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

IDAHO RIVERS UNITED and)
MORGAN AND OLGA WRIGHT,)
)
 Plaintiffs,)
)
 vs.)
)
 DISTRICT RANGER JOE)
 HUDSON, in his official capacity,)
 And UNITED STATES FOREST)
 SERVICE,)
)
 Defendant.)
 _____)

No. 3:15-cv-00169-BLW

**DECLARATION OF DARYL K.
MULLINIX IN SUPPORT OF
PLAINTIFF’S MOTION FOR A
TEMPORARY RESTRAINING
ORDER/PRELIMINARY
INJUNCTION**

I, Daryl K. Mullinix, hereby declare and state as follows:

Professional Experience and Education

1. I have over 40 years of experience in road maintenance and road construction as an engineer. This includes 26 years as a Forest Service engineer on the

Nez Perce Forest. For over 39 years, I was licensed as a professional engineer in the State of Idaho (2013 to 1974). I have also been licensed by the state as a land surveyor since 1974.

2. Since 2005, I have operated my own surveying and engineering consulting firm. I have consulted on numerous projects including secondary road reconstruction, property surveys, right-of-way acquisitions, road use permits, approach permits, Army Corp of Engineer permits, grant applications, route studies and coordination with state and local governmental jurisdictions. My clients include Idaho County, the City of Grangeville, several Highway Districts, as well as private parties.

3. Prior to opening my consulting business, I was employed by the U.S. Forest Service as an engineer for 26 years. Specifically for 11 years (2005 -1994) I was an Assistant Forest Engineer on the Nez Perce National Forest, with responsibilities for road maintenance, facilities, bridges, surveying and real estate management. My duties included land purchases, right-of-way acquisition, and extensive involvement with scenic easements, forest land use permits, and right-of-way surveys.

4. During that portion of my career, for 15 years (2005- 1990) I served on the Wild and Scenic Review Board for the Clearwater and Nez Perce National Forest. In 2006 I received The River Management Society “Frank Church Wild and Scenic Rivers Award” for land acquisitions and scenic easement acquisitions in the wilderness and on scenic rivers. In 2003, I was also the recipient of the Region 1 Lands Director Award for the management of the lands program on the Nez Perce National Forest.

5. The preceding 16 years (from 1995- 1979) I was an Engineer on the Nez Perce National Forest , with responsibilities including road maintenance, construction,

surveying and lands management, prior to my promotion in 1995.

6. Before that time, I worked for Idaho Department of Transportation, Division of Highways as a Project Engineer for 6 years. As a Projects Engineer, I surveyed roads and bridges, and was responsible for contract administration for the construction of numerous portions of state highway.

7. I have a Bachelor of Science degree from the University of Idaho in Mathematics and a Bachelor of Science degree with Honors in Civil Engineering from the University of Minnesota. I have done postgraduate work in surveying at the University of Arizona and Montana State University. I completed the Bureau of Land Management training and had federal authority for surveying as the Nez Perce National Forest's land surveyor.

8. I am very familiar with forest road 652 and the surrounding area. I have been to the site on many occasions over the course of the past 36 years, in my professional capacity as a Forest Service engineer and more recently as an engineering consultant. I most recently visited the Wright property and the IDL proposed sale location in May, 2015. I am also familiar with the 1937 right-of-way easement and the 1977 scenic easement which encumber the Wrights' property, as well as the Forest Service regulations governing the use of Forest Service roads and travel management planning.

The 1937 Easement and 1977 Scenic Easement on the Wrights' Property

9. The Wrights' property is encumbered by two easements held by the Forest Service: a 1937 right-of-way for a forest road, and a 1977 scenic easement under the Wild and Scenic Rivers Act.

10. The 1937 easement conveyed a 30-foot right-of-way “for the construction, repair, maintenance, and operation of a common, main, or State public highway and as a connecting link in the . . . Goddard Point Road #289 Project.” This right-of-way is where forest road 652 crosses the Wrights’ property.

11. The Goddard Point Road #289 Project for which the 1937 easement was obtained never occurred however, and the Forest Service never improved road 652 beyond a native-surface dirt track I believed to have been made by the Civilian Conservation Corps in the 1930’s. The Wrights have maintained a short section of the spur road for access to their home, but no public or private entity maintains forest road 652 beyond the Wrights’ property. Last year, the Forest Service approved signage at the beginning of forest road 652 on the Wrights’ property that states: “Dead End. No Turn Around.”

12. In 1977, pursuant to the Wild and Scenic Rivers Act, the Forest Service obtained a scenic easement over the Wrights’ entire property and other parcels near it, for the purpose of protecting the wild and scenic values of the Selway River corridor. Thus, the easement covers the 1937 right-of-way grant for forest road 652. The Forest Service’s scenic easement strictly limits development and activities on the Wrights’ property, including prohibitions on industrial or commercial activity, changes to the topography, and removal of trees.

13. The Forest Service’s existing Wild and Scenic corridor management plan for the Middle Fork Clearwater, Lochsa, and Selway Rivers states that “[a]ccess roads to serve private lands are to be controlled by scenic easements to ensure compatibility with development of the special planning area and with river

environment protection.” See U.S.D.A. FOREST SERVICE, RIVER PLAN: MIDDLE FORK CLEARWATER INCLUDING THE LOCHSA AND SELWAY OF THE NATIONAL WILD AND SCENIC RIVER SYSTEM (1969), p. 9.

Forest Service Regulations Governing Use of Forest Roads And Travel Management Planning

14. Pursuant to NFMA, the National Forest Roads and Trails Act, and other authorities, the Forest Service has adopted regulations governing administration of the National Forest Transportation system, which regulate use of National Forest System roads including forest road 652 at issue here. *See* 36 C.F.R. Parts 212 & 251.

15. A National Forest System road is defined under the regulations as a “forest road other than a road which has been authorized by a legally documented right-of-way held by a State, county, or other local public road authority.” 36 C.F.R. §212.1. A “forest road” is defined as a “road . . . wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.” *Id.*

16. Generally, forest roads are available for any lawful purpose subject to the rules and regulations governing their use. *See* 36 C.F.R. § 212.6(c) (“use of existing National Forest System roads and trails shall be permitted for all proper and lawful purposes subject to compliance with rules and regulations governing the lands and the roads or trails to be used”).

17. The Forest Service’s policy for managing access to intermingled non-Federal lands is to grant permission for access across Forest lands and easements when necessary. 36 C.F.R. § 212.6(a). Use of forest roads for ingress or egress is also

subject to rules and regulations pertaining to road use. *Id.*, § 212.6(b).

18. If a Forest road is not authorized for general public use, then a “special use” or “road use” authorization is required before using the road to access non-Federal lands. 36 C.F.R. §§ 251.50(d)(1), 251.110(d). Such special use authorization may be denied on various grounds, including if the “proposed use would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses,” the “proposed use would not be in the public interest,” or the “proponent does not or cannot demonstrate technical or economic feasibility of the proposed use or the financial or technical capability to undertake the use and to fully comply with the terms and conditions of the authorization.” 36 C.F.R. §251.54(e)(5).

19. Any individual or entity seeking special use (or road use) authorization must submit an application to the Forest Service under the process outlined in 36 C.F.R. § 251.54. Applications for special uses shall be rejected at the screening stage if “the proposed use would be incompatible with the purposes for which the lands are managed.” *Id.*, § 251.54(e)(5)(i). Applications that make it past screening to the processing stage are subject to public review and comment under NEPA. *Id.*, § 251.54(g)(2)(ii).

20. Under the Forest Service’s travel management planning regulations, which were adopted in 2005, the National Forests are directed to undertake a travel management planning process – including public involvement and NEPA analysis – to designate all roads, trails and areas on National Forests for which motor vehicle use is allowed, including designation of vehicle class, time of year, and other authorizations or restrictions on motor vehicle usage. *See* 36 C.F.R. §§ 212.50-.56. Designated roads,

trails, and areas open to motor vehicle use “shall be identified on a motor vehicle use map” or MVUM. *Id.*, § 212.56.

21. In designating roads, trails, and other areas open to motor vehicle use on a MVUM, the Forest Service responsible official (either Forest Supervisor or District Ranger) “shall consider effects on National Forest System natural and cultural resources, public safety, provisions of recreational opportunities, access needs, conflicts among uses of National Forest System lands, the need for maintenance and administration of roads, trails, and areas that arise if the uses under consideration are designated; and the availability of resources for that maintenance and administration.” 36 C.F.R. § 212.55(a).

22. The Nez Perce National Forest, where Forest road 652 is located, formally began the travel management planning process under 36 C.F.R. §§ 212.50 *et seq.* in May 2007, when it published a Notice of Intent to prepare an Environmental Impact Statement (“EIS”) for a MVUM.

23. In December 2008, the Nez Perce National Forest released a draft EIS for the MVUM for public comment; and then released a Supplemental Draft EIS in December 2010. According to the Forest’s website, “[b]ased on recent appeals and litigation on Travel Management decisions, the forest is currently finalizing the FEIS analysis” for a completed MVUM on the Nez Perce National Forest, after which it will issue a proposed Record of Decision for public review and objection before adopting a final Record of Decision and publishing the MVUM for the Nez Perce National Forest.

24. To date, the Nez Perce National Forest has not issued an FEIS for the MVUM; and no Record of Decision has been issued adopting a final MVUM for the

Nez Perce National Forest.

25. According to the Nez Perce National Forest's website, road and trail designations contained in the Forest's existing road and trail access guides "will remain in place to use until the Forest MVUM map is available to the public." These existing road and trail access guides are dated 2007; as the website acknowledges, "[t]hese documents have not be [sic] recently updated by the forest."

26. Forest service road 652 is shown as an "[u]nimproved [d]irt" road without a number on the official 2013 forest map for the Nez Perce National Forest. The 2013 forest map legend lists the following seven possible road designations; Primary Highway, Secondary Highway, Scenic Byway, Primary Access Route – Normally Suitable for Automobile Traffic – Travel with Caution; Light Duty Road, Paved; Light Duty Road, Composition Unspecified; and Unimproved Dirt. Likewise, the 2007 road access guide for the Nez Perce National Forest does not list forest road 652 as open for any motor vehicle use.

27. Because the 2007 road access guide and forest maps do not list forest road 652 as open for general use, a special use authorization is required under 36 C.F.R. § 251.50(d) for commercial use of the road to haul timber under IDL's proposed Selway Fire salvage sale.

Errors In Designation of Forest Road 652 As a "Public Road."

28. The term "public road" – *i.e.*, the designation used by the District Ranger in the November 20, 2014 determination regarding forest road 652 – is not defined in Forest Service statutes or regulations. However, the Forest Service Manual defines "public road" as "available, except during scheduled periods, extreme weather

or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration.” F.S.M. 7730.

29. The Forest Service’s November 20, 2014 determination that forest road 652 is a “public road” failed to address these definitions under the Forest Service Manual and the facts showing that forest road 652 does not qualify as a “public road” under those definitions – including because forest road 652 is not passable by four-wheel standard passenger cars for most of its length (other than the short stretch maintained by the Wrights across their property); has been gated and locked by the Forest Service for many years past the Wrights’ property; is not listed as an open road on the Nez Perce National Forest’s 2007 (or prior) road access guides; and is covered by the 1977 scenic easement.

30. Prior to the November 20, 2014 determination challenged here, forest road 652 had never been classified by the Forest Service, or any other agency, as a “public road.” By purporting to newly designate forest road 652 as a “public road,” the Forest Service’s determination violated the legal requirements that travel management determinations must be based on public participation and NEPA analysis.

31. Moreover, forest road 652 is not a public road because there is no Forest Service planning document or decision that designates the road as an authorized motorized travel route. Thus, forest road 652 is not open to motorized travel without restrictions, and IDL’s proposed use is not authorized by regulation or law but instead requires a special use authorization under 36 C.F.R. § 251.50(d).

32. Forest Road 652 also is not a public road because title is not vested in

the U.S. Government as required by the Surface Transportation Assistance Act (“STAA”). 23 U.S.C. § 101(a)(8). The Forest Service does not hold title to any of the land underneath road 652.

33. Forest road 652 also is not a public road because it not “maintained by a public authority,” as required by STAA. *Id.* § 101(a)(27). The Wrights maintain the road for access to their residence. Forest road 652 is unmaintained beyond the Wrights’ property.

34. Forest road 652 also is not a public road because it is not “open to public travel.” 23 C.F.R. § 660.103. Beyond the initial approximate 740 feet on the Wrights’ property, forest road 652 is a native surface dirt track that is not passable in a standard passenger automobile.

35. Forest road 652 also is not a public road because a locked gate restricts public use. *Id.* For approximately thirty years there has been a locked gate on forest road 652 where it leaves state land and re-enters private property. The Forest Service maintains a key to that gate.

36. In addition, the November 20, 2014 determination is erroneous because the Forest Service failed to acknowledge the presence of the 1977 scenic easement covering the entire Wright’s property, including the section of forest road 652 on their land, which prohibits commercial and industrial activities within the easement area.

The Roads Planned in Connection with IDL’s Selway Timber Sale are Likely to Cause Significant Erosion in the Wild & Scenic Corridor

37. IDL’s proposed Selway Fire timber sale will clearcut 142 acres of trees and build over three miles of new roads on extremely steep, unstable slopes, with six switchbacks, within one mile of the Selway River. Many of those slopes are between

40 to 80 percent in side slope.

38. IDL also intends to install twenty-seven culverts in streams that feed directly into the Selway River. In addition to the new road building, approximately 0.39 miles of forest road 652 will be reconstructed to a sixteen-foot travel way. Due to the steep terrain of the sale area, a sixteen-foot travel way will require up to a 100-foot clearing width to accommodate cut and fill slopes above and below the road bed.

39. No formal road construction engineering plan has been developed by IDL. The extent of the road construction planning is found in IDL's road Development Log, which I have reviewed. The road Development Log does not reflect any soil or geotechnical analysis was conducted— that is sampling, testing and classifying of the soil material- to support the road design.

40. Road construction will require wasting 18,520 cubic yards of native rock and soil on site, essentially creating a waste area in the Selway Wild and Scenic River corridor. The road Development Log has no mass diagram, to show the movement of the road material, that is the amount of cubic yards of excavation and embankment which show where the fill material will be placed, or the volume of that material calculated.

41. In short, the road building plans appear to have been hastily assembled, are poorly detailed, and involve massive earth-moving within close proximity of the Selway River itself, and the Wright's residence. These facts create the potential for massive sedimentation, debris flow, landslide events, and threaten grave and irreversible damage to environmental resources, property, and human life. The actual likelihood of these plausible events is simply unknown, because neither IDL nor the

Forest Service have adequately analyzed the suitability, adequacy, and potential impacts of the road building in connection with IDL's timber sale in the Selway Wild and Scenic Corridor.

The FS cancelled a similar sale due to erosion concerns

42. The Selway Fire sale is located on state land with virtually identical slope and soil conditions as nearby federal land that the Forest Service previously determined to be unsuitable for road building and logging in 1964 due to grave concerns about erosion and landslides into the Selway River and nearby streams, because of the steepness of the terrain and soil type.

43. In 1964, the Forest Service proposed a timber sale in the Goddard Creek area, which is located up-river and beyond the State-owned tract of land where IDL is currently planning its timber sale. The Forest Service voluntarily withdrew its 1964 logging proposal after the District Ranger determined that "[s]erious slides and slumps may occur due to the road construction and accelerated erosion may result from logging." See Letter from District Ranger William Covey to Forest Supervisor John Milodragovich (April 28, 1964).

44. Because the slopes within the Selway Fire timber sale area are unstable and IDL's road building plan is lacking adequate engineering, there is a significant potential for catastrophic sedimentation, debris flow, and landslide events that could cause irreversible damage to the Selway River, private property, and human life.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. Executed this 24 day of June, 2015.

/s/ Daryl K. Mullinix