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Rick Brazell
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Dear Mr. Brazell,

I am writing on behalf of Idaho Rivers United, Friends of the Clearwater, and a number of concerned citizens who live on or near Highway 12 to urge the Clearwater National Forest to take action to prevent the Idaho Transportation Department (“ITD”) from engaging in illegal activity within the boundaries of the Clearwater National Forest. Specifically, we urge the Forest Service to notify ITD that the issuance of overlegal permits for the Emmert Project¹ and/or the Kearn Module Transport Project (“Kearn”) would violate the authorities listed below and require ITD to seek all necessary and appropriate special use permits.

The Clearwater National Forest (“Clearwater NF”) manages the U.S. Highway 12 corridor in cooperation with ITD under a series of plans and agreements. ITD intends to issue permits allowing ConocoPhillips (“Conoco”) and Imperial Oil/ExxonMobil (“Exxon”) to transport over 200 oversize loads from the Port of Lewiston along Highway

¹ In this letter, “Emmert Project” refers to Conoco’s application for overlegal permits to truck four loads of equipment, each of which measures 225’x29’x26’ and weighs 300 tons, to the oil refinery in Billings, Montana. ConocoPhillips has contracted with Emmert International to transport the loads.

12 to Lolo Pass. The issuance and implementation of these permits would violate multiple agreements and provisions of law, including, but not limited to:

- The National Environmental Policy Act, 42 U.S.C. §§ 4231-4347;
- Highway Easement Deed (1995) and Correction Deeds (1997, 2005) for Highway 12;
- A Design for Wild and Scenic Rivers: Middle Fork Clearwater, Selway, Lochsa;
- Memorandum of Understanding #06-MU-I010500-036 between the State of Idaho Transportation Department District 2 and the Clearwater National Forest;
- U.S. Highway 12 Corridor Highway Improvement and Maintenance Strategy and Implementation Guidelines (1993);
- Northwest Passage Scenic Byway Corridor Management Plan (1997); and
- Forest Service regulations prohibiting certain activities on National Forest lands found at 36 C.F.R. Part 261.

As the federal agency charged with administering the Lochsa River Wild and Scenic River corridor and a signatory to the pertinent agreements, the Forest Service has a heightened duty to comply with and enforce these authorities. Under the circumstances, the failure to take action to address the Emmert and Kearl Projects would be arbitrary and capricious.

I. The Forest Service Must Take Action to Protect the Lochsa Wild and Scenic River Corridor.

The Wild and Scenic Rivers Act charges the Clearwater NF with protecting the scenic, historic, and recreational values of the Lochsa River. Any form of approval or consent for the Emmert Project or the Kearl Project- including failure to enforce the terms of the relevant legal authorities- would violate this duty.

Congress designated the Middle Fork of the Clearwater River “from the town of Kooskia upstream to the town of Lowell; the Lochsa River from its junction with the

Selway at Lowell forming the Middle Fork, upstream to the Powell Ranger Station; and the Selway River from Lowell upstream to its origin” as a Wild and Scenic River when it passed the Wild and Scenic Rivers Act in 1968. 16 U.S.C. § 1271(a)(4). The Forest Service is charged with the responsibility for administering the Lochsa Wild and Scenic River. It must do so, “in such manner as to protect and enhance the values which caused it to be included in said system” and give primary emphasis to “protecting its esthetic, scenic, historic, archeologic, and scientific features.” 16 U.S.C. § 1281(a). In order to carry out this duty, the Clearwater NF has adopted a River Plan for the Middle Fork of the Clearwater River including the Lochsa & Selway and A Design for Wild and Scenic Rivers: Middle Fork Clearwater, Selway, Lochsa.

The Clearwater NF has also become engaged in the management of U.S. Highway 12, which runs through the Lochsa Wild and Scenic River corridor from the town of Lowell to the Idaho/Montana border. Highway 12 has been designated a National Scenic Byway and an All-American Road. In view of these classifications and the highway’s proximity to the Lochsa River, the Clearwater NF has entered into a number of agreements with ITD and coordinates with ITD regularly concerning the management of Highway 12.

For over a year, the Clearwater NF has been consulting with ITD about the modifications to Highway 12 that ITD has permitted in connection with the Emmert Projects and Kearsley Projects. Clearwater NF staff have raised concerns about the impacts of these projects on both the Wild and Scenic River and National Scenic Byway, and ITD has provided enough information to inform the Forest Service of the relevant facts.

These facts indicate that the Emmert and Kearn Projects violate multiple agreements and provisions of law. As the custodian of the Lochsa Wild and Scenic River, the Forest Service must act to enforce these legal authorities.

II. The Forest Service Must Take Action to Comply with the National Environmental Policy Act.

The Forest Service and ITD must analyze the impacts of the Emmert and Kearn Projects in an Environmental Impact Statement (“EIS”) before the projects can proceed. Whether analyzed separately or together, both Projects are major federal actions that will have significant effects on the environment.

The National Environmental Policy Act (“NEPA”) requires a thorough and public analysis of the environmental consequences of proposed federal actions, including a detailed Environmental Impact Statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). State agencies must comply with NEPA when “federal and state projects are sufficiently intertwined to constitute a ‘federal action.’” *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1092 (9th Cir. 2003). A state must also comply with NEPA “if their proposed action cannot proceed without the prior approval of a federal agency.” *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992).

Agencies may not “segment” highway projects into multiple pieces in order to avoid NEPA analysis. *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1139 (5th Cir.1992). “A single NEPA review document is required for distinct projects when there is a single proposal governing the projects, or when the projects are ‘connected,’ ‘cumulative,’ or ‘similar’ actions under the regulations implementing NEPA.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-894 (9th Cir.

2002)(citing 40 C.F.R. § 1508.25). NEPA analysis must include a cumulative analyses of the likely environmental impacts of a proposed action. 40 C.F.R. §§ 1508.7; 1508.25(a)(2).

Both the Emmert and Kearn Projects constitute federal action. Through the implementation of these projects, the State of Idaho and the oil industry intend to convert Highway 12 from a rural scenic byway into an industrial high-and-wide corridor. Although it is managed by the states, Highway 12 is nevertheless a **U.S.** Highway maintained partially with federal funds. Converting it into a high-and-wide corridor would impact four states (Oregon, Washington, Idaho, and Montana), traffic on multiple rivers, and another sovereign nation-the Nez Perce Tribe. Turning Highway 12 into an artery for the energy industry would also threaten the scenic values that led to the Wild and Scenic River designation of the Lochsa River and the All-American Road designation of Highway 12.

The Forest Service's management responsibilities for Highway 12 likewise implicate the federal government in the Emmert and Kearn Projects. The Forest Service manages the Highway 12 Northwest Passage Scenic Byway and the Lochsa Wild and Scenic River corridor cooperatively with ITD. None of the improvements made to Highway 12 over the last two years in order to accommodate the Emmert/Kearn megaloads would have been possible without the Forest Service's tacit consent. In certain instances, Clearwater NF employees have also given explicit approval for the modifications. *See* Email from Heather Berg, Wild and Scenic Rivers Administrator, Clearwater National Forest, to Doral Hoff, District 2 Maintenance Engineer, Idaho

Transportation Department (Jul 1, 2009)(authorizing ITD to modify vegetation on National Forest land in order to accommodate the Kearn loads).

In addition, multiple federal permits will be required before the Kearn Project can be implemented, including special use permits from the Forest Service for the relocation of utility lines and a dredge and fill permit from the Army Corps of Engineers for the expansion of the Port of Lewiston. Exxon's proposal to transport Korean equipment through the United States to Canada is a single proposal that involves four states and two international border crossings that has given rise to multiple highway projects in both Idaho and Montana. The segmentation of these connected actions into multiple environmental reviews would violate NEPA.

Both the Emmert and Kearn Projects will also have significant environmental impacts. If implemented, they will degrade the scenic, historic, and recreational values of a nationally designated All American Road and Wild and Scenic River corridor. They will cause vibrations that could damage historic artifacts and National Historic Trails. Accidents during transport could result in the take of endangered fish. In addition, the transport of this equipment will indirectly cause further development of the Alberta tar sands, resulting in emissions of greenhouse gases, as well as particulate matter, sulfur dioxide, carbon monoxide, nitrous oxide and the hazardous air pollutants benzene, toluene, ethylbenzene, xylene, and formaldehyde.

The Forest Service should accordingly work with ITD, the Army Corps of Engineers, and the Montana Department of Transportation to prepare comprehensive EISs for the Emmert and Kearn Projects.

III. ITD is Violating the Terms of the Highway Easement Deed.

In 1995, the Forest Service granted the State of Idaho “an easement for a right-of-way for the operation and maintenance of a highway . . . on, over, and across, in, and upon [certain] described land of the United States within the Clearwater National Forest.” Highway Easement Deed (June 30, 1995.) The legal descriptions set forth in the Highway Easement deed were later amended and corrected in two Correction Deeds recorded on May 28, 1997 and June 13, 1997.

Under the terms of all three deeds, the State’s easement is subject to a number of conditions. The issuance of an oversize permit for the Emmert Project or the Kearl Project would violate two of these conditions.

First, the easement explicitly “does not include the grant of any rights for nonhighway purposes or facilities.” Highway Easement Deed at 4. The transport of loads of the size contemplated in the Emmert and Kearl Projects does not constitute “highway purposes.” This term, as understood from the Corridor Highway Improvement and Maintenance Strategy and Implementation Guidelines adopted in 1993 (“Maintenance Strategy”), includes recreational, commercial, and residential use. *See* Maintenance Strategy at 4, 6-7. Neither the Maintenance Strategy nor the easement designate Highway 12 as a high-and-wide corridor.

Allowing the Emmert and Kearl loads to use the highway would substantially interfere with all of the traditional and historic uses of Highway 12, essentially converting it from a two-lane highway used for multiple purposes into a high-and-wide corridor where the transport of commercial loads takes precedence over all other uses. For instance, the current proposal to move the loads at night would substantially interfere

with the commercial traffic that Highway 12 has traditionally served. By virtue of their sheer size, the loads proposed for the Emmert and Kearn Projects are categorically different from other oversize loads that have been authorized on Highway 12 in the past. The transport of loads this big inevitably raises unique logistic and safety questions, as evidenced by the amount of state employee time ITD has already spent trying to make these projects feasible.

Authorization of the Emmert and Kearn Projects would also be inconsistent with the easement's requirement that "the State shall protect and preserve soil and vegetative cover and scenic and esthetic values on the right-of-way outside of construction limits." Highway Easement Deed at 4. ITD proposes to park the Emmert and Kearn loads along the side of the highway during the day where they will be seen by every traveler who rafts the river, casts a fishing line, or drives the road. Local residents who rely on tourism to make their living have testified that the presence of the oversize loads would damage the scenic and esthetic values of the corridor. Since Exxon proposes to transport over 200 Kearn loads with as many as two loads on each segment of the highway at a time, a tourist driving through the corridor would potentially be exposed to as many as 6 modules while traveling from Lewiston to Lolo Pass.

We accordingly urge the Forest Service to take action to enforce the terms of the Highway Easement Deed and Correction Deeds.

IV. ITD is Violating Multiple Agreements with the Forest Service.

Authorization and implementation of the Emmert and Kearn Projects would violate multiple agreements that ITD has entered into with the Forest Service by degrading the scenic values of the corridor and conflicting with existing uses of Highway

12. The Clearwater NF and ITD established “a framework for cooperation” in Memorandum of Understanding #06-MU-I010500-036. As part of this agreement, each agency promised to “recognize, utilize, and update” the Maintenance Strategy and the Northwest Passage Scenic Byway Corridor Management Plan (1997)(“Byway Management Plan”). Memorandum of Understanding #06-MU-I010500-036 4 (Aug. 22, 2006).

Both the Maintenance Strategy and the Byway Management Plan establish compliance with the Wild and Scenic Rivers Act as a primary goal for corridor management. Maintenance Strategy at 2-3; Byway Management Plan at 19. They also prioritize recreation and scenic values. The Desired Future Condition described in the Maintenance Strategy establishes the goal that, “the highway and other transportation facilities within the corridor are enhancing the recreational experiences of visitors to the area.” Maintenance Strategy at 19. Similarly, the Byway Management Plan provides,

management of the roadway must be consistent with protecting the scenery, water quality, wildlife, historic and cultural resources. The Wild and Scenic Rivers Act prohibits encroachment into the river, thus the narrow and winding road that exists today will be changed only minimally over time.

Byway Management Plan at 17.

Implementation of the Emmert and Kearn Projects would degrade the scenic and recreational values of the Wild and Scenic River corridor and National Scenic Byway. Modules sitting on the side of the highway would block the view of the river, the passage of large equipment at night would disturb tourists staying in campgrounds and motels close to the highway, and the weight of the loads would damage the road. These impacts

would detract from rather than enhance “the recreational experiences of visitors to the area.”

Furthermore, implementation of the Emmert and Kearl Projects would violate the Maintenance Strategy by creating new conflicts between highway users and intensifying existing conflicts. Through the strategy, the Clearwater NF and ITD agreed to “integrate and coordinate highway facility development and maintenance projects” so as to “achieve a long term solution” to conflicts between commercial and recreational users. *Id.* at 1, 16. Although ITD claims that the modules will not delay traffic for more than 15 minutes, it would be physically impossible for Exxon and Conoco to achieve this goal. *See* Comments of Linwood Laughy to ITD (July 14, 2010). Both commercial and recreational² traffic travel at night and will be delayed by the modules. As a result, nighttime traffic will spill over into the early morning commute time, when many residents commute between Lewiston and other parts of the Highway 12 corridor.

We accordingly urge the Forest Service to take action to enforce the terms of the Maintenance Strategy and Byway Management Plan.

V. ITD Intends to Authorize Unlawful Use of National Forest Land.

Finally, implementation of the Kearl Project would result in violations of the Forest Service’s regulations. The loads proposed for transport in these projects are so wide that they would take up both lanes of the highway. ITD is accordingly requiring Exxon to periodically pull the Kearl loads onto turnouts in order to let traffic pass. Based on currently available information, it appears that Exxon intends to use multiple turnouts that extend outside of ITD’s right-of-way and onto National Forest land. Since parking

² Some tourists travel at night, rather than during the day.

the modules on National Forest land would violate the Forest Service's regulations, the Forest Service must prohibit ITD from making use of these turnouts.

The Forest Service's regulations prohibit, "Placing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person." 36 C.F.R. § 261.10(f). Exxon intends to park modules on Forest Service land in a manner that will impede and inconvenience others trying to use the forest. For instance, Exxon plans to park their modules in the turnout at Mile Post 120.3 in order to remove an extra dolly necessary to enable them to drive across the Fish Creek bridge. This turnout extends an additional 75 – 100 feet outside ITD's right-of-way onto National Forest land. The turnout is a popular stop because it provides a variety of services, including information, Forest Service toilets, an emergency phone, interpretive panels, and a boat launch. Individuals who wish to stop and use this turnout will be unable to do so while the module is stopped there.

The regulations also prohibit the use of any device that produces noise, such as a motor, near a campsite "in such a manner and at such a time so as to unreasonably disturb any person." 36 C.F.R. § 261.11(i). Under Exxon's current traffic control plan, Exxon intends to pull into the turnout at Mile Post 108.3, which extends beyond ITD's right-of-way onto National Forest land and is right next to a Forest Service campground. The trucks transporting the modules will make a significant amount of noise. Since they will be traveling at night, they will unreasonably disturb campers in the area in violation of the regulations.

We accordingly urge the Forest Service to prohibit ITD from bringing modules associated with the Emmert and Kearl Projects onto National Forest land.

TIME IS OF THE ESSENCE

The oversize loads Conoco intends to transport have arrived at the port of Lewiston and, as of this writing, ITD has indicated that it intends to issue the Emmert permit in the near future so that the Emmert loads can move on August 18 or 19.

Although we recognize and respect the constraints on the Forest Service's time, we have no choice but to request that the Forest Service take action by no later than August 17, 2010. For the reasons outlined above, a failure to act by this date would be arbitrary and capricious.

Thank you for your time and consideration.

Sincerely,

/s/ Natalie J. Havlina
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cc:

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Heather Berg, Wild and Scenic Rivers Administrator, Clearwater National Forest

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