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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED, and MORGAN and OLGA WRIGHT, *Plaintiffs,* vs. DISTRICT RANGER JOE HUDSON in his official capacity, and UNITED STATES FOREST SERVICE, *Defendants.*	)	No. 3:15-cv-00169-BLW **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER and/or PRELIMINARY INJUNCTION**

INTRODUCTION

The responses of the Forest Service (*Docket No. 15*) and Intervenor Idaho Department of Lands ("IDL") (*Docket No. 14*) confirm that the key legal issue before the Court is whether Defendant Hudson's November 20, 2014 decision correctly found Forest Road 652 a "public road" and no special use permit is required for IDL to use the road for its Selway Salvage project.

Respondents do not dispute Plaintiffs' showing that Forest Road 652 is mostly an unimproved dirt track which is gated and locked past IDL's property, and does not qualify as a "public road" under the Forest Service Manual. They ask the Court to focus instead on the 740-foot section that crosses the Wrights' property, claiming that this portion – and this portion only – is a "public road" because it is a gravel surface and is subject to the 1937 easement. Respondents ignore the fact that the Forest Service holds a virtually identical old easement across the private land on the other side of IDL's land, yet has allowed the road there to be gated and locked. The Forest Service never explains why these two sections of Road 652 are now characterized and treated so differently. And since the reason Road 652 is deemed a "forest road" is because it provides access to National Forest lands, Road 652 cannot just be dissected into small sections. The Court thus must reject Respondents' attempt to segment analysis of Road 652 into tiny bits to suit their current purposes.

Even if the Court accepts Respondents' invitation to focus only on the section of Road 652 across the Wrights' property, the November 20, 2014 determination still must be reversed. The Forest Service has never before listed this section as a "public road," and its new "public road" determination on November 20, 2014 ignores both the statutory

definition of a "public road" – which requires public maintenance not present here – and the 1977 Wild and Scenic easement, which covers the road along with the rest of the Wrights' property. The 1977 easement forbids using the property for commercial or industrial activities; and it directs that the "public shall be excluded" by the Forest Service. Where the Forest Service contracted in 1977 to protect the Selway River corridor's Wild and Scenic values through these restrictions, it cannot now designate the small segment of Road 652 through the Wrights' property as a "public road" in violation of that easement's terms. At a minimum, by failing even to consider the 1977 easement in making its "public road" determination, the November 20, 2014 decision is fatally flawed, requiring reversal by the Court.

Regarding the balancing of irreparable harms and public interest, Respondents incorrectly accuse Plaintiffs of seeking to have the Forest Service dictate how IDL may manage its lands. That is not the case. The parcel can be logged without the use of Road 652, including by helicopter logging – which is more environmentally sound anyway. The requested injunction only addresses whether IDL requires a Forest Service permit to use Road 652 for its Selway Salvage project. To issue any permit, the Forest Service must assess the impacts of IDL's proposed activities – including the road building and logging, which are connected actions to the road use – upon values including the Selway Wild and Scenic river, its endangered fisheries, and consistency with the 1969 River Plan and the 1977 Wild and Scenic easement.

Due to the November 20th "public road" determination, Plaintiffs are already harmed by the Forest Service's refusal to conduct this public review process; and the extensive truck traffic planned by IDL will certainly harm the Wrights' use and

enjoyment of their property. Serious injury is also threatened by IDL's imminent plans to embark on a massive road construction and logging project that is wholly inconsistent with the protection of the Selway River's scenic, recreational, fisheries, and other values.

Remarkably, the Forest Service itself recognizes this threat: the Forest Service's March 2015 Draft EIS for its proposed Johnson Bar Salvage sale assessed IDL's Selway Salvage project affecting the same project area. That Draft EIS – excerpts of which are attached hereto – merit the Court's careful consideration. The Forest Service refutes IDL's assertions that salvage logging is needed immediately to preserve timber value; underscores that helicopter logging is a more prudent way to salvage log in the steep erosive slopes of the Selway River watershed; and specifically finds that IDL's project poses substantial short-term and long-term threats including "*increased surface erosion* from harvest units and road construction," *"increase[d] risk of mass failure* and delivery of sediment directly into Swiftwater Creek," and "*measurable cumulative effects to fisheries* within the analysis area." *See* Johnson Bar Draft EIS, pp. 226-227 (emphasis added) (Attachment A hereto).

In short, the Forest Service admits that the IDL project poses serious threats to the Selway River Wild and Scenic corridor – yet it is bending over backwards to allow those harms to unfold, by newly designating Road 652 as a "public road" and thereby relieving IDL of having to obtain a special use permit. Because the November 20, 2014 "public road" determination disregards the relevant facts and fails to consider – much less enforce – the Forest Service's own 1977 Wild and Scenic easement covering that road and its duties to protect the Selway Wild and Scenic River, the Court should grant injunctive relief.

REPLY ARGUMENT

I. THE NOVEMBER 20, 2014 DECISION IS A FINAL AGENCY ACTION SUBJECT TO APA REVIEW.

Respondents initially argue this case is non-justiciable. IDL contends this as an unenforceable "failure to act" case under APA Section 706(1) and *Norton v. SUWA*, 542 U.S. 55, 61-62 (2004). *See* IDL Brief, pp. 8-9. The Forest Service agrees and goes even further, asserting that Plaintiffs wrongly seek judicial intrusion into its prosecutorial discretion in violation of *Heckler v. Chaney*, 470 U.S. 821 (1985). *See* FS Brief, pp. 7-9. These arguments are mistaken, since Plaintiffs have properly challenged the November 20, 2014 determination as a final agency action under APA Section 706(2) and *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[1]

Following *Bennett*, the Ninth Circuit has held that "[f]or an agency action to be final, the action must (1) mark the consummation of the agency's decisionmaking process and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow." *Ore. Natural Desert Ass'n v. U.S. Forest Serv.,* 465 F.3d 977 (9th Cir.2006) (quotations omitted). The Court must make a pragmatic consideration of the effect of the action. *Id.* at 982, 985. "An agency action may be final if it has a 'direct and immediate . . . effect on the day-to-day business' of the subject party." *Id.* at 987.

The facts here show the November 20, 2014 decision is a final agency action subject to judicial review under these tests. After the Johnson Bar fire, IDL contacted the

[1] The Forest Service's invocation of *Heckler* is particularly puzzling. It speculates that IDL would act in a scofflaw manner by using Road 652 without a required permit, and that the Court would improperly invade the agency's prosecutorial discretion if the Forest Service then refused to enforce its regulations. Plaintiffs presume, by contrast, that IDL will abide by the Court's ruling and seek a Forest Service special use permit before using Road 652, if the Court so rules. *Heckler* does not apply here in any way.

Forest Service about whether it needed a special use permit to use Road 652 for its planned salvage sale. Initially the Forest Service said it did. IDL submitted a special use permit application in October 2014. Then the Forest Service changed its position, and said – in the November 20, 2014 email to IDL – that no permit was needed because Road 652 is a "public road." *See* Lewis Decl. (*Docket No. 8*), Exhs. 2-10. The Forest Service and IDL concede these facts, and IDL even quotes the November 20th email in its brief. FS Brief, pp. 3-4, IDL Brief, pp. 3-4.

The Forest Service has made a final determination: IDL needs no special use permit because Forest Road 652 is supposedly a "public road." As a result of that determination, IDL is proceeding with its plans to use the road for its sale activities without any special use permit, including over 1,000 logging truck trips to remove the timber. *See* IDL Answer (*Docket No. 12*), ¶ 8. All that traffic will cross the Wrights' property, directly adjacent to their house, and within the Wild and Scenic corridor. Plaintiffs have no opportunity to weigh in on the proposed action, since the November 20th determination decided for the first time that Road 652 is a "public road" without any public notice or comment. These are direct, real consequences from an agency decision, and confirm the November 20, 2014 determination is a final agency action properly reviewed by this Court under APA Section 706(2).

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

The Forest Service and IDL recognize that the heart of the dispute before the Court is whether Forest Road 652 qualifies as a "public road," because that determines whether a special use permit is required for IDL to use the road in conjunction with its

Selway Fire sale. However, they rely on misleading facts and erroneous analysis in their attempts to persuade the Court that Plaintiffs are unlikely to prevail on this claim.

A. Road 652 Is Not A "Public Road."

Plaintiffs' opening brief and declarations demonstrate that Road 652 does not qualify as a "public road" under the Forest Service Manual definition. It is mostly an unimproved track inaccessible by standard passenger vehicles, which is gated and locked past the IDL land; and only 740 feet of the road across the Wrights' property has been maintained by them, at their expense. *See* Wright Decl. (*Docket No. 7-3*), ¶ 11-15; Mullinix Decl. (*Docket No. 7-6*), ¶ 11, 26-35; Lewis Decl., ¶ 22-26 & Exh. 12 (photos). In fact, Road 652 was entirely a dirt track until 2010, when the Wrights paid to have gravel laid on the 700 foot approach to their home. *See* Second Ferguson Decl., ¶ 2.

Respondents do not dispute these facts. Indeed, the Forest Service concedes the only maintenance the Forest Service has apparently ever done on Road 652 is to replace a single aging culvert back in 1987, almost thirty years ago. *See* Hudson Decl., Exh. 14 (*Docket No. 15-15*).

Moreover, the Forest Service has never previously designated Road 652 as a "public road," at least in any public notifications or communications. As Plaintiffs established, the 2007 Access Guide for the Nez Perce National Forest – which remains the effective public document establishing which roads are available for public use on the National Forest – does not even list Road 652, much less designate it as open to public travel. *See* Lewis Decl., Exh. 14 (*Docket No. 8-12*); Mullinix Decl., ¶ 25-27. The Forest Service's submissions confirm that the 1995 Access Guide did not list Road 652 either.

See Hudson Decl., Exh. 8 (*Docket No. 15-9*) (internal FS memo dated May 2, 1996, stating: "The road is not listed in the 1995 access guide").[2]

Again, the Forest Service does not dispute these facts. Instead, it seeks to prop up its November 20th determination by submitting materials from the Nez Perce Forest's Draft Motor Vehicle Use Map (MVUM), which it released for public comment in a 2008 draft EIS. *See* Hudson Decl., ¶ 15 & Exhs. 10-13 (*Docket Nos. 15-11 to 15-14*). But the Forest Service cannot rely on a draft to contend that Road 652 was previously designated as a "public road." The MVUM has not been finalized through the travel planning and NEPA processes required by Forest Service regulations. *See* Mullinix Decl., ¶ 22-25. Until there is a final MVUM, the 2007 Access Guide is the official forest guide on the public's use of forest roads – and it does not list even Road 652, much less designate it as a "public road." *Id.*

B. Respondents Improperly Focus Only On The Section Of Road 652 That Crosses The Wrights' Property.

Unable to refute these facts showing that Road 652 is not a "public road" under the Forest Service Manual definition, Respondents seek to focus only on the 740-foot section that crosses the Wrights' property, and which the Wrights have graveled and maintained at their own expense, to claim that this section – and this section alone – is a "public road."

The Forest Service and IDL do not identify any basis for looking only at this section of the road, other than to point out that IDL never provided an easement to the

[2] The Nez Perce National Forest visitor's map only shows Road 652 as an unimproved, two-track road its entire length. *See* Lewis Decl., Exh. 13 *(Docket No. 8-11)*. Similarly, the Forest Service's Goddard Point topo map shows Road 652 to be a two-track unimproved road its entire length. *See* Hudson Decl., Exh. 13 (*Docket No. 15-14*), p. 6.

Forest Service. They ignore that the private property owners on both sides of the State parcel granted easements in the 1930's for the proposed Goddard Point #289 road project. Their effort to focus only on this short section of Road 652 fails because it is inconsistent, and ignores relevant facts and the underlying statutes and regulations relating to the forest road system.

First, Respondents do not acknowledge that the Forest Service has a nearly identical easement from 1936 on the private parcel located past the IDL land (now owned by the Neal Trust), which is located next to Forest Service land.[3] *See* Second Ferguson Decl., Exh 1. Both the Wright and Neal Trust parcels are encumbered by similar Forest Service road easements to access the Goddard Point #289 road project, which was never built. Although the Forest Service protested the locked gate on Forest Road 652 at the Neal Trust property line back in the 1990's, *see* Hudson Decl., Exh. 7 (*Docket No. 15-8*), it never required that the gate be removed; and obviously accepted the gate since it has a key to the lock to this day. Mullinix Decl., ¶ 35. While insisting that the 1937 easement's "public highway" language on the Wrights' property means that Road 652 is a "public road," the Forest Service has thus allowed gating of that same "public highway" road a few hundred feet away, despite having an easement with the same language. The Forest Service offers no explanation for what rationale would legitimately allow it to re-characterize Forest Road 652 every few hundred feet; and it is wildly inconsistent for the Forest Service to assert that the other end of Forest Road 652 is somehow not a "public road" while the Wrights' portion of Forest Road 652 is public.

[3] A map of Road 652 showing where it crosses the Wrights' property, then IDL land, then Neal Trust lands, before entering Forest Service land, is found at Hudson Decl., Exh. 2 *(Docket No. 15-3*).

Second, Respondents fail to acknowledge that the reason the Forest Service identifies Road 652 as a "forest road" is because it provides access to National Forest lands. Federal law defines a "forest road" as a "road . . . wholly or partly within, or adjacent to, and serving the National Forest System that is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources." *See* 23 U.S.C. § 101(a)(10); 36 C.F.R. §212.1. Obviously, the short section of Forest Road 652 across the Wrights' property does not itself provide access to the National Forest lands located on the other side of the IDL and Neal Trust properties – the road only has relevance to the National Forest System because it leads through those properties to National Forest lands. Again, it is arbitrary and irrational for Respondents to focus only on the 740 feet of Road 652 across the Wrights' property in claiming that section constitutes a "public road," when the rest of the road is not.

In short, the Court should not accept the illogical assertion that the "public highway" contemplated in the 1937 easement across the Wrights' property (which was never built) is 740 feet long and now justifies determining only this stretch is a "public road." The same road continues on to National Forest land through the State and Neal Trust property. It is only a "forest road" because it connects to the National Forest. Such arbitrary and irrational treatment of different short sections of the same road alone reveals that the November 20th determination is fatally flawed.

C. Even If The Court Focuses Only On The Short Section Of Road 652 Across The Wrights' Property, The November 20th Determination Is Still Erroneous And Must Be Reversed.

Even if the Court were to accept this illogical invitation to view the short section of Road 652 across the Wrights' property in isolation, and not in its actual context, to

determine if it qualifies as a "public road," still Plaintiffs are likely to prevail in their challenge to the November 20, 2014 determination, for two reasons. First, this section does not qualify as "public road" under statutory definition; and second, the Forest Service failed to enforce or even consider the impacts of the subsequent 1977 Wild and Scenic easement covering the Wrights' property, including where Road 652 is located.

1. The Road Does Not Qualify As Public Under Statute.

The parties have focused on whether Road 652 qualifies as a "public road" under the Forest Service Manual definition; but that is only part of the inquiry needed here if the focus is on the short section of road across the Wrights' property. As noted in the parties' briefs, Forest Service Manual 7700 defines a public road in terms of whether it is: "1. Available, except during scheduled periods, extreme weather, or emergency conditions; 2. Passable by four-wheel standard passenger cars; and 3. Open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restriction based on size, weight, or class of registration." *See* Lewis Decl., Ex. 11 (*Docket No. 8-9*). This definition cites 23 U.S.C. § 101(a)(27) and 23 C.F.R. § 460.2(c), but does not fully reflect the statutory definition of "public road."

Instead, the term "public road" is defined in federal statute as "any road or street under the jurisdiction of and maintained by a public authority and open to public travel." *See* 23 U.S.C. § 101(a)(27). The "open to public travel" component of this definition is further defined in 23 C.F.R. § 460.2, in the same terms as the Forest Service Manual definition above. But the Forest Service Manual omits the statutory requirement that a "public road" not only be "open to public travel" but also must be "under the jurisdiction of and maintained by a public authority" under 23 U.S.C. § 101(a)(27).

Here, the portion of Road 652 that crosses the Wrights' property is not maintained by any public authority. As discussed above, the Forest Service has not maintained the road (except to replace an aging culvert some thirty years ago). It is the Wrights who maintain the road for access to their home, laying gravel on it 2010. *See* Second Ferguson Decl.; Wright Decl., ¶ 13. This section of road thus does not qualify as a "public road" under the statutory definition; and the Forest Service wrongly failed to consider these facts in its November 20th determination.

2. The Wild and Scenic Easement Restricts Public Use.

Second, as discussed in Plaintiffs' opening brief, the 1977 Wild and Scenic easement covers the Wrights' property, including where Road 652 crosses it, to preserve and protect the Selway River corridor's Wild and Scenic values. *See* Wright Decl., Exh. 1 (*Docket No. 7-4*). It prohibits industrial and commercial activities on the property; and also requires the Forest Service to restrict public use. Specifically, the final clause of the 1977 easement is entitled "Public Entry" and states:

> The Grantee [*i.e.*, Forest Service] is hereby granted the right to permit the public use of the riverbank for fishing and traversing the river, but the public shall be excluded for any other purpose.

Id., p. 5 (emphasis added).

Despite this express clause restricting public use, the Forest Service did not consider the 1977 Wild and Scenic easement at all in its November 20, 2014 determination that Road 652 is a "public road." *See* Lewis Decl., Exs. 2-10. It relied exclusively on the 1937 easement's "public highway" language to find a "public road" exists. Likewise, District Ranger Hudson's declaration also does not mention the 1977

easement. *See* Hudson Declaration (*Docket No. 15-1*). Failing to consider this key document exposes the Forest Service's determination as arbitrary and capricious.[4]

The Forest Service tries to brush this issue off by claiming the Wild and Scenic easement only restricts the Wrights' use of their property (not the Forest Service or anyone else), and that "under black-letter property law . . . the property owner lacks the power to grant rights to later purchasers that are inconsistent with rights granted earlier." *See* FS Brief, at 14 (citing Restatement (Third) of Property (Servitudes), § 4.12). Both those arguments are unfounded.

This is not a situation where different easements have been granted to different buyers, as contemplated in the Restatement (Third). Instead, the Forest Service acquired both the 1937 and 1977 easements covering the same property, now owned by the Wrights. The broadly-framed terms of the 1977 easement were drafted by the Forest Service expressly to protect scenic, recreational and other values of the Selway Wild and Scenic River corridor. It cannot be simply ignored and unenforced now, as the Forest Service has done. This is particularly true since the underlying purpose of the 1937 easement (*i.e.*, building a "public highway" to connect to the Goddard Point #286 project) was never undertaken.

Moreover, the Forest Service's action in purchasing the 1977 easement was consistent with its 1969 River Plan for the Selway Wild and Scenic River, which

[4] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (reversal required under APA where agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise") (*quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

established that the Forest Service would use scenic easements to control access to private properties within the Wild and Scenic corridor to help protect wild and scenic values. *See* Lewis Decl., Exh. 1, p. 9 ("Access roads to serve private lands are to be controlled by scenic easements to ensure compatibility with development of the special planning area and with river environment protection"). Again, the Forest Service cannot now just ignore the 1977 Wild and Scenic easement and its 1969 River Plan when determining whether the portion of Road 652 crossing the Wrights' property is restricted to public use or not, under the Forest Service Manual definition.

The Forest Service is also incorrect in asserting that the 1977 easement only limits what the Wrights can do on their property, not the Forest Service or anyone else. Again, the "Public Entry" clause states clearly that: "The Grantee [*i.e.*, Forest Service] is hereby granted the right to permit the public use of the riverbank for fishing and traversing the river, but the public shall be excluded for any other purpose." Wright Decl., Exh. 1, p. 5 (emphasis added). The underscored language shows that it is the Forest Service's duty to exclude the public from the Wrights' property (except for use of the riverbank). The Forest Service cannot disregard that duty, which it assumed in order to protect Selway River Wild and Scenic values, by now turning around and newly designating Road 652 as a "public road" open to free use by IDL for its industrial and commercial activities, which are prohibited by the easement.

In short, the 1977 Wild and Scenic easement acts as a "restriction on public use" of Road 652 across the Wrights' property, and demonstrates that even this portion of the road does not qualify as a "public road" under the Forest Service Manual definition. At a minimum, the Forest Service erred by not even considering the impacts of the 1977 Wild

and Scenic easement on whether Forest Road 652 qualifies as a "public road" in the November 20, 2014 determination, requiring reversal pursuant to the APA.

III. AN INJUNCTION IS NECESSARY TO PREVENT SERIOUS IRREPARABLE HARM THREATENED BY IDL'S PROJECT.

The Forest Service does not contend that the requested injunction would harm the Federal Government, other than to argue that the Forest Service cannot control IDL's use of its land – which is not the issue. The issue is whether IDL has to obtain a Forest Service permit to use Road 652 for its Selway Salvage project. Although the Forest Service does not mention this in its brief, in fact it has recently analyzed the IDL sale and concluded that it poses very serious risks of environmental harm to the Selway Wild and Scenic River and its endangered fisheries resources, confirming Plaintiffs' showing of these impending irreparable harms. *See* Johnson Bar Draft EIS, excerpts attached hereto. The Court should view IDL's allegations that environmental harm is threatened if an injunction is granted, as well as its exaggerated arguments regarding potential financial harms from an injunction, with considerable skepticism, as discussed below.

A. IDL's Claimed Economic Harms Are Exaggerated And Do Not Outweigh Plaintiffs' Harms.

In evaluating IDL's alleged financial harms, the weighing of equities considers harms only from entry of the requested preliminary injunctive relief – not whether IDL will eventually be able to proceed with its planned sale using a Forest Service special use permit after the merits of this case are decided. Plaintiffs anticipate moving for summary judgment rapidly, with the expectation that the case can be speedily resolved on the merits within a few weeks. Any injunction should be short in duration, necessarily limiting the level of economic losses that an injunction might threaten to IDL.

Moreover, the alleged economic harms that IDL claims from an injunction do not outweigh the substantial procedural and substantive rights and interests that Plaintiffs seek to protect – including ensuring that the Forest Service follows its own regulations and conducts a thorough analysis under NEPA and the Wild and Scenic Rivers Act before determining whether to issue a special use permit to IDL. The Ninth Circuit has "held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns." *Lands Council v. McNair*, 494 F.3d 771, 780 (9th Cir. 2007), *vacated on other grounds*, 537 F.3d 981 (9th Cir. 2008). [5]

In addition, IDL was in no hurry to proceed with its Selway Fire sale, at least until after this litigation was filed. Although the Johnson Bar fire occurred in August 2014, IDL has offered no explanation for why it did not move to auction the Selway Fire sale until late spring 2015.[6] The fact that IDL decided to proceed with its Selway Fire sale after this litigation was filed, and after it moved to intervene, weighs heavily against its claimed harms, since it voluntarily undertook the risk of proceeding with the sale while on notice of Plaintiffs' challenges. As the Ninth Circuit has explained:

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[5] *See also Earth Island Inst. v. U.S. Forest Serv.,* 442 F.3d 1147, 1177 (9th Cir. 2006) (economic loss alone cannot outweigh the need to protect the "precious, unreplenishable resources" in our natural environment from irreparable harm); *Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (possible financial hardship to intervenors and communities surrounding National Forest was outweighed by environmental harms).

[6] IDL originally scheduled an auction in April 2015, but postponed it after the Wrights became aware of IDL's plans and raised objections with IDL and the Forest Service about using Road 652 across their property. The Forest Service's unfounded accusation that Plaintiffs unreasonably delayed seeking judicial relief, *see* FS Brief, p. 17, n. 2, disregards the communications between the parties over the last two months about this issue, including a site inspection between IDL and the Wrights in May 2015. *See* Shumaker Decl. Plaintiffs were forced to seek injunctive relief on short notice because IDL moved aggressively to auction and implement the sale after this case was filed. Plaintiffs scrambled to file their injunction motion on Wednesday, June 24, 2015, just three business days after IDL auctioned the sale on Friday, June 19, 2015.

> [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided.

National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9th Cir. 1973).[7]

B. The Environmental Threats Cited By IDL Are Exaggerated And Fail To Acknowledge The Harms Threatened By Its Own Actions.

The Court also should not give substantial credence to IDL's arguments about the supposed urgent need to log its parcel to avoid loss of timber value, or the environmental harms that it claims are threatened by enjoining its Selway Fire sale. The Forest Service's recently-issued Johnson Bar Salvage Draft EIS thoroughly exposes these claims as unfounded or exaggerated.

First, IDL overstates the potential loss of timber value from delaying timber harvest. IDL bases its argument on that assumption that trees *will die* in the near future, not because they are already dead and losing value. *See* Groeschl Decl. (*Docket No. 3-3*) ¶ 6. In fact, as the Forest Service revealed in the Johnson Bar Draft EIS, only 4% of the entire Johnson Bar Wildfire burned at a high severity. *See* Johnson Bar Draft Environmental Impact Statement (March 2015), p. 91.[8] IDL itself acknowledges that most of the state endowment land burned at a low fire intensity. *See* Groeschl Decl., Ex. F (*Docket No. 3-9*).

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[7] *See also National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000) (both following *Butz* in holding that a party with notice of proceeding who takes action does so at their own risk, and the action may be reversed or enjoined by court sitting in equity).

[8] The Johnson Bar Draft EIS is available on the Forest Service website at: http://www.fs.fed.us/sopa/forest-level.php?110117 (view most current SOPA report, follow link under "Johnson Bar Fire Salvage" to the NEPA documents).

Accordingly, the Forest Service has determined its own Johnson Bar salvage sale will be economically viable - including helicopter logging - even though it does not expect to begin project implementation until October, 2015. *See* Johnson Bar DEIS, p. 41. The Forest Service analysis underscores that helicopter logging is not only financially feasible, but also prudent given the risks of erosion caused by other forms of surface-disturbing logging. *See id.*, p. 69 & 95.[9]

There is also no support for IDL's assertions that salvage logging in necessary to prevent soil erosion and landslide risk. To the contrary, the Forest Service has already determined that IDL's sale will increase those risks. The Johnson Bar DEIS cites peer-reviewed scientific articles which establish that wildfires can actually have a positive effect on ecosystems, while salvage logging can be harmful: "Numerous studies have attributed increases in soil erosion above post-fire disturbance levels to salvage operations, due to increases in road networks that have hydrologic connectivity with stream networks, additional prescribed fires, harvesting on landslide prone areas, and ground based harvest." *See* Johnson Bar DEIS, p. 95.

In fact, when the Forest Service considered IDL's Selway Fire salvage sale in its Johnson Bar DEIS cumulative impacts analysis, it concluded that IDL's sale was likely to create significant sedimentation impacts due to "less stringent BMPs [Best Management Practices] applied on state land." *Id.* p. 222. Specifically:

[9] By contrast, IDL has refused to consider helicopter logging its parcel, and will rely on extensive tractor yarding and other surface-disturbing methods that elevate erosion risks. *See* Shumaker Declaration. IDL's assertion that its logging will comply with the Idaho Forest Practices Act (IFPA) also appears to be incorrect, as the sale contract allows "prescriptive yarding" on about a third of the sale area – a term undefined in the IFPA, which will likely allow the contractor to conduct tractor yarding on steep slopes where the IFPA does not allow it. *Id.*

> Harvest would occur on landslide prone areas along with 3.0 miles of permanent road construction. Short and long-term impacts would include increased surface erosion from harvest units and road construction. **Ground based harvest on landslide prone areas increase the risk of mass failure and delivery of sediment directly into Swiftwater Creek.** The permanency of the new road construction (overall increase in watershed road density and drainage network) on **landslide prone areas could be a source for chronic sedimentation and downstream pulse delivery to the Selway River.** Removal of vegetation within 300 feet of Swiftwater Creek could affect future large wood recruitment short and long-term. Given the proposed activities and spatial and temporal overlap with the proposed Johnson Bar Salvage project and adjacent private salvage operations and distance to occupied fish habitat and Steelhead DCH, **there could be measurable cumulative effects to fisheries** within the analysis area.

Id. p. 226-227 (emphasis added).

The Forest Service also determined that "[a]pproximately 41% of the landtypes located in the proposed units are considered as high mass wasting potential and 87% of units are located on landtypes considered high for subsurface erosion," underscoring the erosion risks of the IDL sale. *Id.,* p. 125. And it determined that taking no action to salvage its timber "would not alter the current soil erosion or landslide potential," thus refuting IDL's claim that logging is needed to reduce erosion risks. *Id.*, p. 124.

The Forest Service's findings about the likely erosion impacts caused by IDL's Selway Fire salvage sale thus confirm the observations of Daryl Mullinix, the veteran road engineer who stated in his declaration for Plaintiffs that IDL's road construction plans "create the potential for massive sedimentation, debris flow, landslide events, and threaten grave and irreversible damage to environmental resources, property, and human life." *See* Mullinix Decl. (*Docket No. 7-6*), ¶ 37-44; Schumaker Decl., ¶ 20-22.

The Court's balancing of irreparable harms and the public interest thus can only tip in favor of the requested injunction. The Forest Service's Johnson Bar Draft EIS

underscores the substantial threats posed by IDL's Selway Salvage project to the ecology and fisheries resources of the Selway River, and to its Wild and Scenic values. At the very least, the Forest Service should be required to fully evaluate the implications of allowing IDL to use Forest Road 652 for its proposed sale through the special use permit process, which has been wrongly short-circuited here.

IV. THE COURT SHOULD IMPOSE NO OR A NOMINAL INJUNCTION BOND UNDER RULE 65(c).

Finally, the Court should reject IDL's request that it impose an $850,000 bond under Rule 65(c), which would prohibit Plaintiffs from obtaining meaningful judicial review and relief from this Court. *See* IDL Brief, at 15-16.

The Court has discretion to require no bond or a nominal security under Rule 65(c), where requiring more would effectively deny access to judicial review. *Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). Courts routinely either waive the bond requirement or impose a minimal bond in cases where the plaintiffs seek to enforce environmental laws. *See id.* (upholding decision to waive bond requirement where injunction granted against development projects); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (no bond for injunction against highway expansion); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) ($100 bond). The 9th Circuit has even reversed district courts that imposed substantial bonds in environmental cases. *See Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975).

Here, the Selway River's Wild and Scenic values constitute a national treasure, recognized by Congress, which warrant protection through a temporary injunction while this case is adjudicated; and hence only a nominal bond (not exceeding $100) if any, is

appropriate. *See The Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988), *rev'd on other grounds*, 918 F.2d 813 (9th Cir. 1990) ($100 bond required for injunction against timber sale based on likely violations of Wild and Scenic Rivers Act); *Sierra Club v. Block*, 614 F. Supp. 488, 494 (E.D. Tex 1985) (one dollar bond required for injunction against timber sale on Wilderness Act grounds); *Morgan v. Walter*, 728 F. Supp. 1483, 1494 (D. Idaho 1989) (no bond required for preliminary injunction to enjoin private party from proceeding with water development project).

CONCLUSION

Plaintiffs respectfully request that this Court grant this motion and enjoin Federal Defendants and/or IDL from using Forest Road 652 for the Selway Fire sale pending resolution of this case on the merits; and impose no bond or a nominal bond (not exceeding $100) under Rule 65(c).

DATED: July 3, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2015, I caused the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the counsel of record listed below:

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United States Department of Agriculture

Forest Service

March 2015

Draft Environmental Impact Statement

Johnson Bar Fire Salvage Draft EIS

Nez Perce/Clearwater National Forests
Moose Creek Ranger District
Idaho County, Idaho

3.2.2.1 National Forest Management Act

The NFMA requires that a sale “consider the economic stability of communities whose economies are dependent on such national forest materials, or achieve such other objectives as the Secretary deems necessary” (NFMA Section14, e,1,c) and "the harvesting system to be used is not selected primarily because it would give the greatest dollar return or the greatest unit output of timber” (NFMA, Section 6, g,3,E,IV). The proposed project would meet the requirements of the NFMA by considering the economic community stability through the IMPLAN model evaluation of the alternatives. Also, the harvest systems are based upon ground-truthed silvicultural practices to achieve the desired long-term forest and access needs, and not on the highest dollar return.

3.2.2.2 Forest Service Manual

The Forest Service Manual directs that economic feasibility be considered in project design, during the early planning stages and NEPA documentation. A sale feasibility analysis was completed at Gate 1, which led to consideration of economic adjustments to the alternatives in order to reflect ways in which to lower costs, such as reducing the amount of helicopter logging and high cost development of landing areas. It also highlighted the potential need for funding to cover reforestation needs caused by the Johnson Bar Fire. Since the fire caused the need for reforestation of the land, removal of the dead trees is not required in order to cover the cost of reforesting the ground. However, by removing some of the fire killed trees, there would be an opportunity to generate funds to contribute to the cost of reforesting the areas.

3.2.2.3 Nez Perce National Forest Plan

Forest Plan Goal A.1, page II-1: “Provide a sustained yield of resource outputs at a level that would help support the economic structure of local communities and provide for regional and national needs”. The proposed action alternatives would help meet Forest Plan goals.

3.2.2.4 Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Although not a direct economic requirement, Executive Order 12898 requires that each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories.

The Johnson Bar analysis did not reveal any disproportionately high or adverse effects to minority and low-income populations. None of the action alternatives are expected to negatively affect the consumers, civil rights, minority groups, Native Americans, women, or any United States citizen. No environmental health hazards are expected to result from implementation of any alternative. This project would not disproportionately affect income level.

Table 3-8: Area and percent of prescription watersheds with activities

Johnson Bar Project 6th HUC Watershed and Forest Plan Prescription Watersheds	Acres of proposed salvage harvest			Proposed temporary roads (acres)			Percent of total watersheds		
	Alt. 2	Alt. 3	Alt. 4	Alt. 2	Alt. 3	Alt. 4	Alt. 2	Alt. 3	Alt. 4
Big Smith Creek-Middle Fork Clearwater River	797	797	493	1.0	0.5	1.9	3%	3%	2%
DECKER CREEK	299	299	220	0.4	0.2	0.8	24%	24%	18%
LODGE CREEK	96	96	96	0.2	0.2	0.2	3%	3%	3%
MIDDLE FORK CLEARWATER FACE	247	247	81	0.1	0.1	0.6	1%	1%	0%
UNNAMED NO. 8	155	155	96	0.3	0.0	0.3	18%	18%	11%
Goddard Creek-Selway River	2055	1662	1683	4.8	0.5	4.8	9%	7%	7%
ELK CITY CREEK	501	363	407	1.1	0.4	1.1	28%	20%	23%
GODDARD CREEK	664	650	626	1.3	0.1	1.3	7%	7%	7%
LOWER SELWAY RIVER	408	306	273	0.2	0.0	0.2	3%	3%	2%
SWIFTWATER CREEK	482	343	377	2.2	0.0	2.2	12%	9%	10%
O'Hara Creek	122	122	122	122.0	122.0	122.0	<1%	<1%	<1%
LOWER O'HARA CREEK	122	122	122	0.5	0.0	0.5	1%	1%	1%

Proposed logging systems minimize the probability that project activities would result in elevated erosion and sediment delivery to streams. Tractor skidding of logs occurs on skid trails and swing trails, and is typically the harvest activity that has the greatest potential to cause soil erosion, as well as sediment delivery where connected or near to streams. Tractor units in this project are limited to ridgetop locations that are generally not connected to the drainage network, and are limited in slope (see soils report for further discussion). Four proposed tractor units (103, 105, 106 and 140) included headwater draws that would have required additional protection from erosion. Scattering of slash in these units following tree removal would reduce probability of erosion and sediment delivery over the existing post-fire condition. However, the burned draws themselves are particularly vulnerable to disturbance and have the potential to transport eroded sediment to the channel network Because of these concerns, the aforementioned units were either changed to skyline (105 and 106) or helicopter (140), or dropped from the project (103). Aside from these four units, the lack of connectivity to headwater draws combined with soil-protecting design features should result in no impact to water quality or riparian and aquatic habitat conditions from tractor skidding.

Helicopter and skyline harvest methods are low-impact approaches where trees are cut by individual fallers and rigged to cables which suspend the logs as they are hauled to landings either partially (skyline) or fully (helicopter). In helicopter units, ground disturbance is minimal (see soils report). In skyline units, linear soil disturbance would likely occur along the corridors where logs are hauled upslope to landings. Unmitigated, these corridors have the potential to concentrate overland flow given their typical linear arrangement on the fall line of the slope. Project skyline corridors would terminate at considerable distances from

stream channels or ephemeral draws, leaving them unlikely to connect to streams. Nevertheless, probability of erosion and sediment delivery would be substantially reduced through various erosion control measures, for example by lining corridors with slash, and installing waterbars if needed during and following yarding operations in order to avoid development of preferential surface flowpaths.

Skyline corridors in several proposed units were evaluated using WEPP in order to estimate effectiveness of proposed erosion control design features. The results of this evaluation suggest that in the absence of erosion-control design features, disturbance in skyline corridors typical of the project would lead to greater erosion and downslope sediment transport than the existing condition (Table 3-9). While no skyline corridors terminate near perennial streams, they could deliver sediment to ephemeral draws, which are more likely to carry runoff in the post-fire setting. The erosion modeling suggests that placement of slash (95% ground cover) on skyline corridors would reduce the likelihood of corridor erosion and sediment transport below that of the existing (post-fire) condition (Table 3-10). Adding water bars at 100-foot intervals where bare soil is exposed would further reduce sediment transport. These conclusions apply to each action alternative.

Table 3-9: Estimated sediment delivery (10% probability) from representative skyline corridors

Unit	Length (feet)	Slope (%)	Burn severity	Existing condition (tons/acre)	Skyline corridor (tons/acre)			
					No BMPs	slash 95%	water-bars	slash + wbars
111	1300	46	moderate	6.8	13.7	0.3	1.4	0.0
114	1000	40	low	0.7	2.3	0.2	0.6	0.0
131	700	47	low to moderate	0.8	2.2	0.1	0.7	0.1

As stated above, hand crews falling trees in treatment units is not predicted to measurably influence post-fire erosion or runoff. Nonetheless, the project presents an opportunity to reduce hillslope erosion below the existing conditions present in many of the treatment units. The project would require scattering of fine woody debris (slash) to achieve an 85% surface cover (approximately 5-10 tons per acre) on treatment unit hillslopes burned at moderate to high severity. In addition to the fine woody debris, coarse (greater than three-inch diameter) woody debris would be retained at the rate of 17-33 tons/acre in all units, regardless of burn severity. The fine woody debris requirement specifically addresses erosion concerns. While the coarse wood requirement addresses soil biological function, it too would help to reduce erosion and sediment transport. The ERMiT interface of WEPP was used to estimate the effect of retaining fine slash on treatment units (Table3-10). The model estimates that this treatment would reduce hillslope erosion by roughly 48 percent on average from existing conditions post-fire (range 37-63%) in treatment units for Alternative 2. Reduction in erosion would be similar in all of the action alternatives. The sediment values shown in Table 3-10 are based on the 10% probability runoff event in the

R1 Sensitive Species	Determination		Rationale
	Alt.1 No Action	Alt. 2-4 Action Alternatives	
			project activities with design criteria, BMPs and logging system methods and location of temp road construction would have negligible direct or indirect effects to WPM under all proposed Alternatives.

3.5.7.1 Alternative 1

Under Alternative 1, the Forest Service would not change management actions in the project area. There would be no proposed harvest, prescribed fire activities, or road maintenance/construction. There could, however, be direct and indirect effects from the Johnson Bar Fire itself including mass failure, infiltration, peak flow, runoff, large woody debris recruitment, and to stream habitat.

Table 3-22: Burn Severity by watershed within the Project Area 1= unburned, 2= Low severity, 3=Medium, 4=High

Subwatershed	Burn Severity	Total Acres burned	Acres Burned in RHCAs
Big Smith-Middle Fork Clearwater	1	670	80
	2	1865	234
	3	1046	76
	4	4	0
Goddard-Selway	1	637	121
	2	3059	719
	3	4481	580
	4	519	15
O'Hara	1	135	21
	2	565	84
	3	268	7
	4	4	0

The Johnson Bar fire is a natural disturbance that has both immediate and long-term consequences for stream ecosystems because it can affect water temperature, channel morphology, stream biota and habitat complexity. The fire burned with mixed severity across approximately 13, 300 acres. The complexity of the landscape led to the mosaic burn, majority low to moderate severity, with only a small percentage of riparian area that actually burned (Table 3-22). No drainage burned in entirety, the greatest burn severity within RHCAs was within the Goddard-Selway subwatershed with moderate burn severity in the upper portions of Burned Creek and Elk City creeks, refer to the Fire and Fuels analysis.

Fire effects on aquatic systems and biota can be extremely resilient to the effects of fire, and even benefit from it, full ecosystem recovery dependent on acres burned and burn

Sediment yield increases as a result of implementing proposed activities would be within the water quality objectives as outlined in Appendix A of the Nez Perce Forest Plan. The NEZSED model results displayed that proposed actions for Alternatives 2, 3, and 4 would not -add to measurable sediment increases above post-fire disturbance levels. With the exception of winter rearing capacity along Elk City Creek, FISHSED detected a reduction in the winter and summer rearing capacity for steelhead of1-6%. There were no differences between the alternatives. These changes would be below the 10% threshold where measurable changes would occur within the stream substrate. FISHSED is strictly a comparison of summer and winter rearing capacity and does not model long-term differences in rearing capacity. NEZSED resulted indicated that long-term impacts (>10 years) would not be measurable. Aside from the FISHSED model, stream gradient channel size and the lack of overall pool habitat along Elk City Creek provides minimal winter rearing habitat.

In general, post-fire sediment increases from the proposed activities would decline to normal conditions after 2-3 years. This has been documented in several other studies that found increases in stream sediment inputs shortly after a fire and 2-3 years post-fire (Chou *et al*. 2004, Larsen *et al*. 2009, Moody and Martin 2001 and 2009, Pierce *et al*. 2004, Robichaud *et al*. 2010, and Stabenow *et al*. 2006). Sediment increases above fire disturbance levels would be undetectable for Alternative 3, which would have very few tractor logging units (approximately 2% of the proposed project area) and very little temporary road construction. Road decommissioning and road reconstruction would be the greatest source of sediment delivery under Alternative 3, but, would have long-term watershed benefits.

Numerous studies have attributed increases in soil erosion above post-fire disturbance levels to salvage operations, due to increases in road networks that have hydrologic connectivity with stream networks, additional prescribed fires, harvesting on landslide prone areas, and ground based harvest (DellaSala *et al*. 2006, Karr *et al*. 2004, McIver and McNeil 2006, McIver and Starr 2001, Silins *et al*. 2009, Smith *et al*. 2011, Wagenbrenner *et al*. 2014). All of these studies acknowledge significant differences between logging systems and actual ground disturbance. Tractor logging has the greatest impacts, followed by skidding over snow, cable yarding over bare ground, skyline, and finally helicopter activities having the least amount of impacts. There are no activities proposed that would increase roads that are hydrologically connected to streams and no harvest on verified landslide prone areas. No ground based harvesting would occur on steep slopes and slash/large wood would be retained in harvest units to minimize compaction and potential erosion.

layers average 2 to 4 centimeters; and in unburned areas, duff/litter layers are approximately 4 to 6 centimeters deep.

3.8.6 Direct and Indirect Effects

The analysis area for direct and indirect effects of the alternatives is the individual treatment units (variable acres) and associated skid trails, landings, and temporary roads within the 26,800 acre project area.

3.8.6.1 Alternative 1

This alternative maintains the existing condition resulting from the Johnson Bar fire. Alternative 1 would not alter the current soil erosion or landslide potential and would retain the same amount of coarse woody material, both standing and down. Existing DSD would persist with very slight natural recovery of surface layers of compacted soils. Over time, large woody debris from dead trees would fall on the ground, increasing organic matter and water-holding capacities on-site.

Under Alternative 1, no road decommissioning activities would occur that would directly improve soil conditions by decompacting soils and adding coarse woody material and other organic matter to the existing road surface. Soils in these areas would remain in a less productive condition.

3.8.6.2 Alternatives 2, 3, and 4

Landslide and Erosion Hazard Potential

The project area has been mapped and divided into landtypes (areas featuring similar soils, hydrology, and vegetation characteristics). Soil erosion and mass wasting are natural processes, and many landtypes across the Forest have high inherent hazards of erosion, mass wasting, and landslides (NRCS 2006). These natural processes have occurred over long time periods and are fundamental factors in creating the present-day landscape.

Landslide-prone (LSP) areas were identified using GIS and lidar analysis. All potential landslide prone areas were excluded from the salvage harvest units. If additional landslide prone areas are identified, the area would be excluded from harvest and a PACFISH buffer would be added. **No harvest activities would occur in these areas.** Indicators of landslide prone areas include: steep (over 60%) concave slopes; hydrophytic vegetation (i.e. sedges, moist site ferns); slumps, draws, and basins; past landslide locations; and obvious soil movement areas (typically indicated by curved and/or buttressed tree boles, soil creep, tension cracks, etc.).

An erosion hazard assessment based on landtype properties was used to determine erosional characteristics of the project units and temporary roads/swing trails. This assessment was used to develop project design measures to minimize erosion potential. Mass wasting, surface erosion, and subsurface soil erosion potentials were evaluated for the landtypes coinciding within the proposed harvest and burn units (see project file for detailed information on individual units.)

Surface erosion was rated as high on 148 acres (5%) of proposed units. Approximately 41% of the landtypes located in the proposed units are considered as high mass wasting potential and 87% of units are located on landtypes considered high for subsurface erosion. Generally, logging in areas with high risk for subsurface erosion is problematic only if the surface soil is removed and the subsurface and parent material is exposed – such as excavated skid trails and landings. Based on past monitoring on the Clearwater Forest, an estimated average 10% of areas using ground-based logging systems are detrimentally disturbed. Using this assumption and the fact that tractor logging is proposed on 202 acres under Alternatives 2 and 4 with 8 acres under Alternative 3, approximately 0 to 20 acres would be utilized for skid trails and landings on areas with high subsurface or mass wasting erosion potential.

Landtype erosion hazards used to assess the effects of the alternatives on soil stability and erosion potentials indicate an overall increase of erosion potential for each of the action alternatives. Surface soil loss through displacement and mixing with infertile substrata has long-lasting consequences for soil productivity. This loss occurs during temporary road construction, excavation of skid trails and landings, and displacement of soils during ground-based harvest. Irreversible damage to soils could result from the loss of the volcanic ash cap. Although soil recovery could still occur in remaining subsurface soils, the exceptionally high porosity and water-holding properties of the Mazama ash cap would likely be irrecoverable. Even though the ash layer is not a significant source of soil nutrient content, loss of the ash layer reduces water-holding capacity and high-quality tree rooting material. Since volcanic ash is not easily replaced, these effects may be very long lasting. Skid trails and landings would be located and designated to minimize the area of soil disturbance.

Design measures to reduce the potential for erosion include the following: limiting the amount of excavated skid trails and landings; fully decommissioning all excavated skid trails and landings on erosive landtypes; and placing large, woody material over the contoured slope for soil stabilization. See the design criteria for soils in Chapter 2 for a complete list of measures.

Less than 200 feet of proposed swing trail is proposed on landtypes rated as high for potential surface erosion in Alternatives 2 and 4, with none in Alternative 3. Approximately 0.5 miles of proposed temporary road and swing trails would be located on landtypes rated as high for mass wasting potential, with only 0.1 miles proposed in Alternative 3. For Alternative 2, approximately 4.9 miles of proposed temporary roads and swing trails are located on landtypes with high subsurface erosion potential, with approximately 0.8 miles in Alternative 3, and 5.4 miles in Alternative 4. Location on these landtypes is often only problematic if the surface soil is removed and the subsurface material is exposed.

The proposed temporary roads would be located on ridgetops and upper slopes, and only short, discontinuous portions would require some form of excavation. All temporary roads would be decommissioned after use, and large woody material (>3 inches in diameter) would be placed on the surface to aid in soil stability. An increased number of water bars or the addition of slash material to the road bed would be used as necessary to reduce erosion while the road is in use. Even if small segments in these roads cut into the subsurface

- Clear Creek Inventoried Roadless Area Prescribed Burn –burning activities (2015-2017) affecting 1,371 acres
- Continued road maintenance on all Forest Service system roads – 7 miles/year
- Snowmobile Recreation – additional 56 miles (9miles in project area) of routes would be added starting 2016

The following foreseeable future or concurrent actions would occur in the Goddard Creek-Selway River and O'Hara Creek subwatersheds (6th-HUC):

- Road Improvements – upgrade three culverts on O'Hara Creek Road #651 to accommodate one percent probability (100-year) flood event (2017-2018)
- Range –continued grazing 2,760 acres
- Fenn Face Prescribed Burn – burn activities (2016) north of Fenn R.S. affecting approximately 1,000 acres
- North Selway Prescribed Burn – burn activities (2017) southwest of Coolwater affecting approximately 1,000 acres
- Continued road maintenance on all Forest Service system roads – 10miles/year
- Pre-commercial thin – thinning (starting 2016) activities located from Swiftwater to O'Hara Creek

A coming salvage sale on state land burned in the Johnson Bar fire is also likely to have sediment impacts based on the severity of the burn on this land, the length of new road construction, and the less stringent BMPs applied on state land.

3.17.1 Alternative 1

Cumulative effects arise from the incremental impact of an action when added to other past, present, and reasonably foreseeable actions. There are no direct or indirect effects from this project; therefore there are no cumulative effects.

3.17.2 Alternatives 2, 3, and 4

Water Yield: As discussed above, percent increase in equivalent clearcut area (ECA) can be used as an indicator of change in water yield resulting from reductions in forest canopy. In this project, removal of live trees would be minimal, but could occur at incidental levels in the construction of temporary roads and skyline corridors. A lower ECA values corresponds to a lower likelihood that undesirable effects of increased water yield (e.g. elevated channel and bank scour) would occur. An ECA value of less than 15 percent is unlikely to result in measurable change in water yield, a condition rated as "high" or healthy by NOAA Fisheries (1998). An ECA value of 15-30 percent could potentially result in measurable increase in basin water yield, and indicates "moderate" conditions, while a value greater than 30 percent is considered low (poor) condition (NOAA 1998). Hydrologists of the Northern

3.18.1 Alternative 1

Under Alternative 1 (No Action), there would be no proposed harvesting, prescribed fires, road maintenance or construction, or road decommissioning. Therefore, Alternative 1 would not incrementally add to the effects from other past, present, and reasonably foreseeable future activities.

3.18.2 Alternatives 2, 3, and 4

The following cumulative effects are common to Alternatives 2, 3, and 4.

Past vegetation treatments have been conducted over the majority of the proposed project area. Prior harvest activities (1930s-2015) include salvage, commercial thinning, shelterwood harvesting, and pre-commercial/non-commercial thinning. Potential effects of harvesting activities have been summarized in the Environmental Effects section. There were approximately 3,700 acres of past harvesting activities in the Big Smith-Middle Fork Clearwater subwatershed and 3,600 acres in the Goddard-Selway and O'Hara subwatersheds. Approximately 400 acres of past harvesting activities occurred within RHCAs. The majority of this harvesting occurred over 20 years ago with opportunities for regrowth. There have been no past vegetation treatments in perennial fish bearing streams within the subwatershed. With the exception of pre-commercial thinning in the Selway-Goddard and O'Hara Creek watersheds, there would be no additional vegetation treatments having temporal/spatial overlap within the analysis area. Given this, the possible increase of sedimentation mobilization, and riparian effects from past vegetation treatments and connected actions would be negligible and offer little opportunity for measurable cumulative effects with ongoing actions for all proposed Alternatives. There would also be negligible cumulative effects to fisheries as a result of the Johnson Bar fire suppression efforts, Johnson Bar BAER efforts, Middle Fork vegetation project, private land salvage, O'Hara culvert replacements, road construction and reconstruction, road maintenance, or grazing.

The proposed project alternatives in conjunction with the 167 acre State of Idaho timber harvest south of Swiftwater Creek would result in measurable cumulative effects to fisheries within the analysis area. The State of Idaho salvage sale would consist of a combination of ground based and skyline harvesting activities along with 3 miles of permanent roads. Harvesting activities would occur within 300 feet of the Swiftwater Creek and also on landslide prone areas. Short- and long-term effects could include increased surface erosion from harvesting activities and road construction. Harvesting on landslide prone areas could increase the risk of mass failure and the delivery of sediment directly into Swiftwater Creek. New permanent road construction on landslide prone areas could be a source for chronic sedimentation and downstream pulse delivery to the Selway River, along with contributing to an overall increase in watershed road density and drainage network. Removal of vegetation within 300 feet of Swiftwater Creek could affect future large wood recruitment in both the long- and short-term.

The 25 miles of proposed road decommissioning and road storage in conjunction with the approximately 4.7 miles of decommissioned roads within the Middle Fork Clearwater

drainage and 7.8 miles in the Selway-Goddard subwatershed would result in measurable positive cumulative effects within the analysis area.

Table 3-52: Johnson Bar cumulative effects to Fisheries common to all subwatersheds

Activity	Past	Ongoing	Future	Direct effects	Indirect effects	Rationale
Johnson Bar Fire Suppression Efforts	X			0	-/0	Approximately 10.5 miles of handline, 4 miles of dozer, 1.2 miles of excavator fireline were constructed and then consequently obliterated after the fire. There was also 3.1 miles of mechanical fuel break. All activities were ridge top and used existing road infrastructure (perimeter of the fire). All handline and mechanical line (39 miles) was rehabbed in Sept/Oct 2014. The majority of the work did not occur within RHCAs. Mechanical dozer line crossed several ephemeral draws to O'Hara Creek. There was no mastication that occurred within RHCAs. Given the location of past activity within the project area, duration of past activity, and past rehab efforts **there would be negligible cumulative effects to fisheries from Johnson Bar suppression efforts.**
Johnson Bar BAER Efforts	X			S-/S+	S-/S+	Culvert removal on lower Elk City Creek, (partial passage barrier, undersized) 2015, direct impacts to fisheries and immediate short-term sedimentation impacts with long-term benefits to stream channel stability and fish distribution. Road improvements along FS 651 Rd, 9701 and 0723B include 31 drop inlet structures. **There would be no cumulative effects from sedimentation impacts because there is no temporal overlap between proposed project work and road improvements were isolated with long-term beneficial cumulative effects.**
Lodge Point Project	X			0	-/0	This 598 acres commercial thin was proposed in upper Lodge Creek. A combination of tractor and skyline methods were used. 4.3 miles of old system roads were reopened. 2.0 miles were decommissioned 2013/2014, and 2.3 miles would be decommissioned in 2015 along with 1.1 miles of new temporary road. Indirect sediment impacts are reduced because there were no RHCA treatments, or temp road construction within RHCAs or culvert upgrades on existing road prism. No net drainage increase because all roads are obliterated after use. Any short-term sediment increases would likely have no measurable impacts to steelhead rearing and spawning habitat 1.5 miles downstream. **Cumulative effects to fisheries would be insignificant given project design criteria, location to occupied fish habitat and no temporal overlap with proposed activities**.
Middle Fork Vegetation Project	X			0	-/-	2586 acres were treated, it was a mixture of skyline and ground based operations. 3.9 miles of road was constructed, 3.3 miles of road was reconstructed and 3.4 miles of road was obliterated. There was an increase in drainage network. There was no harvest within RHCAs and landslide prone was eliminated from harvest units. **Cumulative effects to fisheries would be insignificant given project design criteria, location to occupied fish habitat and no temporal overlap with proposed activities**.
Private Land Salvage	x			-	S-/S-	80-acre salvage, 2 permanent landings and unknown mileage of road construction/reconstruction. There was harvest of trees within 100 feet of Swiftwater and regen harvest within 300 feet of the stream. There was no landing construction just outside of the RHCA. All landings and permanent road were constructed on unstable soils conditions. There is possible sediment delivery directly to Swifwater Creek, and the Selway River through steep ephemeral draws. Harvest within the riparian areas would most likely affect short and long-term LWD recruitment potential to lower Swiftwater. Given past harvest activities, unstable soils, and proximity to occupied fish habitat on Swiftwater, there could be significant cumulative effects. **Cumulative effects to the Mainstem Selway could be minimal given the size of the Selway and available habitat.** Peak flow events on the Selway would likely dilute any increased turbidity from the project area.
IDL Salvage	X	X		-	S-/S-	A 167-acre salvage sale, combination of ground based (98) and skyline (68) and 3 miles of permanent road. Harvest of 100% of the area with 50-foot buffers on perennial non-fish bearing streams and wetland areas and a 100-foot riparian buffer on Swiftwater Creek. Harvest would occur within 300 feet of Swiftwater Creek. Harvest would occur on landslide prone areas

Activity	Past	Ongoing	Future	Direct effects	Indirect effects	Rationale
						along with 3.0 miles of permanent road construction. Short and long-term impacts would include increased surface erosion from harvest units and road construction. Ground based harvest on landslide prone areas increase the risk of mass failure and delivery of sediment directly into Swiftwater Creek. The permanency of the new road construct (overall increase in watershed road density and drainage network) on landslide prone areas could be a source for chronic sedimentation and downstream pulse delivery to the Selway River. Removal of vegetation within 300 feet of Swiftwater Creek could affect future large wood recruitment short and long-term. Given the proposed activities and spatial and temporal overlap with the proposed Johnson Bar Salvage project and adjacent private salvage operations and distance to occupied fish habitat and Steelhead DCH, **there could be measurable cumulative effects to fisheries within the analysis area.**
O'Hara Culvert Replacements	X	X	X	-/0	S-/S+	7 total culvert replacements on non-fishing bearing streams. There would be short-term, measurable downstream increases in sediment turbidity to O'Hara creek but, overall long-term reduction in sediment inputs with culvert upgrades and resurfacing of USFS 651 Rd. **There would be negligible CE, given BMPs, duration and isolation of the activity short-term impacts would be minimized with overall benefits to the watershed with reduction in sediment.**
Road Decommissioning	X			-/0	S-/S+	Approx. 4.7 miles of past road decom in the Middle Fork Clearwater drainage more specifically Lodge Creek SWS, and approximately 7.8 miles in the Selway-Goddard SWS. **Past road decommissioning and the proposed 25 miles of road decommissioning (system and non-system) and road storage would have positive significant CE, with long-term watershed benefits.**
Road Construction/Reconstruction	X			-/0	-0	Past road construction during the 1960s-1980s. No future road construction is proposed, **CE would be negligible given no temporal or spatial overlap with proposed activities.**
Road maintenance	X	X	X	-	+	Road maintenance is ongoing, activities are consistent with the Nez Perce Plan and Road Maintenance and Minor Road Reconstruction Programmatic**. CEs would be insignificant or discountable given BMPs.**
Grazing	X	X	X	-	-	Grazing would be authorized in the Clear-Tahoe Allotment, a small portion of this allotment is located within the project area. Given the majority of fish bearing reaches and most riparian areas are wholly inaccessible to cattle, Forest designated monitoring areas (DMA), modified PIBO sites are located in adjacent watersheds. PIBO data as implicated a static or downward trend in some habitat parameters. There are is one PIBO EM site located in Goddard Creek. DMAs are consistent with Nez Perce Plan standards and guidelines and R1 utilization standards/guidelines. Although there is spatial and temporal overlap, given current utilization standards, rangeland and DMA monitoring for Clear-Tahoe Allotment **CEs would be negligible. Grazing impacts are also mitigated by using appropriate BMPs, and project specific design criteria applied uniformly across the project area.**
Instream Watershed Restoration	X			-	+	During the 1990s a successful large instream habitat improvement project placed several LWD structures to increase pools and side channel rearing habitat. Instream habitat improvements would continue to benefit fisheries in Lower O'Hara**. Past instream work and proposed culvert upgrades, and proposed road decommissioning could have beneficial CEs to lower O'Hara Creek.**

0=Neutral Indirect Effects
- =Insignificant or discountable negative effects
+ = Insignificant or discountable positive effects
S- = Measurable negative effects
S+ = Measurable positive effects
/ = Short-term/long-term effects

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED, and MORGAN and OLGA WRIGHT, *Plaintiffs,* vs. DISTRICT RANGER JOE HUDSON in his official capacity, and UNITED STATES FOREST SERVICE, *Defendants.*	No. 3:15-cv-169-BLW **SECOND DECLARATION OF DEBORAH A. FERGUSON IN SUPPORT OF PLAINTIFFS' MOTION FOR TRO/ PRELIMINARY INJUNCTION**

I, Deborah A. Ferguson, declare and state as follows:

1. I am counsel of record for Plaintiffs Morgan and Olga Wright in this matter. The following statements are based on my personal knowledge.

2. My client, Morgan Wright, has informed me that until 2010, Forest Road 652 was only a dirt track to his house. The road is still not paved. In 2010 he added a layer of gravel on the first 700 feet of Forest Road 652, without structuring a base, to cover the dirt, as access to

his property.

3. Attached as Exhibit "A" is a Forest Service road easement that encumbers the Ruby Neil and Rhea Davis Trust property, to the east of the Wrights' residence. It is recorded as Instrument No. 114602 in the Idaho County Courthouse.

4. This easement was provided to me by Daryl Mullinex, a former Forest Service road engineer on the Nez Perce Forest, who has filed a declaration in support of the Plaintiffs' Motion for Injunctive relief. (Docket No. 7-6).

5. Exhibit "A" was granted to the Forest Service in 1936 from James A. Davis. The property is currently owned by the Ruby Neil and Rhea Davis Trust. Like the road easement that encumbers the Wrights' property, it was acquired as a connecting link for the Goddard Point Road Project, # 289. Daryl Mullinex has indicated that neither Forest Road 652 nor 289 were ever constructed.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. Executed this 3rd day of July, 2015.

/s/ Deborah A. Ferguson
Deborah A. Ferguson

Attorney for Plaintiffs Morgan and Olga Wright

289.

RIGHT-OF-WAY DEED

THIS INDENTURE, Made this 30th day of March, in the year one thousand nine hundred and thirty Six, between

James A. Davis, a widower ~~and his wife~~ of the County of Stark, State of Ohio grantor, parties of the first part, and the United States of America, Dept. of Agriculture, Forest Service, parties of the second part, WITNESSETH:

That for and in consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged, the parties of the first part do hereby grant, bargain and sell, dedicate, convey and confirm unto the party of the second part an easement and right-of-way 60 feet wide across **Lots Seven (7), and Eight (8), Section Fifteen (15), and Lot Three (3) Section Twenty two (22), all in Township Thirty Two (32) North, Range Seven (7), East Boise Meridian, Idaho** and located on the ground according to the survey line, the figures, measurements, and other references shown on the blue print hereto attached and made a part hereof, the said blue print being a true copy of a portion of the plan prepared for the highway to be constructed by the Secretary of Agriculture of the United States, and known as the Selway River-Goddard Point Project. #289.

APPROVED AS TO CONSIDERATION DESCRIPTION AND CONDITIONS
BY [illegible] DATE 5/12/36 7/6/36

The said right-of-way hereby granted is for the construction, repair, maintenance, and operation of a common, main, or State public highway and as a connecting link in the aforesaid Selway River-Goddard Point #289 project, without any reservations or exceptions whatsoever by the parties of the first part with respect to the construction, repair, maintenance, operation, or control or otherwise of the full width of the said right-of-way or of any road which may be constructed upon the said right-of-way. The said parties of the first part hereby release the party of the second part from all damages by reason of, or in connection with, the construction, repair, maintenance, or operation of a road or highway upon the said right-of-way. The parties of the first part do also hereby dedicate the said right-of-way to the general public for all road and highway purposes provided for in the laws of the State of Idaho.

Provided if, at any time hereafter, the said right-of-way shall be discontinued by the properly constituted authorities in such matters for all purposes as a public road, then the said easement covered by the said right-of-way shall revert to the said parties of the first part, his ~~their~~ heirs, successors, administrators, or assigns.

IN WITNESS WHEREOF the said parties of the first part ~~have~~ has hereunto subscribed ~~their~~ his name and affixed ~~their~~ his seal at Canton, County of Stark, State of Ohio, the day and year first above written.

William H. Miller

Perry D Eberly, Witnesses

James A. Davis

ACKNOWLEDGEMENT

State of Ohio)
) ss.
County of Stark)

On this 30th day of March in the year 1938, before me Perry D. Eberly a notary public in and for the State of Ohio, personally appeared James A. Davis, a widower known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Perry D. Eberly
Notary Public for the ~~State~~ County of Stark, residing at Canton, Ohio
My commission expires October 25, 1937.

PERRY D. EBERLY,
Notary Public, Stark County, Ohio
My Commission Expires Oct. 25, 1937

	Phillips	
	Coster	
	Anderson	
	Kapp	
	Rice	

INDEXED 114602 COMPARED

		ACTION BY
	Phillips	
	Coster	
	Anderson	
	Kapp	
	Rice	

STATE OF IDAHO
County of Idaho } SS

Filed for record in the office of the Recorder of Idaho County, at the request of Chas. L. George on the 1st day of Sept, A.D. 1936 at 1:46 o'clock P. M., and recorded in Book 65 of Deeds, Page 292, of the Records of said County.

Henry Telcher, County Recorder

By Margaret Robinson, Deputy

Fee $1.20

Forest Service Office City.

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Attorney for Plaintiff Idaho Rivers United

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED and MORGAN AND OLGA WRIGHT, *Plaintiffs*, vs. DISTRICT RANGER JOE HUDSON, in his official capacity, And UNITED STATES FOREST SERVICE, *Defendant*.	No. 3:15-cv-00169-BLW **DECLARATION OF MARC A. SHUMAKER IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION**

I, Marc A. Shumaker, hereby declare and state as follows:

1. My name is Marc A. Shumaker and I reside in Boise, Idaho. The following matters are personally known to me and, if called as a witness, I could and would testify truthfully thereto.

2. I have been employed as a legal fellow at Advocates for the West since March 2015. I hold a B.S. degree (2000) in Natural Resource Management and Policy from Paul Smith's College and a J.D. (2014) from Stetson University College of Law. I was admitted to the Idaho Bar (#9606) and the District of Idaho in October of 2014.

3. I was previously employed as a forester with the Bureau of Land Management in Coeur d' Alene, Idaho, from 2000 to 2011. During my tenure with BLM, I received professional training in basic road design, helicopter logging, and cable logging from Forest Engineering Inc. in Corvallis, OR. In 2009, I was one of two BLM employees to complete the U.S. Forest Service's National Advanced Silviculture Program (NASP-2), which required nine weeks of forestry training at four different universities around the country.

4. My experience and duties as a BLM forester involved timber sale planning, timber harvest system layout, cruising timber, evaluating forest insect and disease problems, timber sale contract preparation and administration, tree planting, and hazardous fuels reduction. I also worked with BLM's realty specialist and civil engineers to obtain easements for access to federal lands, for timber sale road layout and design. During my tenure with BLM, I worked on dozens of timber sales in Idaho involving road building, helicopter logging, cable logging, and tractor logging. All of my projects were subject to compliance with the Idaho Forest Practices Act under federal regulations.

5. When I began working as a fellow for Advocates for the West in March 2015, I was tasked with investigating the facts surrounding IDL's Selway Fire timber sale and the proposed use of Forest Service Road 652. I obtained IDL's proposed timber

sale contract terms from their timber sale website, the relevant portions of which are identical to the final contract terms contained in Nickalos Carter's Declaration as Exhibit B.

6. Upon reviewing IDL's proposed contract terms I immediately noticed the term "prescriptive yarding," because it is not a term that is recognized in the Idaho Forest Practices Act or generally in the forest industry. The "prescriptive yarding" areas of the timber sale total 58 acres (35% of the harvest units) and are located on steep slopes above the highest roads to be constructed by IDL's timber sale purchaser. A true and accurate copy of IDL's sale map showing the location of "prescriptive yarding" areas is attached as Exhibit 1.

7. "Yarding" is a term used to describe the method of moving freshly cut logs from the stump to a landing area where they can be loaded onto a log truck. There are three yarding methods recognized in the forest industry: (1) ground based yarding, which involves machines that travel off-road and drag logs back to a landing, including tractors, bulldozers, skidders, excavators, loaders, harvesters, forwarders; (2) cable yarding, where a crane-like machine sits on a road or landing and pulls logs out the woods via a suspended cable, and (3) helicopter logging, where logs are attached to a line on a helicopter and flown to the landing.

8. Yarding methods vary significantly in their cost, impact to environmental resources, and suitability for ground slope. Ground based logging creates the most ground disturbance because machines travel off-road on constructed "skid trails," which resemble a very primitive road. Because of erosion concerns, ground based yarding is limited to slopes less than 45% under the Idaho Forest Practices Act, and slopes less

than 35% under Forest Service regulations, which are more stringent However, in reality, ground based logging is often used on slopes greater than 45% because it is the least expensive yarding method. Cable yarding creates less ground disturbance than ground based logging because the machine stays on the road or landing. But cable yarding does create erosion risks because the cable lines create linear areas of disturbed soil that travel straight down the fall line of the slope. Helicopter logging creates the least amount of ground disturbance and erosion potential because logs are not dragged through the woods at all. But helicopter logging is significantly more expensive than cable or ground based yarding and is generally reserved for high value trees on very steep, inaccessible, or sensitive slopes. The viability of helicopter logging depends on the weight of the logs, the value of the logs, and the distance from the harvest area to a suitable landing area.

8. "Prescriptive yarding" is not a recognized method of timber harvest in the forest industry or the Idaho Forest Practices Act because it does not describe what equipment will be used, or how logs will be transported to the landing. IDL's contract terms explain that the purchaser will develop a harvest plan and submit it to IDL's forester-in-charge, subject to the limitations on ground based and cable yarding of the Forest Practices Act. *See* Carter Decl. (Doc. No. 14-3) Ex. B, p. 10. In other words, "prescriptive yarding" has been used to indicate that the yarding method will be determined by the purchaser, as it "prescribes".

9. Due to the location of the "prescriptive yarding" units and their steepness, it appears impossible to remove the logs from those areas without constructing more roads, helicopter logging, or violating the slope limitations in the Idaho Forest Practices

Act. First, cable logging is not an option. The "prescriptive yarding" areas are located uphill from the highest planned roads on IDL's timber sale, so uphill cable yarding is not possible. Downhill cable yarding is rare, dangerous, and disfavored by the Idaho Forest Practices Act. I have never seen or heard of downhill cable yarding being performed in Idaho. My cable logging training with Forest Engineering Inc. confirmed that downhill yarding almost never happens.

10. Second, the majority of the slopes appear to be too steep for ground based yarding. While I have viewed some of the "prescriptive yarding" units from the Selway River Road, but not personally walked these units, IDL's Nickolaus Carter states his declaration with the Court that he prepared a road development log for the state project. *See* Carter Decl. (Doc. No. 14-1) ¶ 5. I downloaded a copy of the development log from IDL's website shortly before the timber sale auction. A true and accurate copy of IDL's Selway Fire Development Log is attached heretofore as Exhibit 2. The road development log contains 27 side slope measurements from the centerline of the new timber sale roads. Only one of these slope measurements is less than 45%, at 38%.

11. Because IDL has designated other harvest units as ground based or cable yarding, it did not make sense to me why IDL did not specify the appropriate yarding method for the "prescriptive yarding" units as required by the Idaho Forest Practices Act. The Act requires IDL to "[s]elect for each harvesting operation the logging method and type of equipment adapted to the given slope, landscape and soil properties in order to minimize soil erosion." Carter Decl. (Doc. No. 14-2) Ex. A., p. 12.

12. Based on my knowledge and field experience with timber sale administration and the topographic sale area map, it is possible that IDL used the term

"prescriptive yarding" to designate logging areas in official documents where cable yarding was not possible, but ground based yarding would exceed the slope limitations in Idaho Forest Practices Act. I know that tractors and skidders can climb steep slopes when no logs are attached to the machine, and they can skid logs straight downhill on slopes far exceeding 45%. Under this scenario, IDL's contractor could drive unloaded skidders or tractors up the less-steep ridges within the "prescriptive yarding" units, and then skid logs downhill to the road through the areas exceeding 45% in slope. Both practices would violate the timber sale contract and the Idaho Forest Practices Act.

13. I visited the Selway Fire site with Deborah Ferguson, Daryl Mullinix, and Morgan Wright on May 12, 2015. During our site visit, we met with Nickalos Carter (IDL resource specialist), Zoanne Anderson (IDL supervisor at Kamiah), Steve Schuster (Idaho Deputy Attorney General), Bob Brammer (IDL operations chief), and Scott Marshall (IDL geological engineer), to discuss our concerns about the Selway Fire timber sale. The site visit occurred on Forest Road 652.

15. In conversation with IDL staff during the visit, Daryl Mullinix asked what computer software IDL had used for their road volume calculations. Nickalos Carter said that he did it by hand and used graph paper.

16. Then I asked Nickalos Carter some specific questions about his yarding plan. I pointed to a cable logging unit on the sale map, which is located on the north side of Burned Creek. I asked him to explain how the unit was planned to be harvested by cable, given the long ridge with no road on it, because logistics of cable yarding would require moving the cable machine to the end of the ridge, about a quarter mile off of the road. He explained that there was some temporary road building and landing

construction that the purchaser would need to complete that is not shown on the sale map. I responded by asking him to confirm that there will be new roads built that are now shown on he sale map. He said that the ridge I was asking about would have a landing on top of it, not a road.

17. Nickalous Carter was also asked to explain what the contract meant by "prescriptive yarding" because it appears to us that the units designated as such are not suitable for either cable yarding or tractor yarding under the Idaho Forest Practices Act. He responded by saying that prescriptive yarding is a relatively new concept they are now using when a unit doesn't really fit one type of harvest, and the timber sale purchaser might have to construct additional roads to get that timber, or just leave the timber there.

20. My site visit and meeting with IDL on the Selway Fire salvage sale elevated and solidified concerns about the environmental impact of IDL's road building and sale plan. That information, combined with IDL's statement that the road layout crew only spent one day in the field laying out 3.5 miles of new roads with six switchbacks on highly erosive soils within the Selway River Wild and Scenic Corridor, confirms Daryl Mullinix's (retired forest service road engineer) opinion that IDL's road building plans are "hastily assembled" and "poorly detailed." Mullinix Decl. (Doc. No. 7-6) ¶ 41.

21. Mr. Carter's responses to our questions also further deepeneded my suspicion that "prescriptive yarding" is a term in the contract to circumvent the ground based yarding limitations of the Idaho Forest Practices Act, which are already more generous that federal restrictions. These slope restrictions are designed to help prevent

the erosion and landslide risks that Plaintiffs allege.

22. Based on the facts and statements above, it is my opinion that IDL's Selway Fire salvage sale will create significant potential for catastrophic sedimentation, debris flow, and landslide events that could cause irreversible damage to the Selway River, private property, and human life.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. Executed this 3d day of July, 2015.

/s/ Marc A. Shumaker
Marc A. Shumaker

EXHIBIT 1

IDL Sale Map

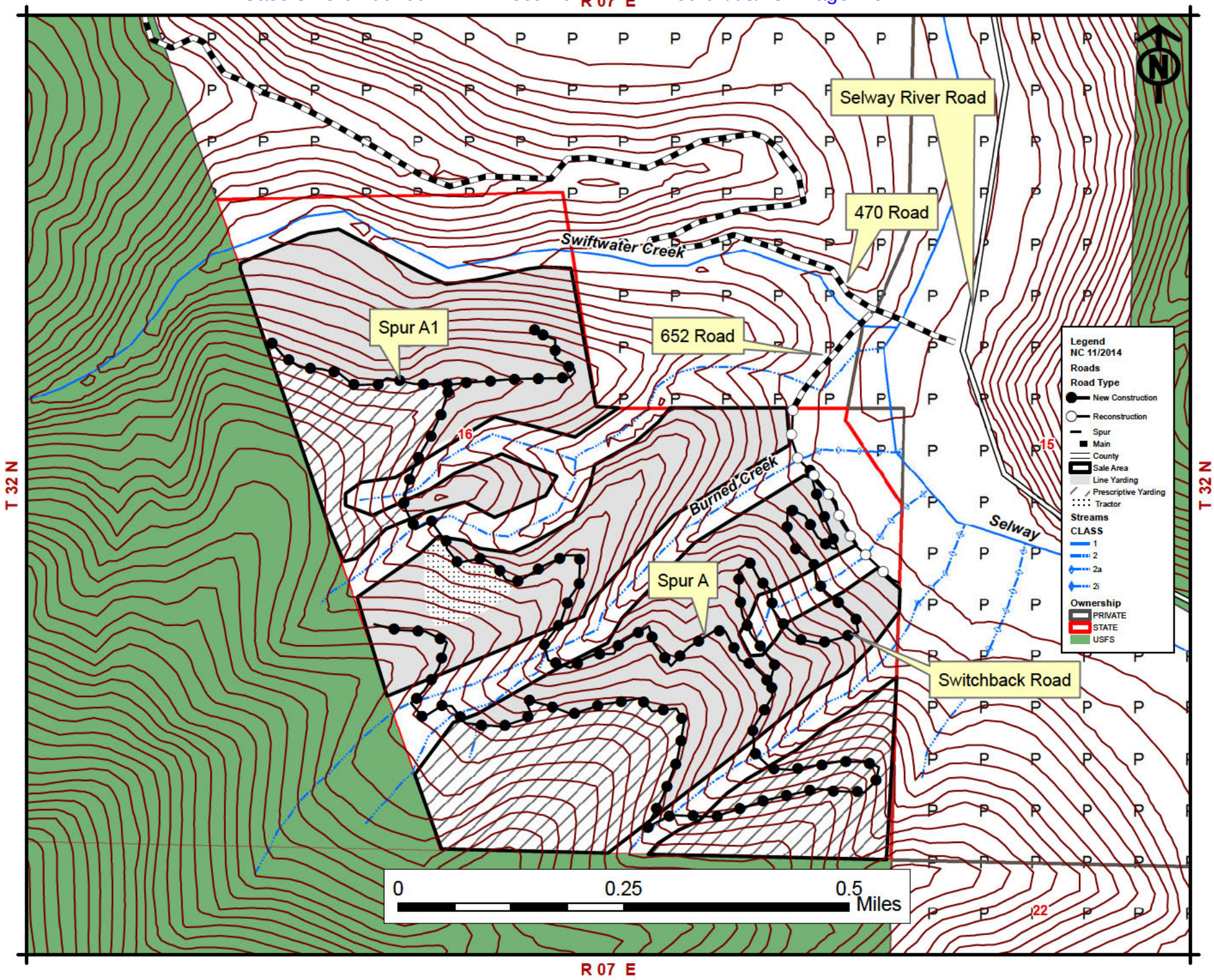
Map 1 of 1
Sale Map
Selway Fire
CR-42-5085
R 07 E
T 32 N
Selway River Road
470 Road
Swiftwater Creek
Spur A1
652 Road
Burned Creek
Selway
Spur A
Switchback Road
Legend
NC 11/2014
Roads
Road Type
New Construction
Reconstruction
Spur
Main
County
Sale Area
Line Yarding
Prescriptive Yarding
Tractor
Streams
CLASS
1
2
2a
2i
Ownership
PRIVATE
STATE
USFS
0
0.25
0.5
Miles
16
15
22

EXHIBIT 1

IDL Road Development Log

DEVELOPMENT LOG

Selway Fire
CR-42-5085

Station (feet)	**652 Road (Reconstruct 0.39 miles Spur Road)**
0+00	Junction with the USFS 470 Road on the west side of the Swiftwater Bridge. Begin existing gravel. **Do not begin Right-of-way clearing.**
0+40	Private drive right.
3+60	Existing culvert, clean catch basin and ditch line.
5+05	Existing culvert in perennial stream, private drive left.
7+00	End of existing gravel. Begin reconstruction to a 16 foot running surface and reestablish drainage ditches.
7+15	Exit private property enter State property. Begin reconstruction to a 16 foot running surface and reestablish drainage ditches. Begin 40' clearing width. Use excavated material from road widening to spread over road surface. Compact direct with vibratory roller prior to rock application. **Begin 4-inch minus pit run rock 6" x 16'.**
8+15	Construct rolling dip.
9+40	Begin vented ford construction. Construct ditch line back to rolling dip.
9+80	Road crosses Burned Creek a Class II stream. Remove existing culvert. Excavate 5 feet down to create bottom of ford. Remove material from inside of road along stream so all flow will be captured in the vented ford. **Install CSP #22, 24" x 60'** in bottom of vented ford as designated by FIC. Construct catch basin to capture normal stream flows and direct through culvert. Fill 2' over culvert with pit run rock and armor stream banks to allow large debris flows and extreme water flows to pass over the ford without escaping the confines of the ford and damaging the culvert. Grade approaches of the ford to approximately 2%. Armor all culvert inlets and outlets.
10+25	End ford construction. Continue road widening, clear, grub and compact subgrade. Begin fill 4' by 950'. Spread and compact waste material in 8'' lifts. Begin inside ditch.
10+70	Junction with Switchback road right. Begin ditch line.

11+15	Construct turnout to left 50' x 100' to current road level. Utilize waste material from full benching activities. Spread and compact waste material in 8'' lifts until the designated location is level with the road surface. Apply pit run rock 6''x 50'x 100' compacted over turnout. .
12+10	Center of existing slough. Clean out to 15' back into hillside. Apply 10'' minus rip rap to hillside to stabilize slough. Construct catch basin and **install CSP #23, 24" x 40'** to drain wet area. Begin ditch line just past slough repair.
13+20	End slough repair. Continue ditch line.
13+55	Remove existing culvert and replace with **CSP #24, 24" x 40'** and reconstruct catch basin. Continue ditch line.
15+40	**Install CSP # 25 24" x 40'** for ditch relief. Construct catch basin.
16+95	Road crosses an unnamed Class II stream. Remove existing culvert. **Install CSP #26, 24" x 60'**. Construct catch basin to capture normal stream flows and direct through culvert. Fill 6' over culvert. Armor inlet and outlet. End ditch.
17+65	Install **CSP # 27 24" x 40'** for drainage. Begin ditch line.
19+75	End fill, return to existing running surface.
20+75	End ditch line. **End rock**. End reconstruction. Intersect State property line and sale area.

Station (Feet) **Switchback Road (New Construction 2.05 miles)**

0+00	Junction with the 652 road at station 10+70. Begin new construction of a 15% favorable road grade. In-slope road with a 16 foot running surface and 60 foot clearing width. Grub all stumps from two feet above the cut to four feet below the fill of the road prism. Make all cut slopes a ratio of 1:1 (horizontal: vertical) on non-full benched roads. Full bench cut slopes will be 3/4:1. Use waste from full bench work to fill non-full benched running surfaces to a compacted depth of 2'. Spread and compact waste material in 8'' lifts. Begin inside ditch. Install rolling dips as designated in the road log or as designated by the State (Forester-in-charge). Tie all ditch lines into the rolling dips. Cut down 8' to 652 road to begin new road. Armor all culvert inlets and outlets.

1+00	Top of approach. End 15% favorable grade begin 10% favorable grade. Side slope shot 50%. Install painted pipe gate.
1+35	Continue 10% favorable grade.
1+85	**Begin 4-inch minus pit run rock 6" x 16'** over CSP #1.
2+35	**Install CSP #1, 24" x 80'**. Fill 4' through draw. Armor inlet and outlet.
2+85	**End rock.** Begin 4" cut to centerline, use material to fill through draw at CSP #1.
3+60	End 4' cut. Begin switch back construction with a 60' turn radius.
4+10	Cut 6' down to maintain 10% grade.
4+55	Cut 8' down to maintain 10% grade.
5+00	Cut 16' down to centerline to maintain 10% grade. Use fill material to fill small basin and in switchback construction.
5+50	Top of switchback cut through ridge to maintain 10% grade. Use fill material to fill small basin as with previous station and to fill through draw on opposite side of ridge.
6+20	**Begin 4-inch minus pit run rock 6" x 16'.**
6+70	Center of draw. Fill through draw 8' to maintain grade. **Install CSP #2, 24" x 80'.** Armor inlet and outlet
7+20	**End rock.**
7+65	Begin second switchback. Begin constructing switchback with 60' turning radius. Use waste material to fill in basin above road as needed.
8+55	Center of switchback.
9+50	End switchback construction. Side slope 70%. Begin full bench construction. Deposit waste material inside of switchback as need to improve turn radius. Begin 15% favorable grade.
10+80	70% side slope, continue full bench construction.

12+35 **Begin 4-inch minus pit run rock 6" x 16'.**

12+85 **Install CSP # 3, 24" x 40' in Class II stream.** Fill 4' through draw. Armor inlet and outlet. End full bench.

13+35 **End rock**.

13+58 Ridge top construct 50' x 50' landing.

14+00 Flat bench below road. Full bench waste material can be deposited here. Spread and compact waste material in 8'' lifts.

15+30 Entering draw. Cut down 4' for alignment. Use waste material to fill through draw.

15+85 **Begin 4-inch minus pit run rock 6" x 16'.**

16+35 **Install CSP # 4, 24" x 50' in Class II stream.** End cutting fill 4' through draw Armor inlet and outlet.

16+85 **End rock**.

16+95 End fill through the draw. Begin full bench construction. Begin 10% favorable grade. Side slope 60%.

17+75 End full bench construction. Side slope 45%.

18+70 Construct turnout on ridge. Side slope 48%

19+10 Continue 10% grade. Side slope 47%.

20+05 Begin full bench construction. Side slope 63%.

20+85 Begin switchback construction with 60' turning radius.

22+45 End switch back construction. Continue 10% favorable grade.

24+10 Remove rock. End full bench construction.

25+45 **Begin 4-inch minus pit run rock 6" x 16'.**

25+95 **Install CSP #5, 24" x 50' in spring area.** Armor inlet and outlet. Fill 4' through draw.

26+45 **End rock.**

27+05 Side slope 55%.

28+10 Begin full bench construction. Side slope 75%.

28+65 End full bench.

31+55 Begin switchback construction with 60' turn radius.

33+90 Top of switchback. Begin 15% favorable grade.

37+35 Construct rolling dip.

39+25 Construct rolling dip in draw. Side slope 50%.

41+25 Begin switchback construction. Continue 15% favorable grade.

43+85 End switchback construction. Begin 10% favorable grade. Junction with Spur A right. Begin inside ditch.

44+60 **Begin 4-inch minus pit run rock 6" x 16'.**

44+85 **Install CSP #6, 24" x 60'** for relief drainage. Armor inlet and outlet. Construct catch basin. End ditch. Side slope 50%.

45+10 **End rock.**

49+00 **Begin 4-inch minus pit run rock application 6" x 16'.**

49+45 **Install CSP #7, 24" x 50' in spring.** Side slope 60%. Begin full bench construction. Armor inlet and outlet. Fill 4' through draw.

51+80 **Install CSP # 8, 24" x 50' in spring.** Armor inlet and outlet.

52+30 **End rock**.

53+00 **Begin 4-inch minus pit run rock 6" x 16'.**

53+50 **Install CSP #9, 24" x 50'** for relief. Armor inlet and outlet. Side slope 53%.

54+00 **End rock.**

54+65 Side slope 73%.

56+80 End full bench construction.

58+25 Construct landing on ridge.

58+75 End 10% favorable grade. Begin 15 % favorable grade. Begin removing rock. Possible rock source.

59+75 End 15% grade. End removing rock.

61+80 Begin full bench construction. Side slope 60%.

63+45 Construct rolling dip.

63+80 Side slope 65%.

64+45 Construct rolling dip in draw.

65+05 Ridge point. Side slope 50%.

66+00 Construct rolling dip.

67+00 Ridge top.

67+90 Side slope 65%.

69+55 **Begin 4-inch minus pit run rock 6" x 16'.**

69+85 **Install CSP #10, 24" x 50' in dry draw for relief**. Armor inlet and outlet. Continue full bench construction.

70+05 **End rock.**

70+85 Narrow ridge, cut ridge back 20 feet for alignment.

71+40 Side slope 80%.

72+75 Remove rock.

73+15 **Begin 4-inch minus pit run rock 6" x 16'.**

73+65 **Install CSP #11, 24" x 60' in Class II stream**. Armor inlet and outlet. Fill 8' through draw. Side slope 80%.

74+15 **End rock.**

74+75 Side slope 72%.

75+20 Side slope 68%.

75+85 Side slope 60%.

76+85 End full bench.

77+85 Tractor ground above road.

81+15 Ridge top, construct landing pad out and down ridge with waste material from full bench construction. Side slope 45%.

83+10 Construct rolling dip.

84+10 Ridge point, cut back 20 feet for curve widening. Make cut slope 2:1 (horizontal/vertical) to aid yarding down ridge.

85+00 Side slope 55%.

86+15 Side slope 58%.

87+15 Construct rolling dip. Begin full bench construction. Side slope 55%.

90+15 Remove rock. Side slope 60%.

91+60 End full bench construction. **Begin pit 4-inch minus run rock 6" x 16'.**

92+45 **Install CSP #12, 24" x 50' in spring.** Armor inlet and outlet. Continue rock.

93+95 Cut down through minor ridge 8'. Use cut material to fill through draw 4'. Remove rock.

94+65 **Install CSP #13, 36" x 50', in Class II stream**. Armor inlet and outlet. Continue pit run rock.

95+65 **End rock.**

98+30 **Begin 4-inch minus pit run rock 6" x 16'.**

98+80 **Install CSP #14, 36" x 60' in Class II stream.** Armor inlet and outlet. Fill 10' through draw.

99+05 Begin full bench. Side slope 58%.

99+30 **End rock.**

100+05 Enter sale area. Side slope 57%.

101+05 Side slope 85%.

102+60 Side slope 62%.

103+20 End full bench. Side slope 38%.

104+90 Cut back ridge extra 20' for alignment. Begin full bench. Side slope 58%.

106+75 End full bench. Construct rolling dip.

108+40 End new construction, construct turnaround.

Station (Feet) **Spur A (New Construction 1.16 miles)**

0+00 Junction with the Switchback Road at station 43+85. Construct junction for two-way ingress/egress. Begin new construction of a 3% favorable road grade. In-slope road with a 16 foot running surface and a 60 foot clearing width. Grub all stumps from two feet above the cut to four feet below the fill of the road prism. Make all cut slopes at a ratio of 1:1 (horizontal: vertical) on non-full benched roads. Full bench cut slopes will be 3/4:1. Use waste from full bench work to fill non-full benched running surfaces to a compacted depth of 2'. Spread and compact waste material in 8'' lifts. Begin inside ditch. Install rolling dips as designated in the road log or as designated by the State (Forester-in-charge). Tie all ditch lines into the rolling dips. Armor all culvert inlet and outlets.

3+00 Construct rolling dip.

4+30 Cut down 6' across ridge to maintain alignment.

6+00 On ridge cut back extra 20' for curve widening, construct yarder pad approximately 80' x 40' x 6'. Side slope 50%.

8+30 Begin full bench construction. Side slope 60%.

9+10 **Begin 4-inch minus pit run rock 6" x 16'.**

9+60 **Install CSP #15, 24" x 60' in spring.** Armor inlet and outlet. Continue full bench.

10+10 **End rock**.

12+10 Knife ridge, cut down 4' through ridge and construct landing out ridge.

13+25 Side slope 60%

14+85 Side slope 54%.

15+35 Construct rolling dip.

16+20 Side slope 70%.

19+00 **Begin 4-inch minus pit run rock 6" x 16".**

19+50 **Install CSP #16, 36" x 80' in South Fork of Burned Creek.** Armor inlet and outlet. Fill 10' through draw. Remove rock.

20+20 **Install CSP #17, 36" x 80' in North Fork of Burned Creek.** Armor inlet and outlet. Continue 10' fill. Side slope 80% out of draw. Begin 10% favorable grade out of draw.

22+55 End full bench. End 10% grade begin 5% favorable grade. Waste deposit location above road, approximately 100' x 100' x 6'. Spread and compact waste material in 8'' lifts.

23+55 **End rock.**

27+50 On flat ridge. Construct landing up and down ridge to best optimize yarding locations. Deposit waste material from full bench activities down ridge approximately 20' x 720' x 6'. Spread and compact waste material in 8'' lifts. Cut and fill on ridge top to create a 55' turn radius around ridge.

30+15 Construct rolling dip.

32+00 **Begin 4-inch minus pit run rock 6" x 16'.**

32+25 **Install CSP #18, 24" x 40' in spring.** Fill 4 feet. Armor inlet and outlet. Side slope 50%.

32+50 **End rock.**

33+35 Small ridge. Cut back 20' for alignment.

35+10 Side slope 55%.

36+15 **Begin 4-inch minus pit run rock 6" x 16'.**

36+40 **Install CSP #19, 24" x 40' in spring**. Armor inlet and outlet. Fill 4' over culvert.

36+65 **End rock.**

39+55 **Begin 4-inch minus pit run rock 6" x 16'.**

40+05 **Install CSP #20, 24" x 40' in Class II stream.** Armor inlet and outlet. Fill 6' through draw.

40+55 **End rock.**

41+75 On small ridge between sale boundaries. Construct a landing out the ridge to make a yarder pad. Cut 4' through ridge.

42+05 **Begin 4-inch minus pit run rock 6" x 16'.**

42+55 **Install CSP #21, 24" x 40' in spring.** Armor inlet and outlet.

43+05 **End rock.**

45+75 Construct rolling dip.

48+50 Junction with Spur A1. Spur A continues out ridge.

53+50 Break in ridge, road drops around point at 10% adverse grade.

60+10 Build landing on point.

61+30 Build turnaround. End new construction. End Spur A.

Station (Feet) **<u>Spur A1</u> (New Construction 0.22 Mile)**

0+00 Begin new construction of an in-sloped road with a 16 foot running surface and a 60 foot clearing width. Grub all stumps from two feet

above the cut to four feet below the fill of the road prism. Use waste from full bench work to fill non-full benched running surfaces to a compacted depth of 2'. Spread and compact waste material in 8'' lifts. Begin inside ditch. Install rolling dips as designated in the road log or as designated by the State (Forester-in-charge). Tie all ditch lines into the rolling dips. Make all cut slopes at a ratio of 1:1 (horizontal: vertical). Begin 15% adverse grade. Armor all culvert inlet and outlets.

1+50 Construct rolling dip. End 15% grade. Begin 5% adverse grade.

3+60 Enter saddle. Construct landing out ridge.

5+25 Construct rolling dip. End 5% grade. Begin 10% favorable grade.

6+10 Side slope 51%.

11+75 **DO NOT CUT ON USFS PROPERTY.** Construct landing. End new construction. End Spur A1.