

SETTLEMENT AGREEMENT

WHEREAS, the subject of this settlement agreement (“Agreement”) is the litigation captioned as *Nez Perce Tribe v. U.S. Forest Service*, No. 13-cv-348 (D. Idaho), *on appeal*, No. 13-36148 (9th Cir.), hereinafter, “Action,” in which the plaintiffs sued the Forest Service, seeking to halt certain oversized truck shipments known as “megaloads” on the segment of U.S. Highway 12 in Idaho crossing the Nez Perce–Clearwater National Forests (“Forests”).

WHEREAS, the term “Parties” means the parties to the Action. This includes plaintiffs-appellees Nez Perce Tribe and Idaho Rivers United (collectively, “Plaintiffs” or “Plaintiffs-Appellees”); and defendant-appellant United States Forest Service (“Service” or “Defendant” or “Defendant-Appellant”).

WHEREAS, on September 12, 2013, the United States District Court for the District of Idaho entered an order granting the Plaintiffs’ request for a preliminary injunction and directed the Service to close 100 miles of Highway 12 crossing the Forests to any megaloads shipped by Omega Morgan until the Service conducts a corridor review study and consults with the Tribe. The district court denied the Service’s motion for reconsideration on October 10, 2013.

WHEREAS, on December 9, 2013, the Service filed a notice of appeal from the district court’s orders. Since March 2014, the Parties have been engaged in confidential settlement discussions under the Ninth Circuit Mediation Program.

WHEREAS, in March 2015, the Service published a study entitled “Values of the Middle Fork Clearwater and Lochsa River Corridor Potentially Affected by Certain Over-Legal Truck Traffic US Highway 12,” and has since consulted with the Tribe concerning the impact of megaloads on the corridor.

WHEREAS, the Nez Perce Tribe has prepared a study determining that the Lochsa River Corridor, which includes Highway 12, is eligible for inclusion in the National Register of Historic Places, based on the importance of the corridor as a traditional cultural property.

WHEREAS, Congress has designated the Middle Fork Clearwater River (“River”) as a component of the Wild and Scenic River System under 16 U.S.C. 1274(a)(1). The Service has recognized the River’s outstandingly remarkable values for scenery, recreation, fisheries, water quality, wildlife, vegetation/botany, prehistory, history and traditional/cultural uses. The designated portion of the River parallels Highway 12 through the Forests.

COME NOW the Parties and agree as follows:

1. Within ten days of the effective date of this Agreement, the Service agrees to transmit to the Idaho Transportation Department the letter attached hereto as Exhibit 1, setting forth the position of the Service as to when oversized loads on Highway 12 are incompatible with the use of the highway corridor through the Forests in light of recognized values under the Wild and Scenic Rivers Act, and the cultural importance of the corridor to the Nez Perce Tribe.

2. Within ten days of the effective date of this Agreement, the Service will voluntarily dismiss its appeal.

3. Within ten days of the effective date of this Agreement, the Plaintiffs will file a Stipulation of Dismissal to voluntarily dismiss their district court case, as set forth in Exhibit 2 hereto.

4. Solely as a compromise to avoid further litigation, and without establishing any precedent, the Forest Service agrees to pay the sum of \$36,066 for attorneys' fees, costs, and expenses incurred by Plaintiff Idaho Rivers United in connection with the district court litigation in this Action. Such payment shall fully resolve any claim for attorneys' fees, costs or expenses incurred in connection with this Action.

5. The undersigned certify that they are fully authorized to enter this Agreement on behalf of all Parties they represent and to legally bind such Parties to it, and that in such capacity they agree to the terms of this Agreement.

6. This document sets forth the entire Agreement of the Parties for the settlement of the Action. No modification to this Agreement shall be valid unless written and executed by all Parties.

7. This Agreement is the product of negotiation and compromise, and the Parties agree that it represents a fair settlement of the Action. The Agreement shall not be construed as an admission of liability by the Service with respect to any matter. The Service enters into this Agreement solely to avoid further litigation.

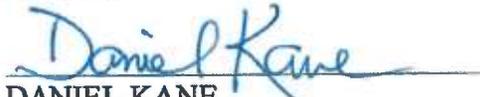
8. This Agreement becomes effective upon the signature of all Parties' respective representatives and is binding upon all Parties including, but not limited to, their officers, directors, employees, successors, and assigns.

9. Nothing in this Agreement may be construed: (1) to deprive a federal official of the authority to revise, amend, or promulgate regulations; (2) to commit a federal official to obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. 1341; or (3) to require a party to take any action contrary to any law or regulation.

10. This Agreement may be executed in one or more separate counterparts, each of which, when so executed, shall together constitute one and the same instrument.

**FOR PLAINTIFF-  
APPELLEE NEZ PERCE  
TRIBE:**

  
\_\_\_\_\_  
MARY JANE MILES  
Chairman

  
\_\_\_\_\_  
DANIEL KANE  
Secretary

Dated: 1-13-17

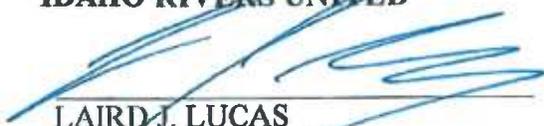
**FOR DEFENDANT-  
APPELLANT U.S. FOREST  
SERVICE:**

  
\_\_\_\_\_  
BRIAN C. TOTH  
United States Department of Justice  
Environment & Natural Res. Division  
Appellate Section  
P.O. Box 7415  
Washington, DC 20044  
(202) 305-0639

*Attorney for United States Forest Service*

Dated: January 17, 2017

**FOR PLAINTIFF-APPELLEE  
IDAHO RIVERS UNITED**

  
\_\_\_\_\_  
LAIRD J. LUCAS  
Advocates for the West  
1320 W. Franklin Street  
Boise, ID 83702  
(208) 342-7024

*Attorney for Idaho Rivers United*

Dated: Jan 12, 2017





File Code: 1560

Date:

Mr. Scott Stokes  
Chief Deputy  
Idaho Transportation Department  
PO Box 7129  
Boise, ID 83707-1129

Dear Mr. Stokes:

The use of U.S. Highway 12 in Idaho for the transport of extremely large oversize loads across the Nez Perce – Clearwater National Forests has been controversial since 2009, when Imperial Oil proposed to transport approximately 200 separate loads up to 29 feet wide and 300 tons through the highway corridor. The controversy centered on the extreme size, number, and frequency of proposed shipments and their effect on the scenic, recreational and amenity values of the Highway 12 corridor. Until the Imperial Oil controversy arose, Idaho Transportation Department had routinely permitted oversize loads on Highway 12 at a low-level for decades. In 2011 the Forest Service was sued over its position that it lacked jurisdiction to regulate oversize loads on Highway 12. (*Idaho Rivers v. U.S. Forest Service and Federal Highway Administration*, No. 11-cv-95 (D. Idaho)). On February 7, 2013, the U.S. District Court for the District of Idaho ruled that the Forest Service and the Federal Highway Administration had authority to review the state of Idaho permits for transporting oversize loads along that portion of U.S. Highway 12 crossing the National Forest. The court also held that the 1995 Department of Transportation easement covering Highway 12 that granted the state of Idaho the right to use the easement for all highway purposes is expressly conditioned upon Idaho's agreement to protect the scenic and aesthetic values on the right-of-way.

During the summer of 2013, Idaho Transportation Department issued Omega- Morgan a permit to transport extremely large oversize loads on Highway 12. On September 12, 2013, the federal district court in Idaho granted the Nez Perce Tribe and Idaho Rivers United a preliminary injunction in a different suit, *Nez Perce Tribe, et al v. United States Forest Service*, No. 13-CV-348-BLW (D. Idaho September 12, 2013). Pending resolution of the merits of that lawsuit, the district court ordered the Forest Service to close Highway 12 between milepost 74 and 174 to any Omega Morgan megaload until the Forest Service conducts a corridor study to assess how visitor and traveler experiences and cultural and intrinsic values associated with the corridor are affected by such loads, and consults with the Nez Perce Tribe.

The Forest Service filed a notice of appeal to the Ninth Circuit from the district court's order. The case was subsequently placed in the Ninth Circuit mediation program. In March 2015, the Forest Service published its final corridor study and began consultation with the Nez Perce Tribe. In consultation with the Tribe, the Forest Service identified a category of oversize traffic that it believes is consistent with scenic and aesthetic values of the corridor as well as Tribal values.



Highway 12 where it passes through the Clearwater National Forest is a unique and nationally significant route. National Forest lands along the route between Kooskia Idaho and Lolo Pass contain significant national designations. One hundred miles of the Middle Fork Clearwater and Lochsa River are designated as a wild and scenic river. The outstandingly remarkable values identified for the rivers are scenery, recreation, fisheries, water quality, wildlife, vegetation/botany, prehistory, history and traditional/cultural uses. A portion of the Selway-Bitterroot Wilderness area is in close proximity. Highway 12 parallels and intersects the Lewis and Clark and Nez Perce National Historic Trails and the Lolo Trail National Historic Landmark. Highway 12 is designated as the “Northwest Passage All-American Road,” a scenic byway under the Surface Transportation Efficiency Act of 1991. It is also designated a state scenic byway. The Powell and Lochsa Ranger stations are listed on the National Register of Historic Places. Highway 12 is also adjacent to, or in close proximity to 52 cultural resource sites including Nez Perce religious and cultural sites.

The corridor study has been instrumental in identifying the high value people place on the river corridor. Even those in favor of additional “megaloads” do not want to see the character of the corridor changed. A common response we heard in preparing the corridor study was that people did not want highway 12 to become an “industrial corridor.” Although the term “industrial corridor” has no specific definition, we understand this concern to mean that the present balance between commercial and noncommercial uses of Highway 12 is acceptable, but increased use of Highway 12 by megaload transporters has the potential to shift uses too much toward the commercial end. Prior to the Imperial Oil proposal, the level of use of Highway 12 for oversize loads was not controversial. We believe the “pre- Imperial” historic level of use reflects a balance of uses that protects the corridor values and provides an appropriate balance between commercial and recreational uses while protecting the scenic and aesthetic values of the river corridor.

Idaho Transportation Department records from 1999 – 2012 for overlegal permits that required a traffic control plan for transit on Highway 12 due to widths of 16 feet or more, or lengths of 150 feet or more indicate that traffic of that size averaged approximately 2-3 trips per month. Further, it does not appear that loads similar to those proposed by Imperial Oil were ever an historic use of the highway. The historic level and character of oversize load traffic on highway 12 has not created unacceptable conflict with the values for which the Wild and Scenic River corridor was designated. Under the District Court’s ruling that the highway easement was “expressly conditioned” upon the protection of scenic and aesthetic values, it is the position of the Forest Service that the following restrictions in the permits issued by the Idaho Transportation Department will protect the scenic and aesthetic values of the Lochsa corridor:

1. Transport of oversize loads exceeding 16 feet in width or 150 feet in length or 150,000 pounds should be limited to a yearly average of two loads per month. In order to accommodate heavy recreational use of the corridor during the summer months (June – August) oversize loads meeting this criteria should be limited to a monthly average of one load per month during this time.
2. The largest megaloads (those which exceed two of the three criteria above) should be prohibited entirely, as such loads have the greatest potential to affect the scenic, aesthetic, and cultural values associated with the corridor. In addition, such loads appear to be a new use of the highway corridor.

We believe such restrictions are a reasonable compromise which allows Highway 12 to continue to be used for commercial purposes including oversize shipments, consistent with its historic use for that purpose while addressing the concern that expanded use of Highway 12 for the shipment of such loads will impact visitor experience in the Wild and Scenic River corridor. Such restrictions on megaload shipments might be modified in the future based on a comprehensive river management planning process, but, based on current information, will now protect the aesthetic and cultural values and the unique experiences associated with the Lochsa corridor.

Sincerely,

LEANNE M. MARTEN  
Regional Forester



NAMES AND ADDRESSES OF COUNSEL  
APPEAR ON SIGNATURE PAGE

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

NEZ PERCE TRIBE, and )  
IDAHO RIVERS UNITED, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
UNITED STATES FOREST SERVICE, )  
 )  
Defendant, )  
\_\_\_\_\_ )

No. 3:13-cv-348-BLW

**STIPULATION OF DISMISSAL**

Pursuant to a separate Settlement Agreement (attached), Plaintiffs Nez Perce Tribe and Idaho Rivers United, and Defendant United States Forest Service, by and through their undersigned counsel of record, hereby stipulate for dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

**IT IS SO STIPULATED.**

Dated: January \_\_, 2016

Respectfully submitted,

/s/ David J. Cummings  
DAVID J. CUMMINGS (ISB# 5400)  
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*Attorney for Plaintiff Nez Perce Tribe*

/s/ Laird J. Lucas  
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*Attorneys for Plaintiff Idaho Rivers United*

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*Attorney for Defendant U.S. Forest Service*

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_ day of January, 2017, I electronically filed the foregoing STIPULATION OF DISMISSAL with the Clerk of the Court by using the CM/ECF system, which sent a Notice of Electronic Filing to all counsel of record.

/s/ Laird J. Lucas