corridor before the Forest Service has completed its study of corridor values and consulted with the Nez Perce Tribe would greatly harm the Tribe, IRU, and the public.

The general public also has multiple interests that weigh in favor of an injunction. First, the public has an interest in federal agencies complying with the law. When an agency disregards the law, "it disregards the public interest and undermines its own credibility." *Western Watersheds Project v. Rosencrance*, No. 09-CV-298-EJL, 2011 WL 39651, at *14 (D. Idaho 2010). The Forest Service's conduct in this case is particularly troubling in this respect. This Court has made it clear that the Forest Service has authority to regulate the transport of mega-loads on U.S. Highway 12, yet the Forest Service has undermined the Court's holding by denying the agency has authority to enforce its own regulatory decisions.

The public also has an interest in the preservation of the U.S. Highway 12 Wild and Scenic River corridor because the Corridor is a national treasure with a combination of resource values found nowhere else in the United States. The highway corridor is rich in Nez Perce history, as recognized by the congressionally-designed Nez Perce National Historic Trail, the Lolo Trail, the Lewis and Clark Trail. The highway corridor is located within the Tribe's aboriginal homeland where, since time immemorial, tribal members have used those lands and resources for subsistence, cultural, spiritual, economic and aesthetic purposes. There are numerous cultural resource sites identified under the National Historic Preservation Act, including Nez Perce religious and cultural sites significant to the Tribe.

In addition, the Middle Fork Clearwater/Lochsa was designated as one of the nation's first Wild and Scenic Rivers because it offers recreational experiences and scenic beauty equal to few places in the country. U.S. Highway 12 is one of only thirty-one highways in the United

States that warrants the designated of "All American Road" by FHWA. *See* List of America's Byways: All American Roads, "http://byways.org/press/listbyways.html" http://byways.org/press/listbyways.html (Accessed July 22, 2013). The stretch of U.S. Highway 12 from Lolo Pass to the town of Lowell has been ranked as one of the Top 10 Bike Rides of the World. World's Best Bicycling, "http://www.adventurecycling.org/resources/blog/worlde28099s-best-bicycling/" http://www.adventurecycling.org/resources/blog/worlde28099s-best-bicycling/ (accessed July 24, 2013) (emphasis added)

> In short, as the National Park Service has put it,
>
> > [T]he intrinsic scenic, natural, cultural, historical, and recreational qualities and resources so eminent along this motorway. These qualities and resources are nationally significant, encompassing two federally designated national historic trails (Nez Perce and Lewis & Clark), a national historic landmark (Lolo Trail NHL), a wild and scenic river, a national historical park, and an All-American Road. In sum, the abundance, accessibility, and integrity of these resources in one location between Lewiston and Lolo Pass-are assets that are incomparable and rarely matched elsewhere in the U.S.

Letter from Jason W. Lyon, Acting Superintendent, National Park Service, to Brian Ness, Director, Idaho Transport Department (Dec 21, 2010).

As explained previously, the transport of mega-loads through the corridor damages these values and the conversion of U.S. Highway 12 into an industrial, high-and-wide corridor will degrade these values. Given the uniqueness of the corridor, such degradation is a loss to the entire nation. Putting a monetary value on this loss would be impossible.

The public interest also favors the issuance of an injunction because the transport of mega-loads in the corridor damages North Central Idaho's tourism economy. Laughy Decl. ¶ 27. For a number of years, tourism has been the only growing industry in this part of Idaho. Using U.S. Highway 12 to transport mega-loads undermines the scenic and recreational values that

attract tourists to the area, threatening local businesses and the jobs they provide. Grubb Decl. ¶¶ 17-20.

In addition, the transport of mega-loads on U.S. Highway 12 unjustifiably places public health and safety at risk. Transporting mega-loads on U.S. Highway 12 is inherently unsafe because U.S. Highway 12 is the artery that supplies the lifeblood to the Nez Perce reservation, the Clearwater National Forest, and residents of the Corridor. U.S. Highway 12 is the only route by which Clearwater National Forest users and staff, as well as Corridor residents, can access necessary goods and services such as groceries, medicine, and emergency services. Laughy Decl ¶¶ 5-6; Grubb Decl. ¶¶ 6, 11. If U.S. Highway 12 is blocked for any reason, Forest-users and residents alike will be unable to travel and unable to receive necessary goods and services until the highway can be reopened.

Blocking the sole transportation route in an isolated area like this, even for short periods, is necessarily unsafe. Delaying access to medical services in an emergency situation increases the chances of a bad outcome, particularly in cases involving trauma and certain conditions, such as heart attacks and strokes. In the U.S. Highway 12 corridor, it often takes the better part of an hour to get to the emergency room. This means that even small delays, such as the fifteen minutes allowed by ITD's mega-load permits, can have a significant impact on the patient's recovery.

It is not realistic, however, to assume that a mega-load can limit traffic delays to fifteen minutes. During the transport of Omega Morgan's mega-load on the night of August 6, traffic was delayed for over an hours. *See* Hendrickson Decl. ¶¶ 5-7. The following night, traffic was delayed for one hour twenty minutes at the Fish Creek Bridge and for over forty minutes on Lolo Pass. *Id.* ¶ 9.

The commercial interests seeking to transport mega-loads on U.S. Highway 12 do not tilt the balance of hardships. No amount of economic hardship could outweigh the irreparable damage to the Tribe's procedural rights, or the Tribe, IRU's, and the public's rights and interests in the Nez Perce-Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River Corridor. The cultural, scenic, esthetic and recreational values damaged by the transport of mega-loads cannot be replaced at any price. The Tribe's emotional and cultural ties to the corridor date back to time immemorial. It would add insult to injury to even attempt to compare the loss of a few dollars (by a company that counts millions in profit every year) to the loss of culture, identity, and territory that has already been experienced by the Nez Perce people, a loss that is intensified and perpetuated by the transport of mega-loads on U.S. Highway 12,

Moreover, the commercial interests seeking to inflict mega-loads on U.S. Highway 12 have alternative routes available and have had ample opportunity to research those routes. Nor can the commercial interests claim surprise or undue harm from any injunction the Court might issue. There has been widespread Tribal and public opposition to the transport of mega-loads and converting U.S. Highway 12 into an industrial corridor for the last three years. Mega-load transports have met with repeated delays due to not only public opposition, but also to weather and other technical difficulties.

IV. THE CIRCUMSTANCES WEIGH IN FAVOR OF WAIVING THE RULE 65(C) BOND REQUIREMENT.

Plaintiffs respectfully request that the Court waive the bond requirement of Rule 65(c) or impose a nominal bond if it decides to issue a preliminary injunction. This court has discretion to request mere nominal security where requiring more would effectively deny access to judicial review. *Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

Idaho Rivers United is a public interest organizations that cannot afford the expense of more than a nominal bond.

Moreover, 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 at 1248 (no bond required in case challenging mineral exploration permit); *Colorado Wild v. U.S. Forest Service,* 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).

Furthermore, Rule 65(c) is based on the theory that a plaintiff should not benefit financially from the wrongful granting of preliminary relief against a defendant. Where, as here, the Nez Perce Tribe and Idaho Rivers United gain no pecuniary interest from the injunction, the purpose of Rule 65(c) is not served and no bond should be required.

CONCLUSION

For the foregoing reasons, Plaintiffs Nez Perce Tribe and Idaho Rivers United respectfully request that this Court grant this Motion for Preliminary Injunction. Plaintiffs further request that no, or a nominal bond, be required because of the public interest nature of this case.

DATED: August 9, 2013.

Respectfully submitted,

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