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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,

and

RESOURCES CONSERVATION  
COMPANY INTERNATIONAL,

Defendant-Intervenor.

Case No. 3:13-cv-348-BLW

**FIRST AMENDED  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**Violations of the Administrative  
Procedure Act (5 U.S.C. § 551 *et seq.*);  
Wild and Scenic Rivers Act (16 U.S.C. §§  
1271-1287); National Forest Management  
Act (16 U.S.C. § 1600 *et seq.*); National  
Historic Preservation Act (16 U.S.C. §470 *et  
seq.* ); and Declaratory Judgment Act (28  
U.S.C. §§2201 *et seq.*)**

Plaintiffs Nez Perce Tribe and Idaho Rivers United amend their Complaint (Dkt. #1) to include updated facts and add National Historic Preservation Act claims.

1. Plaintiffs Nez Perce Tribe (Tribe) and Idaho Rivers United (IRU) bring this action for emergency injunctive relief to prevent irreparable harm to the rights and interests of the Nez Perce people, IRU, and the outstandingly remarkable values of the Middle Fork Clearwater/Lochsa Wild and Scenic River Corridor.

2. This action follows in the footsteps of *Idaho Rivers United v. U.S. Forest Service*, Civ. No. 11-0095-BLW (D.Idaho), 2013 WL 474851 (Feb 7, 2013), wherein this Court held that the U.S. Forest Service has broad delegated authority to regulate the transport of “mega-loads” on U.S. Highway 12 where it passes through the Nez Perce-Clearwater National Forests and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor.

3. Based on the *Idaho Rivers United* ruling, the Forest Service issued interim directives defining what a “mega-load” is and prohibiting the transport of any further mega-loads across the Nez Perce-Clearwater National Forests on U.S. Highway 12 until the Forest Service completes a necessary corridor impacts study and consultation with the Nez Perce Tribe.

4. The Idaho Transportation Department ignored the Forest Service’s directives on August 2, 2013, when it issued a permit authorizing Defendant-Intervenor RCCI’s shipper, Omega Morgan, to transport a mega-load on U.S. Highway 12, beginning Monday, August 5. At the time this lawsuit was initiated, the mega-load was parked in the town of Syringa, which is inside the Nez Perce-Clearwater National Forests and the Wild and Scenic River corridor. The Forest Service took no action whatsoever to prevent the mega-load’s passage through the National Forest. Also at the time of the initiation of this lawsuit, a second RCCI mega-load was located at the Port of Wilma; it remains there. Defendant-Intervenor RCCI has acknowledged

that it intends to transport an additional seven mega-loads via a route which includes U.S. Highway 12 in Idaho. Also, the Lewiston Morning Tribune reported on August 27, 2013 that “[t]he route continues to attract attention from other shippers. Leon Franks, of Contractors Cargo Co. based on Compton, Calif., said his company wants to ship three massive refinery vessels from the Port of Lewiston to Great Falls, Mont., by November.” Plaintiffs are informed and believe, and allege thereon, that many more mega-load shipments are being planned for U.S. Highway 12 in the future.”

5. Prior to the first RCCI mega-load passing through the National Forest, and while the mega-load passed through the National Forest, the Forest Service denied the Tribe’s and public’s requests for relief on the grounds that the agency “lacks authority.” Though this Court’s decision in *Idaho Rivers United* has forced the Forest Service to admit that it has jurisdictional authority to “review” mega-load permits, and though the agency has taken a step toward exercising this authority by issuing interim criteria, the Forest Service decided and represented to the Plaintiffs and the public that it lacks the authority to enforce those interim criteria and its exercise of jurisdiction over transportation within the National Forest and Wild and Scenic River corridor.

6. On August 12, 2013, after the first mega-load had passed through the National Forest and Wild and Scenic corridor, and the next business day after Plaintiffs filed their request for a preliminary injunction in this case (Dkt. # 5-16), the Forest Service sent a letter to the Tribe, purporting to “clarify any misconceptions that may have arisen regarding the Forest Service response associated with Omega-Morgan’s recent transport of an oversized load along Highway 12”, and stating that the Forest Service “has full authority to protect the Highway 12 corridor and its values notwithstanding the State of Idaho’s easement for U.S. 12”, and offering

an explanation that the Forest Service “made the discretionary decision not to seek enforcement action with respect to this shipment...”; and went on to reiterate that its “discretionary decision not to seek to stop the transport of this oversize load in no way reflects a position that the Forest Service lacks authority to seek enforcement of its regulatory authority over such use.” As alleged below, the Forest Service has nonetheless violated, and will foreseeably continue to violate, its own decision preventing the transport of further mega-loads on U.S. Highway 12 until consultation with the Tribe and the corridor impacts study are completed.

7. By denying its authority to enforce its own directives and jurisdiction to regulate the transportation of mega-loads on U.S. Highway 12, and by subsequently acknowledging that it “has full authority to protect the Highway 12 corridor and its values” but asserting that it did or could exercise enforcement discretion with respect to the first mega-load, the Forest Service acted inconsistently with its own agency directives and the non-discretionary requirements under applicable federal law. The Forest Service is yet again “standing down,” just as it did in *Idaho Rivers United*, and allowed RCCI to proceed unauthorized and uncontested with its mega-load through the Wild and Scenic River corridor and National Forest. The agency’s arbitrary conduct irreparably and substantially harms the Tribe because the Tribe was and continues to be deprived of the opportunity to meaningfully consult with its federal trustee concerning the impacts of mega-loads to its rights and interests in the Nez Perce-Clearwater National Forests. Specifically under NFMA and its implementing regulations, as reflected in the Clearwater Forest Plan, the agency must ensure that its actions are not detrimental to the protection and preservation of the Tribe’s religious and cultural sites and practices and access to treaty-reserved rights in the National Forest. The Forest Service must also insure that proposed practices and management activities are coordinated with governmental entities and Indian Tribes to insure requirements of

all laws and regulations are met and terms of Indian Treaties are upheld. In addition, under the NHPA, the Forest Service must take into account the effect of its undertaking on historic properties, including Traditional Cultural Properties. This mandate includes requiring meaningful consultation with the Tribe that attaches cultural or religious importance to historic properties that may be affected by the Forest Service's activities. These federal statutory requirements under NFMA and NHPA, in conjunction with the Forest Service's responsibilities under Executive Order 13175 and Department of Agriculture policies on coordination consultation with Indian tribes, require the Forest Service to consult with the Tribe prior to proceeding with an undertaking or management activity that may affect Tribal treaty rights, cultural resources and religious practices. In addition, the Forest Service has responsibilities to the non-tribal public, including IRU, under NFMA and NHPA that involve coordination and public involvement. The agency cannot simply waive or defer its consultation responsibilities until after the management activity occurs because to proceed with enforcing its directives would be inconvenient or politically challenging for the Forest Service.

8. In conjunction with the Nez Perce Tribe's preliminary August 20, 2013 consultation with the Forest Service, the Tribe formally requested that the Forest Service acknowledge that the agency's exercise of regulatory jurisdiction to review and approve ITD permits for any future mega-loads, including conducting and completing a corridor impacts study through the U.S. Highway 12 corridor from Milepost 74 to 174, and that the Forest Service comply with its analysis and consultation duties under Section 106 of the NHPA.

9. By letter dated August 28, 2013, the Forest Service acknowledged the Tribe's request, but determined that, "[g]iven the litigation and upcoming hearing before Judge Winmill, the Forest Service will wait to see what comes from that before engaging in discussion of Section

106 issues.” The Forest Service further noted that “no permits will be issued by ITD during this period giving all the parties a chance to gather more information.”

10. The Forest Service’s decision that it lacks the authority to enforce its jurisdictional authority over Highway 12 in the National Forest, or alternatively that the agency’s acknowledgement that it “has full authority to protect the Highway 12 corridor and its values” but did or could exercise enforcement discretion to choose not to comply with its own statutory responsibilities under NFMA and the NHPA irreparably and substantially harms the Nez Perce Tribe and IRU, its members, and its staff by degrading the outstandingly remarkable scenic and recreational values of the Middle Fork Clearwater/Lochsa Wild and Scenic River.

11. Plaintiffs Nez Perce Tribe and IRU accordingly seek immediate judicial review, as well as declaratory and injunctive relief, from this Court to prohibit unauthorized passage of mega-loads across Nez Perce-Clearwater National Forests land, and to prevent the irreparable injuries to Plaintiffs and their members that would result from this intrusion.

#### **JURISDICTION AND VENUE**

12. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; the National Forest Management Act (NFMA) 16 U.S.C. § 1600 *et seq.*; the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; and the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271–1287. An actual, justiciable controversy now exists between Plaintiffs and Defendant, and the requested relief is therefore proper under 28 U.S.C. §§ 2201–02 and 5 U.S.C. §§ 701–06.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occur within this

judicial district, Plaintiffs reside in this district, and the public lands and resources in question are located within this district.

14. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

### **PARTIES**

15. Plaintiff NEZ PERCE TRIBE is a federally recognized Indian tribe headquartered in Lapwai on the Nez Perce Reservation. Since time immemorial, the Tribe and its tribal members have used and enjoyed the lands and waters of the Clearwater Basin, including those areas now encompassing the Nez Perce-Clearwater National Forests and Middle Fork Clearwater/Lochsa Wild and Scenic River.

16. In 1855, the Tribe negotiated a treaty with the United States. Treaty of June 11, 1855, with the Nez Perce Tribe, 12 Stat. 957 (1859) (1855 Treaty). Article 3 of the 1855 Treaty explicitly reserved to the Tribe certain rights, including the exclusive right to take fish in streams running through or bordering the Reservation, and “the right to fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands.”

17. The Tribe has a significant interest in the Forest Service’s administration and regulation of the Nez Perce-Clearwater National Forests. When not prevented from doing so by the transport of mega-loads on U.S. Highway 12, the Tribe and its members derive subsistence, ceremonial, recreational, aesthetic, scientific, commercial, cultural, and spiritual benefits from the land and resources of the Nez Perce-Clearwater National Forests that comprise part of the Tribe’s vast aboriginal territory and on which the Tribe enjoys access to, and exercise of, treaty-

reserved rights. The past, present, and future enjoyment of these benefits by the Tribe and its members has been, is being, and will continue to be irreparably harmed by the Forest Service's disregard of its statutory duties—specifically the Forest Service's decision that it lacks the authority to enforce its own jurisdiction authority over U.S. Highway 12 within the National Forest and its own directives disallowing mega-loads on U.S. Highway 12 without a corridor impacts study and tribal consultation. These are actual, concrete injuries caused by Defendant's violations of law, for which judicial relief is required to remedy the harm caused to the Tribe.

18. Plaintiff IDAHO RIVERS UNITED is a regional, membership, not-for-profit conservation organization representing all who love the freedom, adventure, and solitude of Idaho's rivers. IRU's mission is to protect and restore the rivers of Idaho, and it has become a powerful force for safeguarding Idaho's imperiled wild steelhead and salmon, including protecting and enhancing stream flows and riparian areas, and defending and promoting the wild and scenic qualities of Idaho's great wild rivers.

19. Many of IRU's members and staff work, live, study, and/or recreate in the Nez Perce-Clearwater National Forests and the surrounding region, including in the Middle Fork Clearwater/Lochsa Wild and Scenic River area. Plaintiff's members and staff derive aesthetic, recreational, scientific, inspirational, educational, economic, and other benefits from the Middle Fork Clearwater and Lochsa Wild and Scenic Rivers and the surrounding National Forest on a regular and continuing basis and intend to do so frequently in the immediate future.

20. Defendant's violations of law as alleged herein irreparably harm the aesthetic, commercial, conservation, scientific, recreational, educational, economic, and other interests of IRU's staff, board of directors, and members. These are actual, concrete injuries caused by

Defendant's violations of law, for which judicial relief is required to remedy the harm caused to IRU.

21. Defendant U.S. FOREST SERVICE is an agency or instrumentality of the United States, within the Department of the Agriculture. The Forest Service is vested by law with the authority and duties to manage and protect the public lands and resources of the Nez Perce-Clearwater National Forests and the Clearwater/Lochsa Wild and Scenic River corridor at issue in this litigation.

22. Defendant-Intervenor RESOURCES CONSERVATION COMPANY INTERNATIONAL ("RCCI"), is a wholly owned subsidiary of General Electric, one of the world's largest corporations. Following the filing of the complaint and injunction motion in this case, RCCI moved to intervene, which Plaintiffs and Defendant did not oppose; and intervention has been granted by the Court. Dkt. #25. RCCI has engaged Omega Morgan to act as its shipper for RCCI's planned mega-loads for U.S. Highway 12. According to RCCI's filings with the Court, it has seven additional mega-load shipments intended for U.S. Highway 12, in addition to the one that was shipped in early August this year and the second that is currently staged at the Port of Wilma, which RCCI has represented to the Court will be shipped up U.S. Highway 12 beginning on or after September 18, 2013. These impending RCCI mega-load shipments underscore the need for interim injunctive relief in this case.

## **LEGAL FRAMEWORK**

### **The Administrative Procedure Act**

23. Under the APA, this Court is authorized to "hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706 (2)(A). Forest Service

final agency actions issued under NFMA and the WSRA are reviewed under the “arbitrary and capricious” standard of the APA. *E.g., Bennett v. Spear*, 520 U.S. 154, 175 (1997).

### **The Property Clause of the U.S. Constitution**

24. The Property Clause of the U.S. Constitution gives Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. art. IV, § 3, cl. 2. This power is “without limitation,” *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)); and allows Congress to even regulate conduct on private lands where necessary to protect federal property. *Id.* at 538.

### **National Forest Management Act**

25. NFMA, 16 U.S.C. § 1601 *et seq.*, is the primary federal statute guiding management of the National Forests, and imposes the mandate that the National Forests be managed for multiple uses, including outdoor recreation, watershed protection, wildlife and fish resources, and wilderness. NFMA requires all National Forests to prepare detailed land and resource management plans (Forest Plans), and sets requirements for those plans. 16 U.S.C. §1604. All actions taken by the Forest Service, including issuance of permits, plans, or contracts for the use of Forest Service land, must be consistent with Forest Plans. *Id.* at § 1604(i); 36 C.F.R. § 219.8.

26. Congress has given the Secretary of Agriculture authority to “prescribe such regulations as he determines necessary and desirable to carry out the provisions of [NFMA],” 16 U.S.C. § 1613, and “[t]o make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary,” including National Forest land. 7 U.S.C. § 1101(f).

27. Among other requirements under NFMA, 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. 219.11 (b) (5), (6).

28. To implement NFMA’s requirements and those of its implementing regulations, in 1987 the Forest Service developed a Forest Plan for the Clearwater National Forest (“Forest Plan”) that contains standards and guidelines for the forest’s administration. Section E identifies several forest-wide standards “that are considered as minimum requirements that must be met.” Forest Plan at II-20-40 (emphasis added). Among these standards is Cultural Resources which requires that the Forest Service

[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.

Forest Plan at II-23.

Another Forest prescription 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.

29. The Forest Plan further requires the Forest Service to manage the Clearwater/Lochsa Wild and Scenic River corridor to “[p]rovide developed and dispersed recreational opportunities in a rural or roaded natural-appearing setting as landownership patterns permit.” *Id.* at III-25.

### **The National Historic Preservation Act**

30. In passing the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., Congress declared that “historic properties significant to the Nation's heritage are being lost

or substantially altered, often inadvertently, with increasing frequency,” and resolved that “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;” *Id.* at § 470, (b)(3)-(4). Section 106 of NHPA requires federal agencies to “take into account the effect of [an] undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register [of Historic Places]. 16 U.S.C. § 470(f). NHPA defines an undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y).

31. Under NHPA’s implementing regulations, “[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them.” 36 C.F.R. § 800.16(f). Under this consultation process, federal agencies must “make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register...; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

32. Section 106 requires that, if historic properties are “[p]roperties of traditional religious and cultural importance to an Indian tribe,” the federal agency consult with that tribe. 16 U.S.C. § 470(d)(6)(A). Specifically the NHPA implementing regulations require federal agencies “at all stages of the section 106 process, to consult with tribes that “attach[ ] religious

and cultural significance to historic properties that may be affected by an undertaking.” 36 C.F.R. § 800.2(c)(2)(ii). “The goal of consultation is to identify historic properties potentially affected by the undertaking...” *Id.* § 800.1. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 607 (9th Cir. 2010). Historic properties eligible for inclusion in the National Register can include Traditional Cultural Properties (“TCP”). *See* Patricia L. Parker & Thomas F. King, National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1 (1998), *available at* <http://www.nps.gov/history/nr/publications/bulletins/pdfs/nrb38.pdf> (last visited September 6, 2013).

33. Section 106 further requires as part of the consultation process that the federal agency must “confer with the State Historic Preservation Officer (‘SHPO’) and afford the Advisory Council on Historic Preservation a reasonable opportunity to review the agency’s determinations with respect to the undertaking. 36 C.F.R. § 800.4(d). Specifically, the agency must “request the SHPO’s views on ways to identify historic properties, and seek information from interested parties likely to have knowledge about historic properties in the area.” *Pueblo of Sandia v. U.S.*, 50 F.3d 856,859 (10th Cir. 1995). The request must be ‘initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.’ *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768,787 (9th Cir. 2006)(quoting 36 C.F.R. § 800.1(c)).

### **The Wild and Scenic Rivers Act**

34. Congress delegated additional authority over the federal lands to the Forest Service through the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271–87. As stated in Section 1(b) in the Wild and Scenic Rivers Act, Congress declared it to be,

the policy of the United States, that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

16 U.S.C. § 1271(b).

35. To implement this policy, the Wild and Scenic Rivers Act established a national Wild and Scenic Rivers System, 16 U.S.C. §§ 1272 & 1273(a); and defined the criteria for inclusion of rivers within the Wild and Scenic Rivers System as any “free-flowing stream and the related adjacent land area” that possesses one or more of the “outstandingly remarkable values” identified in Section 1(b). 16 U.S.C. § 1273(b).

36. For these originally designated rivers, Section 3(b) of the Wild and Scenic Rivers Act directed the Forest Service (as the “agency charged” with their administration) to “designate detailed boundaries” for the rivers and their associated corridors within the Wild and Scenic Rivers system, and provided that such boundaries “shall include an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river.” 16 U.S.C. § 1274 (b). Congress also directed that the agency determine which of the protections available under the WSRA apply to these originally designated rivers. *Id.*

37. Implementing these statutory directives, the Forest Service determined that the Middle Fork Clearwater and Lochsa Rivers should be designated as “recreational” rivers within the Wild and Scenic Rivers System, identified the associated corridor, and published notice of these determinations. *See* Middle Fork Clearwater Wild and Scenic River: Classification, Boundaries, and Development Plan, 34 Fed. Reg. 15565 (Oct. 7, 1969).

38. The Forest Service designated the Middle Fork Clearwater and Lochsa Rivers as “recreational” primarily because of the presence of U.S. Highway 12 within the river corridor.

34 Fed. Reg. at 15566. The Act defines “recreational river areas” as possessing one or more of the outstandingly remarkable values identified in Section 1, and are “rivers or sections of rivers that are readily accessible by road or railroad, that may have some development on their shorelines, and that may have undergone some impoundment or diversion in this past,” 16 U.S.C. § 1272(b)(3).

39. Section 10(a) of the Wild and Scenic Rivers Act requires agencies administering the Wild and Scenic Rivers System to protect and enhance their outstandingly remarkable values, as follows:

Each component of the wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeologic, and scientific features.

40. Similarly, Section 12(a) of the Wild and Scenic Rivers Act mandates, “the Secretary of Interior, the Secretary of Agriculture, and the head of any other federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System . . . shall 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(a)(emphasis added).

41. The Forest Service has authority and jurisdiction to enforce all relevant legal authorities, including those listed above, within the right-of-way for U.S. Highway 12. *Idaho Rivers United v. U.S. Forest Serv.*, 11-cv-95-BLW, 2013 WL 474851 (Feb. 7, 2013). This authority includes the ability to regulate the transport of “mega-loads” on U.S. Highway 12 through the Nez Perce-Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild

and Scenic River Corridor. The Forest Service subsequently acknowledged that it has “full authority to protect the Highway 12 corridor and its values” but asserts that it did and could exercise enforcement discretion with respect to megaloads on U.S. Highway 12. The Forest Service did not exercise enforcement discretion and it does not have discretion to waive applicable statutory requirements under NFMA, NHPA, and WSRA.

## **FACTUAL BACKGROUND**

### **U.S. Highway 12**

42. U.S. Highway 12 traverses the Nez Perce Reservation and the Tribe’s aboriginal territory including what are now the Nez Perce-Clearwater National Forests. U.S. Highway 12 is adjacent to, and at some places crosses, the Nez Perce National Historic Trail, which marks the historical route taken by the Nez Perce to hunting grounds in Western Montana. U.S. Highway 12 serves as a primary route for Tribal transportation, commerce, safety, and as an access route for the exercise of treaty-reserved rights on National Forest and other public lands in Idaho and Montana.

43. U.S. Highway 12 also traverses the Nez-Perce Clearwater National Forests, an area of 1.8 million acres of National Forest land in Idaho between the Palouse Prairie and the Bitterroot Mountains. For many miles, U.S. Highway 12 parallels the Middle Fork Clearwater/Lochsa Wild and Scenic River, one of the first rivers to be designated as Wild and Scenic by Congress in 1968. In fact, U.S. Highway 12 is actually located inside the boundaries of the Wild and Scenic River, as designated by the Forest Service. *See* Management Guides Middle Fork of the Clearwater, Including the Lochsa and Selway, FS, 2-3, 155 (July 25, 1973) (Management Guides) (“The Lewis and Clark Highway, within the River Boundary, is an adequate facility for the present”); River Plan Middle Fork Clearwater Including the Lochsa and

Selway of the National Wild and Scenic River System, FS, 2-5, 200–211 (showing U.S. Highway 12 running through the Recreation River boundary).

44. The Middle Fork Clearwater/Lochsa Wild and Scenic River and its corridor are an unparalleled, national recreational resource. Every spring, boaters travel from around the United States to test their mettle on the Lochsa’s big water, expert-level rapids. Depending on the season, anglers flock from throughout the Northwest to hook native trout, giant Chinook salmon, and steelhead. In summer, visitors and locals alike enjoy swimming in the rivers and camping and hiking in the corridor. Elk hunters arrive in fall, and winter sees hound hunters, snowshoers, and cross-country skiers. The corridor’s hot springs are an attraction year round.

#### **Creation of a High-and-Wide Corridor**

45. Since the fall of 2008, the oil industry and a specialized group of shipping companies have been working to convert U.S. Highway 12 into an industrial high-and-wide corridor that prioritizes the transport of “mega-loads” over other uses of the highway, in flagrant violation of the findings, determinations, and mandates of all applicable legal authorities.

46. To the best of Plaintiffs’ knowledge, this process began in 2008 when Exxon Mobil, acting through its subsidiary Imperial Oil (collectively, “Exxon-Imperial”) decided to use U.S. Highway 12 to ship over 200 loads of industrial oil equipment to the Kearl Oil Sands Project in Fort McMurray, Alberta. The Kearl proposed loads were larger and heavier than any load that had ever travelled on Highway 12 before.

47. One reason for choosing this route was the potential to create a new “high load” corridor through Idaho and Montana on Highway 12. In order to create this “high load corridor,” Exxon Imperial modified U.S. Highway 12 and surrounded corridor in numerous ways between

2009 and 2011, including by raising utility lines, removing a gondola cable operated by the U.S. Geological survey, and drastically modifying much of the vegetation along U.S. Highway 12.

48. All of these corridor modifications—utility line relocations, tree trimming, and gondola cable removal—have made the Wild and Scenic River/Scenic Byway an attractive route for other companies wishing to transport unusually large loads. Five companies have sought and received permission from ITD to transport mega-loads on Highway 12, including Exxon-Imperial, through the transportation company Mammoet; ConocoPhillips, through a transportation company called Emert International; Weyerhaeuser, through the transportation company Nickel Bros; Selway Corps, which did its own shipping; and Ellet Industries, using the shipping company Omega Morgan.

*Idaho Rivers United v. U.S. Forest Service*

49. On August 11, 2010, IRU petitioned the Forest Service to grant relief from the transport of Exxon-Imperial and Conoco's mega-loads.

50. On September 10, 2010, Clearwater National Forest Supervisor Rick Brazell responded to IRU's letter by sending a letter to ITD the Exxon-Imperial and Conoco mega-load proposals. *See* Letter from R. Brazell, Clearwater National Forest Supervisor, to J. Carpenter, Idaho Transportation Department, District 2 Engineer (Sept. 10, 2010) (FS, 8-27, 200-201) (2010 Brazell letter).

51. Although the 2010 Brazell letter conveyed numerous concerns about the use of U.S. Highway 12 to transport mega-loads, it nevertheless concluded that the Forest Service lacked jurisdiction to regulate mega-loads traveling on Highway 12, stating: "We both recognize the Forest Service's limited jurisdiction with regard to what travels the highway within the existing right of way, even across the National Forest." *Id.* at 200.

52. Based on the Forest Service's September 2010 letter declining to take action to regulate mega-loads on Highway 12, IRU brought suit in this court March 10, 2011. IRU challenged the Forest Service's determination that it lacked jurisdiction or authority to regulate the transport of mega-loads on U.S. Highway 12.

53. This Court issued its decision in the case on February 7, 2013. The Court found that an extensive line of authority set forth in IRU's briefing, "beginning with the Property Clause and proceeding through the Organic Act, the Federal-Aid Highways Act, the Wild and Scenic Rivers Act, and finally the Highway Easement's directive to protect the scenic and esthetic values of the river corridor – is focused on granting the federal defendants the authority to regulate the use of roads over federal land." *IRU*, 2013 WL 474851.

54. The Court also found that the Forest Service's determination that it lacks jurisdiction over the mega-loads has a "substantial adverse effect" on the interest of Idaho Rivers United, the Plaintiff in that case and co-Plaintiff in this case:

"This agency stand-down [by the USFS] makes it likely that more mega-loads will be planned and approved...the 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. The Forest Service itself feared that the ITD's approval "will ultimately lead to future additional proposals."

*Id.*

55. The Court subsequently issued judgment, pronouncing, "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." *IRU*, WL 474851.

### **The Forest Service's Mega-load Directives**

56. 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 that the Forest Service had understood that “it is 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:

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.

57. The Forest Service asserted that the 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 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.

58. 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 through the National Forest or within the Wild and Scenic River Corridor without the Forest Service first performing—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.”

59. 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 overlegal loads on U.S. Highway 12 in an effort “to further develop and refine” the Forest Service's criteria.

60. On July 24, 2013, ITD requested that the Forest Service reconsider the criteria regarding the stopping of traffic.

61. On or around July 22, 2013, Oregon-based hauler Omega Morgan offloaded two cylindrical vessels weighing approximately 644,000 pounds and measuring 255 feet long, 23 feet

high, and 21 feet long at the Port of Wilma along the Snake River in the State of Washington. These vessels constitute the initial two RCCI mega-loads bound for the Alberta tar sands.

62. 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.”

63. 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” that 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 of Idaho’s oldest state scenic byways, designated in 1989. The 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 Hell Gate, 1855. The U.S. has government-to-government and trust responsibilities to the tribes, including protection of and access to reserved treaty-right [sic] 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.

64. The Forest Service then emphasized that “[t]he 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.”

65. 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).”

66. The Forest Service emphasized that “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.”

67. 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 “You [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.”

68. 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.”

69. On Friday, August 2, 2013, ITD provided a copy of a permit for an overlegal load provided that same day to Omega Morgan. 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.”

70. The next morning, the Lewiston Morning Tribune quoted the Forest Supervisor as saying: “We don't have the authority to stop the megaloads. You read the court ruling and it says we have the authority to review the state permits. We have reviewed them and made our interim criteria.”

71. On August 5, 2013, the Chairman of the Nez Perce Tribe spoke with Forest Service Chief, Tom Tidwell, by phone and petitioned him to enforce the Forest Service’s directives and stop the mega-load from entering the Nez Perce-Clearwater National Forest. The Chief denied this request on the ground that, although the Forest Service has jurisdictional

authority to review mega-load permits, it lacks authority to enforce relevant federal authorities against the transport of a mega-load.

72. 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 through August 9, as well as a letter from Omega Morgan indicating that they plan to proceed on August 5.

73. The Forest Service stated 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."

74. The Forest Service's August 5, 2013 letter to Omega Morgan concluded: "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 frustration with Omega Morgan'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 putting transporters 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: that “I understand your company transported a similar over legal load on Idaho State Highway 20 recently” and that at a May 15, 2013 meeting Omega had indicated a route analysis of potential routes to Canada had been completed.” The letter requested information about that alternative route analysis.

75. In an emergency session on Sunday, August 4, the Nez Perce Tribal Executive Committee, the governing body of the Nez Perce Tribe, passed a resolution opposing the transport of the mega-load through the Reservation and Nez Perce-Clearwater National Forest.

76. On the afternoon of Monday, August 5, 2013, ITD issued a press release on its website announcing that the transport of the initial RCCI mega-load would proceed on U.S. Highway 12 that evening. ITD did not provide any opportunity for public notice, comment or hearing before approving the initial RCCI mega-load.

77. On August 5, 2013, Omega Morgan began transporting the RCCI mega-load from the Port of Wilma on U.S. Highway 12/95. Hundreds of protesters, including members of the Nez Perce Tribe leadership, many Tribal members, and non-members, turned out to witness and oppose the mega-load shipment. As a consequence of public demonstrations, in the vicinity of the Nez Perce Tribe’s Clearwater River Casino, transport ended that day on Highway 12/95, before the junction with U.S. Highway 95 South.

78. On the morning of August 8, 2013, the mega-load crossed into the Clearwater National Forests and the Wild and Scenic River Corridor. Prior to that time, the Nez Perce Tribe and IRU had fully expected the Forest Service to take action consistent with its repeatedly stated determination that “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.”

79. Despite the Forest Service's clear directives prohibiting mega-loads on the Nez Perce-Clearwater National Forests, the agency did not attempt to stop the mega-load and instead allowed it to pass unauthorized through the National Forest. It is evident that the Forest Service is now following a "stand down" approach and refused take any enforcement actions with respect to that mega-load or other mega-loads that may imminently seek passage through the National Forest.

80. At the time this lawsuit was initiated, a second mega-load was parked at the Port of Wilma, and Plaintiffs were informed and believed that RCCI intended to obtain an overlegal permit for this mega-load from ITD to travel on U.S. Highway 12 in the imminent future.

81. On the first business day following the filing of Plaintiffs' motion for a preliminary injunction, Nez Perce-Clearwater National Forests Supervisor Rick Brazell sent a letter to Nez Perce Tribal Chairman Silas Whitman. The Forest Service letter, purporting to "clarify any misconceptions that may have arisen regarding the Forest Service response associated with Omega-Morgan's recent transport of an oversized load along Highway 12", states:

First, I fully recognize the U.S. District Court has ruled that my agency has full authority to protect the Highway 12 corridor and its values notwithstanding the State of Idaho's easement for U.S. 12. Over our objection, the State issued a permit to Omega-Morgan. The Forest Service has made the discretionary decision not to seek enforcement action with respect to this shipment for a number of reasons.

The Forest Service offered the following explanations: it "remains in productive discussions with Idaho Transportation Department and Federal Highways regarding this issue"; it is "currently engaged in an accelerated study of the social, cultural, and aesthetic impacts of the transport of such oversized loads through the National Forest on U.S. Highway 12" which it expects "to be completed by approximately September 30 of this year"; and:

Finally, proposing judicial action is not a matter that we take lightly, particularly when such action involves a state. We believe it is incumbent upon us to pursue all avenues for a negotiated resolution of our concerns before even contemplating such an action. Similarly, we take our consultation responsibilities with the Tribe equally seriously and we must complete our formal government to government consultation before we could ever entertain legal action.

The Forest Service concluded:

I want to reiterate that our discretionary decision not to seek to stop the transport of this oversized load in no way reflects a position that the Forest Service lacks authority to seek enforcement of its regulatory authority over such use.

82. On August 15, 2013, the Tribe responded to the Forest Service's August 12, 2013 letter, stating:

The Tribe remains extraordinarily disappointed that the Forest Service – after reasonable initial steps in the exercise of jurisdiction over the use of U.S. Highway 12, including the adoption of megaload-defining criteria and a decision that no megaload transportation would be authorized until a corridor impacts study and Nez Perce Tribal consultation were completed – then decided to allow the first megaload shipment of August 5-9, 2013 across the National Forest and Wild and Scenic River corridor.

Your statement that the Forest Service recognized its enforcement authority but discretionarily chose not to exercise it as to the first megaload is not an acceptable or reasonable explanation. (The Tribe did not misconceive statements: all Forest Service representations to date, to the Tribe and to the public, have been that the Forest Service lacked the authority to enforce its jurisdiction.). The issue will be addressed in court, but the Tribe observes that the legal context surrounding this matter is one in which the Forest Service does not have the discretion to choose not to enforce any or all of the (multiple) protective federal authorities Congress has delegated to it regarding the National Forest, the Wild and Scenic River, and the U.S. Treaty-reserved rights and resources of a federally-recognized Indian Tribe. An assertion of discretion in the legal context of this case will be found to be either inapplicable or illegitimate as a matter of controlling law.

The Tribe went on to state:

That said, the Forest Service's letter acknowledgment that it possesses full authority, including enforcement authority, over the use of U.S. Highway 12 is noted and appreciated. If the Forest Service will commit to exercise that authority and preclude the shipment of any additional megaloads, pending the completion of a meaningful corridor impacts study and full Nez Perce tribal consultation, it is conceivable that what will be discussed in the near future, in and out of the context of the lawsuit, is the scheduling, timetable and substance of those processes.

The Tribe emphasized, with respect to the process of consultation, that:

[T]he agenda and substantive issues the Tribe is now developing for the overall consultation process are extensive and that that meeting will be only the first of a series of formal consultation meetings between the Forest Service and the Tribe, which as you previously noted will take a substantial amount of time. (Consequently, the Tribe observes that the September 30 date the Forest Service proposes for study completion in your letter is not realistic and the Tribe urges the Forest Service to consider a more feasible timetable and a more formal process that includes meaningful tribal and public participation.).

With respect to the substance of consultation, the Tribe stated:

There must be a thorough, meaningful examination and assessment of the adverse impacts of megaload transportation on U.S. Highway 12 on the Tribe's treaty-reserved rights and resources under both the 1855 Nez Perce Treaty itself and under multiple natural and cultural resource statutes.

And, with respect to the sequence of enforcement action and consultation, the Tribe emphasized:

The Tribe notes that the Forest Service's letter statement that consultation should precede agency enforcement action inverts the correct, lawful sequence. This is a critical point. The Forest Service must be prepared to take at least interim, status-quo preserving enforcement action to protect the Tribe from adverse impacts to its Treaty-reserved rights and resources prior to the completion of consultation so as to prevent injuries that the Forest Service has not yet fully comprehended or assessed through that very consultation process.

The Tribe concluded:

The Tribe believes the Forest Service possesses all necessary authorities to protect rights, values and interests in the National Forest whose preservation has been delegated to the Forest Service by Congress under multiple federal laws and whose preservation is required by the United States' 1855 Treaty with the Nez Perce Tribe. Your [August 12] letter appears to acknowledge this. We hope the Forest Service will now act consistently with its federal law and U.S. Treaty obligations to both the U.S. public and the Nez Perce Tribe.

83. On August 15, 2013, Regional Forester Faye Krueger wrote the Federal Highway Administration's Idaho Division Administrator, Peter Hartman for "assistance in resolving issues concerning the issuance of over legal-sized load permits on US Highway 12 by the Idaho Transportation Department." The Forest Service recited this Court's ruling that the Forest Service and FHWA "have authority and jurisdiction to enforce all relevant legal authorities ...

within the right-of-way for U.S. Highway 12 held by ITD.” The Forest Service then expressed that its “desire is to establish an administrative mechanism, by which we can redeem our review authority.” The Forest Service proposed that “ITD add a stipulation to their over legal-sized permits that meet our criteria, requiring the permittee to obtain written consent from the USFS prior to transporting their cargo and in order to validate the permit.”

84. On August 16, 2013, Forest Supervisor Brazell met with officials from the Idaho Transportation Department. The Lewiston Morning Tribune reported on that meeting on August 17, 2013:

Brazell met with officials from the Idaho Transportation Department Friday in Boise and asked them to not issue any megaload permits during the next six weeks. In an interview with the Tribune, he said that request was denied. "We really pleaded with them to give us the six weeks but they feel like their regulations don't allow that," he said. Brazell said he was made to understand the state may receive another megaload permit application as soon as next week.

85. On August 22, 2013, the Tribe wrote the Forest Service, emphasizing that:

the government-to-government consultation process begun on August 20 will necessarily require a series of meetings; this Forest Service-Nez Perce Tribe consultation and study must be done in a thorough and comprehensive manner in order to be meaningful. We appreciate the Forest Service's and the Obama Administration's recognition of that. We expect that in this instance there will be consideration of a wide range of issues and concerns based on various protective federal laws and the United States' Treaty with the Nez Perce Tribe.

The Tribe also requested that the Forest Service:

formally acknowledge that the Forest Service's exercise of regulatory authority to review and approve ITD permits for any future mega-loads, including conducting and completing a corridor impacts study, through the U.S. Highway 12 corridor from Milepost 74 to 174 constitutes a federal undertaking for purposes of Section 106 of the NHPA and that the “protective—“look before you leap”—sequence mandated by the NHPA is consistent with the agency's interim directives and overall corridor study the Forest Service is pursuing, and is a necessary process that must be performed concurrently with consultation with the Nez Perce Tribe, to assess the impacts of future mega-loads on properties of religious and cultural significance to the Tribe, including Traditional Cultural Properties.

86. On August 27, 2013, the Lewiston Morning Tribune reported:

Another GE evaporator awaits shipment at the Port of Wilma and the route continues to attract attention from other shippers. Leon Franks, of Contractors Cargo Co. based on Compton, Calif., said his company wants to ship three massive refinery vessels from the Port of Lewiston to Great Falls, Mont., by November.

87. On August 29, 2013, the Forest Service responded to the Tribe's August 22 letter requesting NHPA Section 106 consultation, stating:

Given the litigation and upcoming hearing before Judge Windmill (sic), the Forest Service will wait to see what comes from that before engaging in discussion of Section 106 issues. We also have been advised that no permits will be issued by ITD during this period giving all parties a chance to gather more information. I appreciate your patience in this sensitive matter.

88. Following the filing of this lawsuit and Plaintiffs' injunction motion, Defendant-Intervenor RCCI informed the Court and parties that it would not seek to ship its second mega-load up Highway 12 until September 18, 2013; and based on that representation the injunction hearing was reschedule to September 9, 2013. Plaintiffs are informed and believe, and allege thereon, that RCCI and its shipper, Omega Morgan, intend to utilize the same traffic control plan that ITD approved for the first RCCI mega-load; and that RCCI/Omega Morgan will submit an application to ITD for an over-legal permit approving the second mega-load transport on or just before September 18, 2013, unless injunctive relief is granted by this Court. Because ITD does not require public notice, comment or hearing before approving over-legal permits, and its practice has been to issue permits quickly upon submission of an application, entry of interim injunctive relief is needed to prevent the second (and future) RCCI mega-loads from proceeding up U.S. Highway 12 and across the Nez Perce-Clearwater National Forests and Wild and Scenic Corridor without federal approval or authorization.

89. Immediate declaratory and injunctive relief is necessary to prevent mega-loads from entering the Nez Perce-Clearwater National Forests where it poses imminent and irreparable harm to Plaintiffs' rights and interests in the National Forest.

**FIRST CLAIM FOR RELIEF:  
THE FOREST SERVICE IMPROPERLY  
DETERMINED THAT IT HAS NO ENFORCEMENT AUTHORITY  
OVER TRANSPORT OF MEGA-LOADS ON U.S. HIGHWAY 12**

90. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

91. This First Claim for Relief challenges the Forest Service's final decision denying the Tribe's petition that the Forest Service exercise its authority by taking enforcement action to regulate mega-loads into and/or through the Nez Perce-Clearwater National Forest on U.S. Highway 12. This claim is brought pursuant to the judicial review provisions of the APA. 5 U.S.C. 706(2).

92. As noted above, the Tribe petitioned the Forest Service for relief from transport of mega-loads by Omega Morgan on August 5, 2013. The Forest Service denied this request, and the first of Omega Morgan's mega-loads entered the Nez Perce-Clearwater National Forest and the Wild and Scenic River Corridor on the morning of August 8, 2013.

93. The Forest Service denied the Tribe's petition on the grounds that the agency lacks authority to enforce its directives regulating the transport of mega-loads on U.S. Highway 12.

94. Contrary to the Forest Service's determination that it lacks authority to enforce its mega-load directives, this Court has expressly held 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.

95. Since this Court's holding, as noted, the Forest Service has begun to exercise its regulatory authority over mega-loads on U.S. Highway 12 by establishing interim criteria prohibiting access to defined mega-loads. The Forest Service has also determined that any mega-loads that meet any of the interim criteria will trigger further Forest Service review, including requiring a corridor impacts study and consultation with the Nez Perce Tribe.

96. The Forest Service's denial of authority to enforce its decision prohibiting transport of Omega Morgan's mega-load on U.S. Highway 12 traversing the Nez Perce-Clearwater National Forest, and the Forest Service's subsequent acknowledgement that it "has full authority to protect the Highway 12 corridor and its values" but that it did and could exercise its enforcement discretion with respect to the mega-load crossing the National Forest. are both arbitrary, capricious, an abuse of discretion, and not in accordance with law, as set forth in this Court's decision in *Idaho Rivers United v. U.S. Forest Service*, 11-cv-95-BLW (Feb. 7, 2013), under the APA, which has caused or threatens serious and irreparable injury to Plaintiffs' rights and interests.

**SECOND CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL FOREST MANAGEMENT ACT**

97. The Nez Perce Tribe realleges and incorporates by reference the preceding paragraphs.

98. This Second Claim for Relief challenges the Forest Service's violation of the National Forest Management Act, 16 U.S.C. § 1601 *et seq.*, and NFMA's implementing regulations by failing to ensure that transport of Omega Morgan's megaload would not be detrimental to the protection and preservation of the Tribe's religious and cultural sites and

practices and treaty rights, in violation of the Clearwater National Forest Plan. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706(2).

99. Under NFMA, the Forest Service must develop and regularly revise Forest Plans for each National Forest. 16 U.S.C. §§ 1604(a), (e) & (g)(3)(B). Once a forest plan has been developed, all subsequent agency actions, including site-specific management activities, must be consistent with the governing forest plan. 16 U.S.C. § 1604(i).

100. As noted above, the Clearwater National Forest Plan requires the agency to “insure proposed practices and management activities are coordinated with the governmental entities and Indian Tribes to insure requirements of all laws and regulations are met and terms of Indian Treaties are upheld,” and to “ensure that Forest actions are not detrimental to the protection and preservation of Indian Tribes’ religious and cultural sites and practices and treaty rights.”

101. The Forest Service determined that consultation with the Nez Perce Tribe and a corridor impacts study about the impacts of mega-loads is necessary to ensure protection and preservation of the Tribe’s religious and cultural sites and practices and treaty rights.

102. The scheduled preliminary government-to-government consultation did not occur before Omega Morgan proceeded to move a mega-load across the Nez Perce-Clearwater National Forests on U.S. Highway 12 in violation of the Forest Service’s interim criteria.

103. Although the Tribe appealed to the Forest Service to take enforcement action against Omega Morgan and prohibit the entry of Omega Morgan’s first mega-load on the National Forest, the agency denied the Tribe’s request on the ground that it lacked enforcement authority to stop the mega-load.

104. The Forest Service subsequently acknowledged that it “has full authority to protect the Highway 12 corridor and its values” but asserts that it did and could exercise its enforcement discretion with respect to the mega-load crossing the National Forest.

105. The Forest Service did meet with the Nez Perce Tribe on August 20, 2013 as the first of a series of consultations and meetings to discuss the impacts of mega-loads on the Tribe’s religious and cultural sites and practices and treaty rights. Despite the Forest Service’s directives and full acknowledgement of regulatory authority over mega-loads on U.S. Highway 12, the Forest Service will not commit to complying with its own directives and prevent the transport of future mega-loads on U.S. Highway 12 until consultation with the Tribe and the corridor impacts study are complete. The Tribe informed the Forest Service that the agency needs to perform a comprehensive study of potential impacts of mega-loads, including meaningful consultation with the Tribe, compliance with Section 106 of the NHPA and other applicable federal laws, and adopt a rulemaking process or other action with full public participation to protect the scenic, cultural, historic, natural and other values of the Nez Perce-Clearwater National Forest and Clearwater/Lochsa Wild and Scenic Corridor.

106. This violation of NFMA and implementing regulations is arbitrary, capricious, and abuse of discretion, not in accordance with law under the APA, and has caused or will continue to cause irreparable harm to Plaintiff Nez Perce Tribe’s rights and interests.

**THIRD CLAIM FOR RELIEF:  
VIOLATION OF THE WILD AND SCENIC RIVERS ACT**

107. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

108. This Third Claim for Relief challenges the Forest Service’s violation of the Wild and Scenic Rivers Act, 16 U.S.C. § 16 U.S.C. §§ 1271-1287, by refusing to enforce relevant legal authorities against Omega Morgan in order to protect the outstandingly remarkable scenic

and recreational values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706(2).

109. Under the Wild and Scenic Rivers Act, as noted above, the Forest Service has a mandatory duty to administer designated Wild and Scenic Rivers “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 aesthetic, scenic, historic, archeologic, and scientific features.” 16 U.S.C. § 1281(a). The Act also imposes the mandatory duty that the Forest Service “shall 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(a).

110. The Forest Service has violated these duties by refusing to enforce the requirements of the applicable legal authorities discussed above, despite the fact that the transport of mega-loads through the Wild and Scenic River corridors degrades the scenic and recreational values of the river and the corridor.

111. Under the APA, the Defendant’s denial of the Tribe’s petition for relief and refusal to enforce the mandates of the Wild and Scenic Rivers Act and the other provisions and requirements of law constitute final agency action over which this Court may exercise judicial review and compel performance by the Forest Service that are arbitrary, capricious, an abuse of discretion, and contrary to law, for which judicial review and reversal is required under the APA. 5 U.S.C. § 706(a)(2). *See also Idaho Rivers United*, 11-cv-95-BLW, Docket No. 32 at 9.

112. Moreover, entry of declaratory relief is appropriate pursuant to the Declaratory Judgment Act, as there is currently a live and justiciable controversy between Plaintiff and Defendant over the legal mandates and duties applicable to the Forest Service’s ongoing

management of the public lands and resources within the Highway 12 corridor, for which entry of declaratory relief is necessary in order to preserve and protect the federal lands and resources and public interest.

**FOURTH CLAIM FOR RELIEF:  
VIOLATION OF THE NATIONAL HISTORIC PRESERVATION ACT**

113. Plaintiffs hereby incorporate all prior allegations by reference.

114. Section 106 of the National Historic Preservation Act requires that federal agencies “take into account the effect of the[ir] undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f.

115. Sites of historical significance including, but not limited to, Traditional Cultural Properties, areas containing human remains, designated cemeteries, cairns denoting ceremonial sites or burial sites, Native American village ruins, petroglyphs, pictographs, fishing sites, hunting grounds and gathering areas. These include both real and personal property of traditional, religious and cultural significance to the Tribe, IRU and the public, and they are included in or eligible for inclusion in the National Register of Historic Places.

116. The NHPA implementing regulations require the Forest Service, at all stages of the Section 106 process, to consult with tribes that “attach[ ] religious and cultural significance to historic properties that may be affected by an undertaking,” to “identify historic properties potentially affected by the \undertaking.” 36 C.F.R. §§ 800.2(c)(2)(ii); 800.1. The implementing regulations further require the Forest Service to consult with the Idaho SHPO.

117. By allowing mega-loads to cross the Nez Perce-Clearwater National Forests in violation of its own agency directives prohibiting the passage of such loads until consultation with the Tribe and a corridor impacts study are completed, and by failing to consult with the

Idaho SHPO and other consulting parties and to confer with the federal Advisory Council on Historic Preservation, the Forest Service is failing to take into account the effect of this action on historic properties, including Traditional Cultural Properties eligible for inclusion in the National Register of Historic Places, in violation of the NHPA. These acts and/or omissions resulted in, and will continue to result in, arbitrary and capricious decisions that have irreparably harmed and will continue to harm Plaintiffs.

### **PRAYER FOR RELIEF**

WHEREFORE, PLAINTIFFS pray that the Court grant the following relief:

A. Issue immediate injunctive relief, including temporary restraining order(s) and/or preliminary injunction(s), ordering the Forest Service to enforce its already established “authority and jurisdiction to enforce all relevant legal authorities” over the use of U.S. Highway 12 within the Nez Perce-Clearwater National Forests and Wild and Scenic River corridor by prohibiting the movement of all criteria-defined mega-loads until such time as the Forest Service has completed a permit review, corridor impacts study, and consultation with the Nez Perce Tribe in accordance with NFMA, NHPA, WSRA, and other applicable federal law;

B. Alternatively, issue immediate injunctive relief, including temporary restraining order(s) and/or preliminary injunctions, prohibiting Defendant-Intervenor RCCI (and its agents) from applying for, or utilizing, any over-legal load permit from ITD for the second and future planned RCCI mega-loads intended for U.S. Highway 12;

C. Adjudge and declare that the Forest Service acted unlawfully in determining that it lacks authority to enforce its directives regarding the transport of mega-loads through the Nez Perce-Clearwater National Forest on U.S. Highway 12;

D. Adjudge and declare that the Forest Service acted unlawfully in acknowledging that it “has full authority to protect the U.S. Highway 12 corridor and its values” but asserting that it did or could exercise enforcement discretion with respect to mega-loads crossing the Nez Perce-Clearwater National Forests on U.S Highway 12 that would result in violation of the agency’s statutory mandates to Plaintiffs under NFMA, NHPA, and the WSRA;

E. Issue declaratory relief holding that the Forest Service’s determination that it lacks authority to enforce its decision prohibiting the transport of mega-loads on U.S. Highway 12 over the Nez Perce-Clearwater National Forests violates NFMA, NHPA, and the WSRA, and is arbitrary, capricious, and abuse of discretion, and/or contrary to law;

F. Issue declaratory relief holding that the Forest Service’s alleged exercise of enforcement discretion violates procedural and substantive requirements of law and is arbitrary, capricious and contrary to law;

G. Award Plaintiff IRU its reasonable costs, litigation expenses, and attorney’s fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and/or all other applicable authorities; and/or

H. Grant such further relief as the Court deems just and proper in order to provide Plaintiffs with relief and protect the public interest.

DATED this 6<sup>th</sup> day of September, 2013.

Respectfully submitted,

/s/  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6th day of September, 2013, I electronically filed the foregoing with the Clerk of the United States District Court for the District of Idaho by using the CM/ECF system. All participants in the case are registered CM/ECF users, and will be served by the CM/ECF system:

**U.S. Forest Service**

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/s/ Lori F. Picard \_\_\_\_\_

Lori F. Picard