

Laurence (“Laird”) J. Lucas (ISB# 4733)
 Director of Litigation
 Advocates for the West
 P.O. Box 1612
 Boise, ID 83701
 208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

Deborah A. Ferguson (ISB# 5333)
 Ferguson Durham, PLCC
 223 N. 6th Street, Suite 325
 Boise, ID 83702
 208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

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

| | | |
|--------------------------------------|---|--|
| IDAHO RIVERS UNITED, and |) | |
| MORGAN and OLGA WRIGHT, |) | No. 3:15-cv-169-BLW |
| |) | |
| <i>Plaintiffs,</i> |) | PLAINTIFFS’ MOTION FOR |
| |) | TEMPORARY RESTRAINING |
| vs. |) | ORDER AND/OR PRELIMINARY |
| |) | INJUNCTION |
| DISTRICT RANGER JOE HUDSON |) | |
| in his official capacity, and UNITED |) | <u>Expedited Treatment Requested:</u> |
| STATES FOREST SERVICE, |) | <u>Relief Needed Before July 6, 2015</u> |
| |) | |
| <i>Defendants.</i> |) | |

Plaintiffs Idaho Rivers United and Morgan and Olga Wright respectfully move this Court, pursuant to Fed. R. Civ. P. 65, for entry of a temporary restraining order and/or preliminary injunction ordering Defendants U.S. Forest Service and District Ranger Joe Hudson to notify proposed Intervenor Idaho State Board of Land Commissioners and Idaho Department of Lands (jointly, “IDL”) that IDL is not authorized to use of Forest Road 652 on

the Nez Perce National Forest for any activities associated with IDL's Selway Fire timber sale and road construction project. (If necessary, Plaintiffs also seek injunctive relief against the IDL to prohibit it from proceeding with sale activities utilizing Forest Road 652 pending resolution of this case).¹

As alleged in the Complaint filed in this matter on May 19, 2015 (*Docket No. 1*), Plaintiffs challenge the November 20, 2014 determination by Defendants that Forest Road 652 is a "public road," and hence the IDL need not obtain a special use permit or authorization under Forest Service regulations to use the road for access to IDL's Selway Fire timber sale. IDL plans to construct over 3 miles of new road up very steep slopes near the banks of the Selway River, within the Selway River Wild and Scenic River Corridor, and clearcut some 6.9 million board feet of timber. IDL will use Forest Road 652 as the sole access for heavy equipment and logging trucks conducting the site preparation, road construction, logging, and timber removal.

Despite knowledge of this litigation and their motion to intervene, IDL auctioned the Selway Fire sale on June 19, 2015. IDL's counsel has advised Plaintiffs that its contractor will begin working on the sale project beginning July 6, 2015. Specifically, counsel for IDL advised Plaintiffs' counsel that: "IDL anticipates that [the contractor] will be moving/transporting fallers/chainsaws to the site during the week of July 6 to begin work on the state parcel portion of the access route and then move road building equipment (dozer/excavator, dump trucks, etc.) on site during the week of July 13 to start the actual road construction work." *See* accompanying Declaration of Deborah Ferguson. Accordingly, Plaintiffs request expedited treatment of this motion and a decision by the Court prior to July 6, 2015 in order to preserve

¹ Plaintiffs have filed a Statement of Non-Opposition to IDL's Motion To Intervene in this case. *See Docket Nos. 3 & 5.*

the status quo and avoid irreparable harm pending adjudication of this case.

As detailed in the accompanying Plaintiffs' Opening Brief In Support Of Motion For Temporary Restraining Order And/or Preliminary Injunction, and in the accompanying Declarations of Morgan Wright, Kevin Lewis, and Daryl Mullinix, immediate injunctive relief is necessary because Plaintiffs will suffer certain irreparable harms if injunctive relief is not granted, including deprivation of their procedural rights to participate in the Forest Service's determination regarding Forest Road 652 and its NEPA evaluation of a special use permit application for IDL's proposed use of the road; impairment or destruction of scenic, aesthetic, recreational, and other values associated with the federally-protected Selway Wild and Scenic River corridor; extensive equipment traffic on Forest Road 652 within the Wild and Scenic corridor and through Plaintiff Wrights' property, interfering with the Wrights' quiet use and enjoyment of their property; and potentially catastrophic impacts to the Wrights' property, the Wild and Scenic River corridor, and the Selway River itself due to mass erosion triggered by IDL's planned road construction and/or clearcutting activities.

As further explained in the Complaint and accompanying brief and declarations, injunctive relief is also appropriate because Plaintiffs are likely to prevail on their claim challenging the Forest Service's November 20, 2014 determination that Forest Road 652 is a "public road," and hence no special use permit is required for IDL's Selway Fire project activities using the road. The undisputed facts show that Forest Road 652 does not qualify as a "public road" under the Forest Service Manual's definitions; and it has never previously been designated as a "public road" before the November 20th determination challenged in this case. Further, the November 20th determination violates the Forest Service's 1977 Wild and Scenic easement encumbering the Wrights' property (including over Forest Road 652), which bars

industrial and commercial activities, such as those associated with IDL's sale activities.

Plaintiffs also request that the Court waive any bond requirement under Rule 65(c) or impose a minimal bond, not exceeding \$100, in light of the public interest nature of this proceeding and to ensure Plaintiffs' access to judicial relief. *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

WHEREFORE, Plaintiffs respectfully move the Court to grant this motion on an expedited basis, and enjoin Defendants and/or the proposed IDL Intervenors from allowing or undertaking any use of Forest Road 652 for activities associated with IDL's Selway Fire sale, pending resolution of this litigation.

Dated this 24th day of June, 2015.

Respectfully submitted,

/s/ Laurence ("Laird") J. Lucas
Laurence ("Laird") J. Lucas (ISB 4733)
Director of Litigation
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

/s/ Deborah A. Ferguson
Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345- 5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2015, I caused the foregoing PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY

INJUNCTION, along with the accompanying PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION, and the accompanying DECLARATIONS OF DEBORAH FERGUSON, MORGAN WRIGHT, KEVIN LEWIS, and DARYL MULLINIX (plus all attachments thereto) 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:

CLAY R. SMITH
Deputy Attorney General
State of Idaho
clay.smith@ag.idaho.gov

SHASTA KILMINSTER-HADLEY
Deputy Attorney General
State of Idaho
shasta.k-hadley@ag.idaho.gov

I further certify that I sent, via email, true and correct copies of the foregoing documents on this date to Christine England, Assistant U.S. Attorney, District of Idaho, whom I am informed is representing Federal Defendants in this matter (but has not yet entered a Notice of Appearance) addressed to:

Christine England
christine.england@usdoj.gov

/s/ Laird J. Lucas
Laurence ("Laird") J. Lucas

Laurence (“Laird”) J. Lucas (ISB# 4733)
Director of Litigation
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

**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’ OPENING BRIEF
IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING
ORDER and/or PRELIMINARY
INJUNCTION**

INTRODUCTION

Plaintiffs Idaho Rivers United and Morgan and Olga Wright seek immediate injunctive relief ordering Defendants U.S. Forest Service and District Ranger Joe Hudson to notify proposed Intervenor Idaho State Board of Land Commissioners and Idaho Department of Lands (jointly “IDL”) that IDL may not utilize Nez Perce National Forest Road 652 within the Selway Wild and Scenic River corridor – and across the Wrights’ property – as part of IDL’s Selway Fire timber sale, pending resolution of this case. IDL intends to start using Forest Road 652 for moving heavy equipment and site clearing for its planned Selway Fire project beginning the week of July 6, 2015, despite Plaintiffs’ request for delay while this case is adjudicated. *See* accompanying Declaration of Deborah Ferguson.

Through the November 20, 2014 decision challenged here, the Forest Service Defendants for the first time declared Forest Road 652 to be a “public road,” and thus authorized IDL to use Forest Road 652 across the Wrights’ property and within the Selway Wild and Scenic River corridor without considering the significant environmental impacts of their decision, or requiring IDL to obtain a special use permit.

Because Forest Road 652 does not qualify as a “public road” under the Forest Service’s own definitions, Forest Service regulations require that IDL must obtain a special-use authorization before using the road for the Selway Fire sale. Moreover, that process requires land use plan conformance, public participation, and environmental impact analysis before approving a special-use permit. None of these critical procedural steps have been taken, placing Plaintiffs’ interests and the Selway Wild and Scenic River corridor in immediate and serious risk of harm.

The November 20th decision asserted that Forest Road 652 is a “public road” simply because the Forest Service obtained an 1937 easement to construct a “public highway” there. But the anticipated “public highway” was never built. And except for approximately 740 feet that crosses the Wrights’ property and is maintained by the Wrights, Forest Road 652 is an unimproved road inaccessible by standard passenger vehicles and with a locked gate; and hence does not qualify as a “public road” under the Forest Service’s own definition. Thus, the November 20th decision declaring Forest Road 652 to be a “public road,” thereby avoiding NEPA analysis and a special use permit for IDL’s Selway Fire sale, is arbitrary, capricious, and unlawful, and should be reversed.

Immediate injunctive relief is necessary to prevent IDL’s imminent use of Forest Road 652 for the Selway Fire sale in reliance on the Forest Service’s flawed November 20th decision. IDL auctioned the sale after this case was filed and after IDL moved to intervene; and IDL intends to begin earth moving, road construction, and tree cutting imminently, which will result in serious and irreversible damage to the Selway Wild and Scenic River corridor and Plaintiffs’ interests, as discussed in detail below.

STATEMENT OF FACTS

I. THE SELWAY WILD AND SCENIC RIVER.

From its headwaters in the Bitterroot Mountains, the Selway River flows through unparalleled scenery and solitude to its confluence with the Lochsa and Clearwater Rivers, creating “one of the highest quality” whitewater river experiences in the nation. RECREATION.GOV: SELWAY RIVER, <http://www.recreation.gov>. The Selway “is unique because it is the only river in the United States that received instant inclusion to both the Wilderness Preservation System and the Wild and Scenic River System.” *Id.*

Through the Wild and Scenic Rivers Act of 1968, Congress mandated that the Selway be protected for the “benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271. The Forest Service is required by the Act to manage its lands to “protect and enhance the values which caused it to be included in said system.” *Id.* § 1281(a).

In 1969, the Forest Service adopted a River Management Plan for the Selway, Lochsa and Middle Fork Clearwater Rivers. *See* accompanying Declaration of Kevin Lewis, Exhibit 1 (copy of 1969 River Plan). Notably relevant here, that Plan requires that “[a]ccess roads to serve private lands are to be controlled by scenic easements to ensure compatibility with development of the special planning area and with river environment protection.” *Id.*, p. 9 (emphasis added).

To protect the Wild and Scenic corridor, the Forest Service has used taxpayer money to acquire some 186 scenic easements to date, which encumber about 4,000 acres of non-federal land within the Selway, Lochsa, and Middle Fork Clearwater Wild and Scenic river system. *See* NEZ PERCE-CLEARWATER NATIONAL FORESTS, FOREST PLAN ASSESSMENT (June 2014), ch. 15, p. 20. These include the 1977 Wild and Scenic easement on the Wrights’ property, discussed below.

II. THE WRIGHTS’ PROPERTY AND FOREST ROAD 652

Plaintiff Morgan Wright is an avid river rafter and long-time member of Plaintiff Idaho Rivers United (IRU), and has enjoyed running the Selway River for decades. *See* accompanying Declaration of Morgan Wright, ¶ 2.¹ Reflecting his love for the Selway

¹ Plaintiff IRU is a membership-based conservation organization whose mission embraces protecting and restoring Wild and Scenic rivers, including the Selway. *See* Lewis Declaration. IRU members prize the Selway River corridor for its recreational, conservation, scientific, and aesthetic opportunities, which are threatened with irreparable

River, he purchased property on the Selway River over two decades ago, and he and his wife Olga have built and maintain a home there. *Id.*

The Wrights' property is located on the south side of the Selway River, about 2.8 miles upstream from the confluence of the Selway and Lochsa Rivers, at Lowell, Idaho. *Id.*, ¶ 3. Access to the Wrights' property is via Forest Road 652, a short spur road off Forest Road 470, which is an improved road that crosses the Selway over the Swiftwater Bridge. *Id.* The Wrights' property lies entirely within the one-quarter mile federally-designated Wild and Scenic corridor of the Selway River. *Id.*, ¶ 4. This area has very steep slopes; and the adjoining Idaho parcel lies partly up-slope from their property. *Id.*

In 1937, the Forest Service obtained an easement for Forest Road 652 over what is now the Wrights' property. *See* Wright Decl., Exh. 2. The 1937 easement conveyed a 30-foot right-of-way to the Forest Service "for the construction, repair, maintenance, and operation of a common, main, or State public highway and as a connecting link in the . . . Goddard Point Road #289 Project." *Id.* Forest Road 652 crosses about 740 feet of the Wright's property in this right-of-way. *Id.*

However, the Forest Service never built the Goddard Point Road #289 Project for which the 1937 easement was obtained; and the Forest Service did not improve Forest Road 652 beyond a native-surface dirt track, apparently made by the Civilian Conservation Corps in the 1930's. *See* accompanying Declaration of Daryl Mullinix (former Nez Perce Forest road engineer and surveyor), ¶ 11. Today, over eight decades later, Forest Road 652 remains a short unimproved spur road that parallels the Selway River within the Wild and Scenic River corridor. *Id.*

harm as a result of the Forest Service's unlawful November 20, 2014 decision, challenged here. *Id.*

As the accompanying declarations and photographs attest, Forest Road 652 consists mostly of a muddy track which is not passable by four-wheel standard passenger cars for most of its length, other than the short stretch maintained by the Wrights to access their property. *See* Mullinix Decl., ¶¶ 11, 29-35; Wright Decl., ¶¶ 12-15; Lewis Decl., Exh. 12 (photos). Neither the Forest Service nor any other public entity maintains the road that crosses the Wrights' property, or any portion of it beyond their property. *Id.* Moreover, the Forest Service has maintained a locked gate for approximately 30 years on Forest Road 652 about a quarter mile from the Wrights' property, where it leaves the adjoining state land and enters the next private parcel. *Id.* Given these facts, it is unsurprising that Forest Road 652 has never been identified as "public road" by the Forest Service before, including on its official forest maps; and is not listed as such on the Nez Perce National Forest's 2007 Road Access Guide, which is the current road designation map for the Forest. *See* Lewis Decl., ¶¶ 22-25 & Exhs. 13-14.

The Forest Service paid \$160,000 in 1977 to obtain a Wild and Scenic easement covering Plaintiff Wrights' property. *See* Wright Decl., Exh. 1. The easement contains explicit restrictions how the Wrights' property may be developed and used, including:

- * "The lands within the easement area shall not be used for any professional or commercial activities. . . ."
- * "No mining or industrial activity shall be conducted on the lands within the easement area."
- * "The Grantee 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."

See Wright Decl., Ex. 1., pp. 2-4 (emphases added). The Wrights have adhered to the restrictions of the 1977 Wild and Scenic easement, including by having to obtain Forest

Service approval over all aspects of the design and construction of their home. The Forest Service also recently approved posting a sign at the entrance to their property that states: “Dead End. No Turn Around.” *Id.*, ¶¶ 8-9, 15.

III. DEFENDANTS’ UNLAWFUL DETERMINATION THAT FOREST ROAD 652 IS A “PUBLIC ROAD”

Because of the unimproved nature of the road and the 1977 Wild and Scenic easement, the Wrights were stunned this winter to learn the Forest Service granted IDL authorization to proceed with extensive road construction and logging activities for the planned Selway Fire sale using Forest Road 652 across the Wrights’ property, without requiring any special use permit and without any public notice, comment, or evaluation under NEPA and the Wild and Scenic River Act. *See* Wright Decl., ¶ 16. The facts of how the Forest Service made this determination were only unearthed by Plaintiff IRU using the Freedom of Information Act. *See* Lewis Decl., ¶ 19 & Exhs. 2-10.

In August 2014, the Johnson Bar fire burned portions of federal, state and private lands in the Clearwater and Selway River areas. *Id.* IDL contacted the Forest Service in September 2014 to determine whether a special use permit was needed to use Forest Road 652 to access burned state land adjoining the Wrights’ property for IDL’s planned road construction and logging. *Id.*, Exh. 2. In response, the Forest Service initially – and correctly – advised that a commercial road use permit was required under Forest Service special use permit regulations, before IDL could use the road for its timber sale. *Id.*, Exhs. 3-4. On September 3, 2014, IDL began coordinating with the Forest Service to obtain a special use permit for Forest Road 652. *Id.*, Exh. 4.

Sometime on or before October 16, 2014, District Ranger Joe Hudson received a completed commercial road use permit application for Forest Road 652 from IDL. *Id.*,

Exh. 6. On October 16, 2014, District Ranger Hudson shared the application with his staff and began assembling a team to assess NEPA and Wild and Scenic Rivers Act requirements. *Id.*, Exh. 5. In communications with the National Marine Fisheries Service, the Forest Service was also advised that ESA Section 7 consultation would be required over both the special use permit and potential impacts of the IDL road construction and logging activities, since the Selway River is habitat for ESA-listed salmon, steelhead, and bull trout. *Id.*, Exh. 8.

On November 14, 2014, however, Defendant District Ranger Hudson received guidance from his staff that a road use permit was not required for Forest Road 652, because it is supposedly a “public road.” *Id.*, Exh. 9. A staff e-mail asserted that Forest Road 652 meets the Forest Service Manual definition of “public road” with no restrictions on public use because the “1936” (sic) right-of-way was granted for a “public highway.” *Id.* This email did not consider the physical features of the road, or the fact that it is not shown as a “public road” on the Forest Service’s road access guide. *Id.*

Accepting this flawed advice, on November 20, 2014, Defendant District Ranger Hudson informed IDL that no Forest Service special use permit was required to use Forest Road 652 in connection with its timber sale because it meets the Forest Service Manual’s definition of public road. *See* Lewis Decl., Exh. 10. Based on that analysis, District Ranger Hudson concluded that there are no existing restrictions on the use of Forest Road 652, and that IDL is not proposing “any use on these roads outside what is already authorized by regulation or law.” *Id.* The Forest Service gave no public notice of this November 20th determination, and did not undertake NEPA analysis beforehand.

As underscored by its intervention motion and supporting materials, IDL has relied on District Ranger Hudson's November 20, 2014 determination that Forest Road 652 is a "public road" in proceeding with its plans to conduct its Selway Fire sale. *See Docket No. 3.*² IDL held a public auction for the timber sale on June 19, 2015, with full knowledge of Plaintiff's pending litigation and after it moved to intervene in the case; yet IDL did not mention this pending litigation in the information it provided to potential bidders for the Selway Fire sale. *See id.*, Groeschl Decl. ¶ 8 & Exs. I – K.

IDL's proposed Selway Fire sale will clearcut 142 acres of trees and build over three miles of new roads on extremely steep, unstable slopes, within one mile of the Selway River. Compl. ¶ 61. In addition to the new road building, approximately 0.39 miles of forest road 652 will be reconstructed to a sixteen-foot travel way. *Id.* Excavated materials will be used to create a large waste area within the Wild and Scenic corridor. Mullinix Decl., ¶ 40.

Because IDL intends to use Forest Road 652 as the only access road to the sale, every vehicle, every piece of heavy equipment, and every logging truck associated with the sale will pass within close proximity to Plaintiff Wrights' residence. This includes over 1,000 logging trucks needed to remove the logged trees, as well as hauling all the equipment needed to conduct site preparation and construct the new roads on IDL lands. All this traffic means the Wrights will be significantly harmed in their quiet use and enjoyment of their home. *Id.*, ¶¶ 17, 24-27. And there will be significant industrialized or commercial use of Forest Road 652 within the Selway Wild and Scenic River corridor, violating the terms of the 1977 easement as well as the 1969 River Plan. *Id.*

² Plaintiffs do not oppose IDL's intervention motion. *See Docket No. 5.*

IDL's Selway Fire sale will also have significant short and long-term impacts on recreational and scenic enjoyment of the Selway Wild and Scenic corridor for the general public and Plaintiff IRU's members. *See* Wright Decl. ¶ 27; Lewis Decl. ¶¶ 30-35. A flurry of industrial activity is likely to begin at any moment. Once the noise and dust subside after two years of road building and clear cutting, the character of the Selway Wild and Scenic corridor will be forever marred with extensive road cuts, fills, and switchbacks; and unnatural forest openings within full view from the Selway River and the Selway River road. *Id.*

Additionally, the potential impacts of IDL's Selway Fire sale may well prove to be catastrophic. The timber sale area consists of steep slopes and highly erosive soils with a history of stability problems. The road building and logging plans have been hastily assembled, are poorly detailed, and involve massive earth-moving within close proximity of the Selway River itself, and the Wright's residence. These facts create the potential for massive sedimentation, debris flow, landslide events, and threaten grave and irreversible damage to environmental resources, property, and human life. *See* Mullinix, Wright, Lewis Declarations.

These adverse impacts are likely to occur absent judicial relief because the Defendants' erroneous November 20, 2014 determination that Forest Road 652 is a "public road" has unlawfully exempted IDL's activities from the regulations which are intended to identify and evaluate these impacts. Injunctive relief is necessary because IDL has moved aggressively to auction the Selway Fire timber sale despite this litigation, and intends to begin sale work immediately using Forest Road 652.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

Under Rule 65, the Court may issue a preliminary injunction pending resolution of Plaintiffs' claims on the merits. Fed. R. Civ. P. 65; *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981). To win injunctive relief, Plaintiffs must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). A sliding scale approach is used in the Ninth Circuit, where a preliminary injunction is appropriate if plaintiffs have raised serious questions going to the merits and the balance of hardships tips sharply in plaintiffs' favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

Injunctions are often appropriate to delay actions that harm to natural resources, as "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003) (quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

The Court reviews the Forest Service's November 20th determination under the APA's judicial review standards to determine whether the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This requires a "thorough, probing, in-depth review" to determine whether the agency presented a "rational connection between the facts found and the conclusions

made.” *Native Ecosystems Council v. United States*, 418 F.3d 953, 961 (9th Cir. 2005). An agency determination is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, 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.” *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT FOREST ROAD 652 IS NOT A PUBLIC ROAD AND THUS IDL MUST OBTAIN A SPECIAL-USE AUTHORIZATION.

Plaintiff’s IRU and the Wrights are likely to succeed on their claim challenging Defendants’ November 20, 2014 decision that deemed Forest Road 652 to be a “public road” for the first time.³

As explained below, the November 20th decision relied on the language of the 1937 easement while ignoring the facts that the anticipated “public highway” was never built; and that Forest Road 652 remains a mostly unimproved two-track road, inaccessible to normal passenger vehicles, which has a locked gate – and hence does not qualify as a “public road” under the Forest Service’s own definitions. Moreover, Forest Road 652 has never been designated as a “public road” previously by the Forest Service; and the agency has not gone through the public travel planning process necessary to

³ The November 20th determination is a final agency action which is judicially reviewable under the APA, as it consummated the agency’s decision-making process and determined rights and obligations, causing harm to Plaintiffs who were deprived of their procedural rights to participate in Forest Service travel planning and special permit processes. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

designate it as such. Finally, the 1977 Wild and Scenic easement limits the use of Forest Road 652 to preclude industrial and commercial activities, such as IDL's planned timber sale and associated road construction. By ignoring all these factors and the relevant legal definitions and procedures for designating public roads, the November 20th decision is arbitrary, capricious, an abuse of discretion and contrary to law, requiring reversal.

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

The November 20th determination that Forest Road 652 is a "public road" directly contradicts the Forest Service Manual definition of "public road," as recently confirmed by the Ninth Circuit. *See Public Lands for the People, Inc., v. U.S. Department of Agriculture*, 697 F.3d 1192, 1199 (9th Cir. 2012) (finding that the Manual definition is reasonable and supersedes previous conceptions of "public roads"). The Forest Service Manual defines "public road" as:

1. Available, except during scheduled periods, extreme weather, or emergency situations.
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 restrictions based on size, weight, or class of registration.

See F.S. Manual, Chapter 7730 (Lewis Decl., Exh. 11).

Here, the facts show that Forest Road 652 is mostly an unimproved road not passable by a four-wheeled standard passenger car, there has been a restrictive locked gate on the road for approximately thirty years, and a Forest Service-approved sign warns potential travellers that the road dead-ends with no turn around. *See* Wright Decl., ¶¶ 3-15. Thus, Forest Road 652 does not meet the Forest Service's definition of "public road",

as confirmed by the opinion of a former Forest Service road engineer who continues to do road engineering and surveying in this area. *See* Mullinix Decl., ¶ 20-36.

Additionally, Forest Road 652 is not open for general public use. The Nez Perce National Forest has been working on a forest Travel Plan for several years now, but does not yet have an approved travel management plan or motor vehicle use map (“MVUM”). *See* Wright Decl., ¶ 25; Lewis Decl., ¶¶ 22-25; Mullinix Decl., ¶ 26. According to the Nez Perce National Forest’s website, until the MVUM is completed, road and trail designations contained in the Forest’s existing road and trail access guides “will remain in place to use until the Forest MVUM map is available to the public.” *See* Lewis Decl., Exh. 14. The existing 2007 Road Access Guide does not even list Forest Road 652, much less identify it as a “public road.” *Id.* Similarly, the 2013 Nez Perce forest map shows Road 652 as an “unimproved dirt” road without any number. *Id.*, Exh. 13. *See also* Mullinix Decl., ¶ 26 (explaining why Forest Road 652 does not qualify as a “public road” under any definition).

Because Forest Road 652 does not meet the Forest Service’s definition of a public road, and because the Forest Service has not completed the necessary public process to designate Forest Road 652 as open for general use, Plaintiffs are likely to prevail on their claim that a special use authorization is required under 36 C.F.R. § 251.50(d) for IDL’s commercial use of the road to haul equipment and logged timber for the Selway Fire sale.

B. The 1977 Wild and Scenic Easement Prohibits Industrial Activities On Plaintiff Wright’s Property, Including The Forest Service’s 1937 Easement for Forest Road 652.

In addition, the November 20th determination is arbitrary, capricious, and contrary to law because it ignores other important restrictions on uses of Forest Road 652 within the Selway Wild and Scenic River corridor.

The Forest Service obtained the 1937 easement for purposes a constructing a public highway across the Wrights' property, which was never constructed. Subsequently, the Forest Service obtained the 1977 Wild and Scenic easement covering the Wrights' entire property – including the right-of-way from the 1937 easement. *See* Wright Decl., Exhs. 1-2. As quoted above, the 1977 Wild and Scenic easement explicitly prohibits industrial and commercial activities on the entire property; while also restricting public access to the property only along the riverbank. *Id.*, Exh. 1, pp. 2-4.

Remarkably, according to the FOIA documents obtained by IRU, Forest Service staff never even considered the more recent and comprehensive 1977 Wild and Scenic easement even while they relied on the language of the 1937 easement to conclude that Forest Road 652 is a “public road.” *See* Lewis Decl., Exhs. 2-10. The Forest Service Manual provides that a “public road” has no restrictions on use; yet the 1977 Wild and Scenic easement expressly precludes industrial uses of the Wrights' property within the Wild and Scenic corridor, including where Forest Road 652 is located. Likewise, as quoted above, the 1969 River Plan calls for using Wild and Scenic easements to control access to private properties in order to preserve wild, scenic and other values. *See* Lewis Decl., Exh. 1. Yet the Forest Service also did not address the River Plan in the November 20th determination that Forest Road 652 is a “public road.”

By failing even to consider – much less enforce – the 1977 Wild and Scenic easement and the 1969 River Plan, the Forest Service's November 20th determination must thus again be reversed under the APA. *See Motor Vehicle, supra* (APA standards require reversal where agency decision is not based on a “consideration of the relevant factors” and or there has been “a clear error of judgment”).

The situation here is similar to this Court's determination that the Forest Service erred in asserting it lacked authority to regulate mega-loads on Highway 12 within the Clearwater/Lochsa Wild and Scenic River corridor. *See Idaho Rivers United v. U.S. Forest Service*, No. 1:11-CV-95-BLW, 2013 WL 474851 (D. Idaho Feb. 7, 2013). The Court there upheld that the Forest Service's authority to protect the Wild and Scenic corridor, in part because the Highway 12 easement from the federal government to the State of Idaho was expressly conditioned on protecting the corridor's scenic and esthetic values. *Id.* Here, the Forest Service has conditioned the use of its own 1937 right-of-way for Forest Road 652 through the subsequent 1977 Wild and Scenic easement; and thus the agency has full authority to enforce that easement to protect Wild and Scenic values, instead of ignoring it, as it did in the unlawful November 20th determination.

C. The Forest Service Must Evaluate IDL's Proposed Road Use Under Special Use Permit Regulations, NEPA, And The ESA.

Under Forest Service regulations, the type of written authorization required for use of a Forest Service road is determined by the proposed use and current designated use of the road. A "special-use or road-use authorization" is required when access involves "surface disturbance" or "use of a road not authorized for general public use." 36 C.F.R. § 251.110(d). Here, a special-use or road-use authorization is required because, as shown above, Forest Road 652 is neither a public road nor authorized for general public use.

The Forest Service's special-use permitting regulations control the screening and processing of permit applications. During the screening stage, the Forest Service "*shall* reject any proposal" if the proposed use would be "incompatible or inconsistent with the purposes for which the lands are managed," or "would not be in the public interest." 36 C.F.R. § 251.54(e)(5) (emphasis added). The 1977 Wild and Scenic easement on the

Wrights' property, which covers Forest Road 652, was obtained by the Forest Service in order to restrict land uses and protect the Wild and Scenic values of the Selway River corridor. Thus, IDL's proposed road use is likely "incompatible" and "inconsistent" with the purposes for which the lands are managed; however, the Forest Service has avoided making that determination by unlawfully exempting IDL from special-use permitting requirements through the November 20th decision.

Even if the Forest Service had determined that IDL's use was compatible with the Wild and Scenic River Act and resource management plans, such as the 1969 River Plan, the application would still need to clear NEPA's procedural hurdles in the application processing stage. *Id.* § 251.54(e)(5). At a minimum, the "public shall receive adequate notice and an opportunity to comment upon a special use proposal," and the Forest Service must determine whether the proposed activity is in conformance with resource management plans and does not "materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Services [NEPA] Handbook 1909.15, chapter 30." *Id.* Environmentally sensitive resources and lands include endangered, threatened, and sensitive species; floodplains; and Congressionally designated areas such as Wild and Scenic River corridors. F.S.H. 1909.15, chapter 31.2.

It is likely that a NEPA analysis would determine that issuing IDL's required special-use permit would result in "material impacts" to the "characteristics" and "functions" of the Selway Wild and Scenic corridor. The scope of the Forest Service's NEPA analysis must include the impacts of IDL's Selway Fire sale because the "project's viability is founded on the" Forest Service's issuance of the special-use authorization. *White Tanks Concerned Citizens, Inc., v. Strock*, 563 F.3d 1033, 1042 (9th Cir. 2009)

(applying NEPA's "connected action" requirement (40 C.F.R. § 1508.25(a)(1)) to the scope of an impact analysis).

Likewise, ESA Section 7 consultation is required here because the Selway River is habitat for ESA-listed salmon, steelhead and bull trout; and as the National Marine Fisheries Service has informed the Forest Service, the ESA consultation must include not only use of Forest Road 652 but IDL's road construction and logging activities that would utilize a special use permit for the road. *See* Lewis Decl., Exh. 8.

Additionally, Forest Service and IDL documents have identified serious mass erosion and landslide risks on and adjacent to IDL's timber sale area. Significant impacts are very likely to result from of the Forest Service's decision to authorize IDL's commercial use of Forest Road 652, yet they have not been analyzed because the Forest Service had failed to follow regulatory procedures. *See* Mullinix Decl., ¶¶ 37-44.

Therefore, by unlawfully designating Forest Road 652 as a public road, the Forest Service has avoided compliance with its own regulations, its own management plans, its obligations to protect the Selway River, and the procedural requirements of NEPA and the ESA, again requiring reversal of the November 20th decision under the APA.

III. IMMEDIATE RELIEF IS NEEDED TO AVOID IRREPARABLE HARM.

Injunctive relief is necessary to preserve the status quo and prevent further irreparable harm to the Plaintiffs. The Forest Service's refusal to require a special-use authorization for IDL's use of Forest Road 652 and conduct the necessary NEPA analysis has already harmed Plaintiffs' procedural interests; and threatens irreparable harm to the scenic, aesthetic, recreational and other values of the Selway Wild and Scenic River corridor, destruction or impairment of the Wrights' right to quiet enjoyment of their

property free from industrial activities, and even potentially catastrophic damage to the Wright's property. *See* Lewis Decl. ¶ 30-35; Wright Decl. ¶ 17. (discussing these harms).

Plaintiffs have abundantly established that “irreparable injury is likely in the absence of an injunction,” *Winter v. NRDC*, 555 U.S. at 22. Here, Plaintiffs have already been deprived of their procedural right to comment on the Forest Service's illegal road use authorization and participate in the NEPA process for any special use permit application. Moreover, serious environmental injury is imminent – including cutting of trees and bulldozing activities within the Wild and Scenic corridor, as well as extensive heavy equipment use of Forest Road 652 through the Wright's property. Earth-disturbing actions and tree cutting will begin as early as the week of July 6 and continue with extensive hauling of heavy equipment, logging, and use of logging truck to remove felled timber through the Wrights' property in coming weeks and months, unless an injunction is issued. Not only does this threaten irreparable harm to the Wrights' quiet enjoyment of their own property, but it constitutes impressible industrial and commercial activity that mars the scenic, aesthetic, and recreational values of the Selway Wild and Scenic River corridor. *See* Wright, Lewis Declarations.

The prospect of irreparable catastrophic harm from mass erosion caused by IDL's road construction and logging is also very real. As described in the accompanying declaration from former Nez Perce Forest road engineer Daryl Mullinix, IDL's proposed road construction plans:

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

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

See Mullinix Decl., ¶41. In short, Plaintiffs' injuries are actual injuries and are likely to increase in severity, magnitude and permanence and irreparability if the Forest Service's decision to declare that Forest Road 652 is a public road is allowed to stand.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

The balance of the hardships and public interest weigh strongly in favor of enjoining the Forest Service and/or IDL from using Forest Road 652 for the Selway Fire sale. One side – Idaho Rivers United and its members, and the Wrights – will suffer irreparable harm from the immediate impacts of IDL's road construction and logging. The Forest Service's unlawful authorization of IDL's road use also undermines the public interest because the agency has failed to protect the nationally-designated Selway Wild and Scenic River corridor. On the other side, the Forest Service will experience no injury from being directed to do its job.

Likewise, IDL cannot complain of having to comply with existing federal regulations that require it to obtain a special permit to use Forest Road 652 for the Selway Fire sale. Moreover, IDL auctioned the sale on June 19 with full knowledge of this litigation – and remarkably made no mention of this pending litigation in the information available to potential bidders. The long-term environmental damage caused by IDL's imminent road building and clear-cutting in the Selway Wild and Scenic River corridor cannot be undone once it occurs.

The public interests also weigh in favor of an injunction. Congress has already mandated that the Selway River's Wild and Scenic values be protected. Moreover, the

public has a strong interest in the Forest Service correctly following its own regulations. When an agency disregards the law, “it disregards the public interest and undermines its own credibility.” *Western Watersheds Project v. Rosencrance*, No. 09-CV-298-EJL, 2011 WL 39651, at *14 (D. Idaho 2010).

CONCLUSION

For the foregoing reasons, 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.

DATED: June 24, 2015.

Respectfully submitted,
/s/ Laird J. Lucas
Laurence (“Laird”) J. Lucas (ISB 4733)
Director of Litigation
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

/s/ Deborah Ferguson
Deborah A. Ferguson (ISB 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

Laurence (“Laird”) J. Lucas (ISB# 4733)
Director of Litigation
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
Attorney for Plaintiff Idaho Rivers United

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga Wright

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

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

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. I have been in communication with Deputy Attorney General Clay Smith, who represents proposed intervenors Idaho State Board of Land Commissioners and Idaho Department of Lands (jointly, “IDL”) concerning the status of IDL’s planned Selway Fire

timber salvage sale and associated sale activities, including road construction. Mr. Smith has advised me via email that IDL conducted an auction for the sale on June 19, 2015; and that the winning bidder (IFG) intends to commence sale activities beginning the week of July 6, 2015. Specifically, he stated that “IDL anticipates that IFG will be moving/transporting fallers/chainsaws to the site during the week of July 6 to begin work on the state parcel portion of the access route and then move road building equipment (dozer/excavator, dump trucks, etc.) on site during the week of July 13 to start the actual road construction work.”

3. I have also been in communication with Christine England, Assistant U.S. Attorney for the District of Idaho, who has been assigned to handle this case on behalf of the Forest Service Defendants.

4. On June 23, 2015, I requested via email to both Mr. Smith and Ms. England that the Forest Service and/or IDL agree to delay implementing IDL’s Selway Fire sale for at least a few weeks, to avoid the need for seeking a temporary restraining order in this matter (particularly since the 4th of July holiday is approaching). Mr. Smith advised me today that IDL believes that it is important for the project to proceed forward as anticipated, and his client declined to agree to a delay in implementation. Ms. England informed me that it was the position of the Forest Service that it is not implementing or conducting IDL’s sale, and it will not prohibit the IDL from proceeding with its project.

5. Because Plaintiffs will experience irreparable harm if the Selway Fire sale activities commence using Forest Road 652 before this Court can adjudicate the merits of this case, and because the Defendants and proposed Intervenor will not agree to postpone sale activities, Plaintiffs respectfully request that the Court handle this motion on an expedited basis, and issue a decision before July 6, 2015, including on an *ex parte* basis if necessary.

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

/s/ Deborah A. Ferguson
Deborah A. Ferguson

Attorney for Plaintiffs Morgan and Olga Wright

Laurence (“Laird”) J. Lucas (ISB# 4733)
Director of Litigation
Advocates for the West
PO Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
*Attorney for Plaintiff Idaho Rivers
United*

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
*Attorney for Plaintiffs Morgan and
Olga Wright*

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

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

I, Morgan Wright, hereby declare and state as follows:

1. I am a Plaintiff in this action, along with my wife Olga. I have personal knowledge of the matters stated in the declaration and could and would competently testify to these facts.

2. I am an avid river rafter and long-time member of co-Plaintiff Idaho Rivers United, and have enjoyed running the Selway, Lochsa, Clearwater and other rivers for decades. Because of my love for the Selway River and its outstanding scenic, recreational and other values, I purchased a property adjacent to the Selway River twenty five years ago, and built and maintain a home there, with my wife, Olga Wright.

3. The address of our property is 111 Swiftwater Road, Kooskia, Idaho. It is located on the south side of the Selway River, immediately to the east of where the Swiftwater Bridge crosses the Selway River, 2.8 miles upstream from the Selway's confluence with the Lochsa River at Lowell, Idaho. The access to our property is via forest road 652, which is a short spur road off forest road 470, an improved road which crosses over the Swiftwater Bridge.

4. Our property lies entirely within the one-quarter mile Wild and Scenic corridor of the Selway River, which was protected by Congress when it adopted the Wild and Scenic Rivers Act in 1968. This area features very steep slopes; and adjoining property held by the State of Idaho is up-slope from my property, in part.

5. When I purchased the property, I understood that it was encumbered by two easements held by the Forest Service. The first is a 1977 Wild and Scenic easement held by the U.S. Forest Service to protect and maintain wild and scenic values on the property. The second is a 1937 right-of-way for a forest road. True and correct copies of these easements are attached hereto as Exhibits 1 and 2, respectively.

6. Based on my purchase of the property and interactions with the Forest Service about it, I am aware that the Forest Service paid \$160,000.00 from public funds in 1977 to obtain the Wild and Scenic easement (Exhibit 1) over our entire property

and other parcels near it, for the purpose of protecting the wild and scenic values of the Selway River corridor. As the language of Exhibit 1 shows, the Wild and Scenic easement covers our entire property, including where forest road 652 crosses our property.

7. As Exhibit 1 also shows, the Forest Service's 1977 Wild and Scenic easement strictly limits development and activities on our property, including a prohibition on all industrial or commercial activity, changes to the topography, the number and design of all structures, and removal of vegetation.

8. I understood that I would have to comply with these extensive restrictions on the development and use of the property when I purchased it, and have also strived diligently to do so. I also appreciated that the Wild and Scenic easement would legally protect and preserve the remarkable scenic, recreational and historic values of the Selway River within the Wild and Scenic River corridor for my family, and for all Idahoans, now and in the future, as the restrictions run with the deed in perpetuity.

9. Because of the 1977 Wild and Scenic easement, before we could build our home, we submitted a detailed written proposal to the Forest Service's Scenic Easement Review Board on the Lochsa Ranger District in 2005. We then began an extensive design review and approval process, at considerable expense, to comply with the restrictions of the Wild and Scenic easement. Three features of our site plan were denied, because they involved placement of a small amount of fill in low level areas. The Forest Service determined that the easement prohibited even this minor change in topography.

10. As Exhibit 2 shows, the 1937 easement conveyed a 30-foot right-of-way to the Forest Service “for the construction, repair, maintenance, and operation of a common, main, or State public highway and as a connecting link in the . . . Goddard Point Road #289 Project.” This right-of-way is where forest road 652 crosses approximately 740 feet of our property.

11. However, the Forest Service never built the Goddard Point Road #289 Project for which the 1937 easement was obtained; and the Forest Service did not improve forest service road 652 beyond a native-surface dirt track, which I understand to have been made by the Civilian Conservation Corps in the 1930’s.

12. Today, forest road 652 remains a short unimproved spur road that parallels the Selway River within the federally-designated Selway Wild and Scenic River corridor. It is not passable by four-wheel standard passenger cars for most of its length, other than the short stretch maintained by us across our property.

13. At our own expense, we have maintained the short section of the spur road for access to our home. Neither the Forest Service nor any other public or private entity maintains the road that crosses our property or any portion of it beyond our property. The road is a rough dirt track beyond our home.

14. In fact, the Forest Service has maintained a locked gate for approximately thirty years on forest service road 652 about a quarter mile from our property, where it leaves the adjoining state land and enters the next private parcel, a short distance upriver from our home. The Forest Service maintains a key to that locked gate.

15. Last year, the Forest Service approved our request for signage at the

beginning of forest road 652 on our property that states: “Dead End. No Turn Around”, because RV campers often turned into the road, quickly realized it was a dead end and not maintained beyond our property, and then attempted to turn around, backing up perilously close to our home. It was necessary to obtain Forest Service approval because we cannot erect even a small sign on our property without Forest Service approval under the terms of the 1977 Wild and Scenic easement.

16. I was shocked to learn last fall, in connection with IDL’s proposed timber sale, that the Forest Service District Ranger Joe Hudson for the first time was designating forest service road 652 as a “public road”. Forest road 652 does not even appear in the 2007 Forest Service Road & Trail Access Guide, and it is shown only as an unimproved dirt track (without a road number) on the Nez Perce Forest map.

17. IDL’s proposed Selway Fire timber sale on the state lands adjacent to our home calls for constructing over 3 miles of new road up extremely steep, unstable and erosive slopes, many of which are between 40 to 80 percent in slope. IDL plans to clearcut about 142 acres within and adjacent to the Selway Wild and Scenic River corridor, yielding over 6.89 million board feet of timber. Constructing the new roads for the IDL sale will require extensive heavy equipment use over our property on forest road 652. Likewise, well over 1,000 logging trucks will cross our property on forest road 652 to remove the timber. The equipment and truck traffic across our property will seriously interfere with and harm our use and enjoyment of our home and property.

18. Additionally, based on my own inspections of the area and consultation with a road engineer who previously worked with the Forest Service in this area, I believe that the planned IDL timber harvest and road building will create a serious risk

of physical harm to us and our property, from the potential for mass erosion and resulting landslides from the road and logging activities. IDL has rejected any suggestion of helicopter logging to avoid these serious risks.

19. IDL has relied on District Ranger Hudson's November 20, 2014 determination that forest road 652 is a "public road" in proceeding with its plans to conduct its planned Selway Fire timber sale on the state lands adjacent to our property, utilizing forest road 652 through our property to access the sale, construct the new roads, and remove the logged timber.

20. To my knowledge, no road construction engineering plan has been developed by IDL. According to IDL sale documents that I have reviewed, road construction will require wasting 18,520 cubic yards of native rock and soil on site, essentially creating a waste area in the Selway Wild and Scenic River corridor. IDL also intends to install twenty-six culverts in streams that feed directly into the Selway River. In addition to the new road building, approximately 0.39 miles of forest road 652 will be reconstructed to a sixteen-foot travel way.

21. IDL has also advised me that the contractor who is awarded the sale may request permission from IDL to build other additional roads in connection with the sale, to increase the contractor's ability to access all the trees for the clearcut in this very steep terrain.

22. I was never informed that the Forest Service approved IDL's use of forest road 652 through my property for the proposed salvage sale without requiring any special use permit; I only discovered this fact after Idaho Rivers United received documents from the Forest Service under the Freedom of Information Act this winter.

23. The Forest Service has never previously designated forest road 652 as a public road open to all public use, without restriction; and it has not undertaken the required NEPA analysis for any such decision.

24. Based on the November 20, 2014 determination by District Ranger Hudson that forest road 652 is a “public road” open to all public use without restriction, the Forest Service has approved IDL’s use of forest road 652 for the IDL salvage sale without requiring a special use permit pursuant to Forest Service regulations and requirements. Accordingly, the Forest Service has conducted no analysis under NEPA or the Wild and Scenic Rivers Act to assess IDL’s proposed use of road 652 and its road building and logging activities for consistency with the Forest Service’s river corridor management plan, Forest Plan, Wild and Scenic easement, or other requirements. Neither has the Forest Service assessed the serious potential impacts of this project, including how the extensive truck traffic may affect Wild and Scenic values or the potential for mass erosion affecting either my property or the Selway River and its fisheries and other values.

25. Both my wife and I have been deprived of the opportunity to participate in the Forest Service’s decision to allow an activity that will very likely result in significant harm not only to the Selway Wild and Scenic River corridor but also to our personal residence and property.

26. The Forest Service’s authorization of the use of forest service road 652 across my property in connection with IDL’s project is in direct violation of the Wild and Scenic easement encumbering my property, by allowing industrial and/or commercial activities – i.e., extensive use of heavy equipment and logging trucks to

carry out the IDL sale – within the Selway River wild and scenic corridor, which the easement was created to protect.

27. Despite efforts by my counsel to advise the Forest Service of its legal violations in allowing IDL to use forest road 652 across my property without requiring any special use permit, and the filing of the complaint in this action, the Forest Service has been unwilling to change its position; and is allowing IDL to proceed with its planned salvage sale. Unless the Court enters injunctive relief, I and my wife will experience irreparable harms in many ways, including substantial interference with the quiet enjoyment of our property, breach of the 1977 Wild and Scenic easement, and deprivation of our rights to participate in the Forest Service's decision. Unfortunately, in light of the Forest Service's and IDL's insistence on proceeding with the proposed salvage sale without any Forest Service analysis or special use permit, injunctive relief from this Court is the only way to prevent these irreparable harms from occurring to myself, my wife, and the Wild and Scenic corridor.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct. Executed this 20th day of June, 2015.

/s/ Morgan Wright
Morgan Wright

EXHIBIT 1

1977 Wild and Scenic Easement

274318

Tract No. 870

 INDEXED (u)
 TRACTED (u)
 FILMED (u)

 NATIONAL WILD AND SCENIC RIVERS SYSTEM
 RECREATION RIVER AREA EASEMENT

THIS EASEMENT, dated this 2 day of December, 1977, by and between Mattie Harrington Walker, a widow dealing with her sole and separate property, of Lewiston, Idaho, hereinafter called the Grantor, and the UNITED STATES OF AMERICA, whose post office address is Washington, D.C. 20250, hereinafter called Grantee;

WHEREAS, Public Law 90-542 (82 Stat. 906) provided for the establishment of a Wild and Scenic Rivers System, and designated that portion of the Middle Fork Clearwater River in Idaho from the town of Kooskia upstream to the town of Lowell, the Lochsa River from its junction with the Selway at Lowell forming the Middle Fork upstream to the Powell Ranger Station, and the Selway River from Lowell upstream to its origin as a component of the National Wild and Scenic Rivers System to be administered by the Secretary of Agriculture as part of the National Forest System, and

WHEREAS, the Grantor is the owner of certain land which is in the established boundaries of the Middle Fork Clearwater River component of the National Wild and Scenic Rivers System, Nezperce National Forest, and located in Idaho County, State of Idaho, and

WHEREAS, the Grantee through the Forest Service, in accordance with P.L. 90-542 (82 Stat. 906), desires to administer such land to protect the scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values of the free-flowing Middle Fork Clearwater, including the Lochsa and Selway Rivers, and their immediate environments, and to prevent any developments that will tend to mar or detract from their scenic, recreation, geologic, fish and wildlife, historic, cultural, or other similar values, and to that end exercise such reasonable controls over the land within the restricted areas described herein as may be necessary to accomplish such objectives;

NOW THEREFORE, the Grantor for and in consideration of the sum of \$160,000.00, the receipt of which is hereby acknowledged, and in consideration of the covenants herein contained, does hereby grant and convey unto the Grantee and its assigns an easement and right in perpetuity to and over any and all portions of the following described lands:

Lots 1, 2 and 3 of Section 16, T.32N., R.7E., B.M.

EXCEPTING THEREFROM a tract between the South boundary of Swiftwater Road and the right bank of the Swiftwater Creek, in Lot 3, Section 16, Township 32 North, Range 7 East, containing 0.47 acres and more particularly described: Beginning at a point on the South boundary of said Swiftwater Road whence the Meander Corner of Fractional Sections 15 and 16 (which is 1049.4 feet South 0°27' West from the Section Corner of Sections 9, 10, 15, 16) is North 84°29' East 1316.4 feet; Corner Number One an iron pipe; thence Westerly on said boundary on the arc of an 8° curve 200 feet to Corner Number Two an iron pipe; thence South 4° 34' East 94 feet to Corner Number Three an iron pipe; thence North 79° 30' East 200 feet on the South bank of said Creek to an iron pipe, Corner Number Four; thence North 4° 34' West 111.3 feet to the point of beginning.

The easement area includes all the land now owned by the Grantor in Lots 1, 2 and 3 of Section 16, T.32N., R.7E., B.M., being 104.53 acres, more or less.

The acquiring agency is the Forest Service, United States Department of Agriculture.

1. USE BY GRANTEE:

The Grantee is hereby granted the right to go upon the land described in this easement for the following purposes:

APPROPRIATE CONSIDERATION
 DESCRIBED IN THE CONDITIONS
 BY LLC Grantee DATE 11/22/77

- a. To inspect for violations and to administer this easement.
- b. To remove or eliminate any advertising displays, signs and billboards, stored or accumulated junk automobiles, and other salvage materials, junk, or debris which may be found on the above-described area.
- c. To mark, cut, and remove all dead, dying, diseased, or insect-infested trees and shrubs which in the judgment of the Grantee detract from the aesthetics of the above-described area, and to plant and selectively cut or prune trees and shrubs to restore or maintain the scenic view and to implement disease prevention measures. The property owner shall be consulted prior to initiation of such operations. Any merchantable timber so cut shall, unless otherwise agreed, be cut into logs of standard lengths for disposal by the landowner.
- d. To perform such other scenic, aesthetic, historical, fish and wildlife, and sanitation restoration as may be deemed necessary or desirable. The landowner shall be consulted prior to initiation of such projects.

2. RESTRICTIONS ON LAND USE BY GRANTOR:

- a. The lands within the easement area shall not be used for any professional or commercial activities except such as can be and are in fact conducted from a residential dwelling without exterior alteration of the dwelling.
- b. No mining or industrial activity shall be conducted on the lands within the easement area.
- c. The Grantor, all heirs and assigns, retain the right to use the easement area for general crop and livestock farming and for limited residential development consistent with applicable State and local regulations. Such right shall be subject to the following limitations:
 - (1) No part of any of the lands shall be sold or leased in lots smaller than two (2) acres, or which will leave a remaining parcel of less than two (2) acres. If subdivided, each tract shall be subject to the provisions of this easement.
 - (2) A total of five (5) single-family residential lots is the maximum number authorized for the easement area.
 - (3) Each single-family residential lot shall be limited to a minimum width of 300 feet as measured parallel to the river.
 - (4) No commercial buildings, multi-family residential buildings, or other industrial or commercial structures shall be erected on said land, and not more than one residential dwelling with appropriate accessory structures shall be permitted on a given lot.
 - (5) Hereafter no structures shall be placed within 200 feet of the Selway River, except as may be authorized in writing by the Secretary of Agriculture or his duly authorized representative.
- d. That buildings, utility pole lines, and structures may be constructed, erected, or moved onto said lands only for farm or single-family residential purposes. New or additional structures shall be subject to the following requirements:
 - (1) The location and architectural design of such structures shall be harmonious with the landscape and general surroundings. Architectural and site plans must be approved in writing by the Secretary of Agriculture or his duly authorized representative prior to construction, erection, or placement of new or additional structures.
 - (2) Such structures shall not exceed a height of thirty (30) feet measured from the natural grade at the middle of the front of the structure to the highest point of the roof or parapet.

(3) Roofs shall be constructed of nonreflective material or painted and maintained with earth-tone colors.

(4) Adequate provisions for disposal of waste and sewage shall be made to fully comply with applicable State and local regulations for sanitation and water pollution control. The waste and sewage disposal facilities shall be approved in writing by the Secretary of Agriculture or his duly authorized representative prior to the construction, erection, or moving of new or additional buildings and structures onto said lands.

e. There is specifically retained by the Grantor, all heirs and assigns, the right to perform ordinary maintenance on all existing roads, structures and buildings, together with the right to replace, rebuild, or substitute any road, building or structure now existing with similar roads, buildings or structures in substantially the same location.

f. The Grantor or her agent shall not move in old houses, cottages, house trailers, fishing or hunting shacks, portable structures, or any other low-quality, unattractive or nonpermanent improvement or structure into the easement area. Mobile homes are permitted for permanent residences provided their color, structure, profile, design and positioning on the property, including landscaping, are harmonious with the rural environment. Written permission shall be obtained from the Secretary of Agriculture or his duly authorized representative prior to the placing of mobile homes on said lands.

g. No dump of trash, ashes, garbage, sewage, sawdust, or any similar unsightly or offensive material shall be placed upon or within the easement area, except as is incidental to the occupation and use of the land for normal agricultural or horticultural purposes.

h. No signs, billboards, outdoor advertising structures or advertisement of any kind or nature shall hereafter be erected, displayed, placed, or maintained upon or within the easement area. Existing use for any such purpose shall be terminated and any such signs shall be removed on or before June 30, 1978, except that one (1) on-premise sign not greater in size than 36 inches by 24 inches may be erected and maintained to advertise the sale, hire, or lease of the property, or to advertise the sale or availability of any goods, products, or services on the land, and one additional sign may be erected and maintained to designate the owner or the name of the property. The two authorized signs shall not be placed within 200 feet of the Selway River.

i. No changes in the general topography of the landscape or land surface, including the riverbed, will be permitted except for those caused by the forces of nature, and those authorized in writing by the Secretary of Agriculture or his duly authorized representative. No permission shall be required to drill wells or to lay, operate, maintain, repair, or remove water and sewer pipelines, conduits, or drains below the surface of the easement area insofar as such activities do not permanently impair or ruin the natural beauty of said easement area.

j. No trees or shrubs shall be pruned, removed, or destroyed on the land in the easement area except those authorized in writing by the Secretary of Agriculture or his duly authorized representative. Permission need not be obtained to cut dead trees or to remove hazardous trees for reasons of safety. Likewise, seedling trees or seedling shrubbery may be grubbed up or cut down in accordance with good farm practice on lands presently being cultivated or for residential maintenance purposes. Cultivated crops, including orchard fruit and nut trees, may be pruned, sprayed, harvested and otherwise maintained in accordance with good farm practice.

k. Ingress and egress between the easement area and Forest Road No. 470 shall be limited to not more than four (4) access points. The location of any new access point shall fully comply with applicable State and local safety regulations and prior to use shall be approved in writing by the Secretary of Agriculture or his duly authorized representative.

1. Archaeological or paleontological explorations shall be conducted only by a reputable museum, university, college, or recognized scientific or educational institution as authorized by a permit from the Secretary of Agriculture or his duly authorized representative. All specimens or materials of archaeological or paleontological interest shall be adequately and permanently safeguarded and preserved for scientific study and public observation. The excavated lands or ruins shall be restored to their customary condition or such other steps shall be taken to safeguard and conserve the excavated sites as may be necessary to preserve their residual scientific values.

PUBLIC ENTRY:

The Grantee 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. Where needed, the Grantee may erect appropriate signs indicating that portion of the easement area which is not open to public entry.

TO HAVE AND TO HOLD the easement hereby granted, unto the Grantee, and its assigns forever. This grant shall be binding upon the heirs and assigns of the Grantor and shall constitute a servitude upon the above-described land.

IN WITNESS WHEREOF, the Grantor has hereunto set her hand on the day and year first above written.

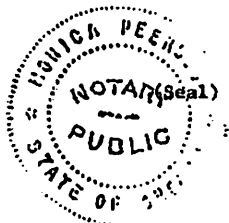
Mattie Harrington Walker
Mattie Harrington Walker

ACKNOWLEDGMENT

STATE OF OREGON)
) ss.
County of Columbia)

On this ____ day of _____, 19__ , before me, the undersigned, a Notary Public in and for the State of Oregon, personally appeared Mattie Harrington Walker, a widow, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she 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.



Notary Public for the State of Oregon
Residing at _____
My commission expires _____

Filed and recorded at the request of IDAHO COUNTY TITLE CO.

at 3:30 o'clock PM this 12 day of December 1927

By Charles H. White
Deputy
Ex-Officio Auditor and Recorder
Idaho County, Idaho
Fee \$ 4.00

R.T. - Idaho County, Idaho

EXHIBIT 2

1937 Right-of-Way Easement

County of Idaho) ss. I hereby certify that this instrument was filed for record in the office of the Recorder of Idaho County at the request of Charles George at 11 o'clock A.M. this 4 day of March, A.D. 1939.
Henry Telcher,
County Recorder.

Fee \$1.20

125479

Lillian Finnell

to

RIGHT-OF-WAY DEED

U.S. Forest Service
Dep't of Agriculture

THIS INDENTURE, Made this 20th day of November, in the year One Thousand Nine Hundred and Thirty Seven, between Lillian Finnell of the County of -- State of --, grantor, parties of the first part, and the United States Forest Service, Dep't of Agriculture, parties of the second part, WITNESSES

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 30 feet wide across Lot 3, Section 16, Township 32 N. Range 7 E Boise Meridian and located on the ground according to the survey line, the figures, measurements, and other references shown on the blueprint hereto attached and made a part hereof, the said blueprint 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 Goddard Point Road #289 Project.

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 Goddard Point Road #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, their heirs, successors, administrators, or assigns.

IN WITNESS WHEREOF the said parties of the first part have hereunto subscribed their names and affixed their seals at Lewiston, County of Nez Perce, State of Idaho, the day and year first above written.

Lillian Finnell

ACKNOWLEDGMENT

STATE OF IDAHO

County of Nez Perce

ss.

On this 20th day of November in the year 1937, before me, A. L. Lyons, Jr. a Notary Public in and for the State of Idaho, personally appeared Lillian Finnell, known to me to be the person whose name is subscribed to the within

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

" A. L. Lyons, Jr. Notary Public "
" State of Idaho "

A. L. Lyons, Jr. Notary Public
for the State of Idaho, residing
at --. My commission expires --.
Notary Public for Idaho, residing
at Lewiston therein. My commis-
sion expires July 21, 1941.

৩৩.

I hereby certify that this instrument was filed for record

Henry Telcher,
County Recorder.

2A.

Laurence (“Laird”) J. Lucas (ISB# 4733)
Director of Litigation
Advocates for the West
PO Box 1612
Boise, ID 83701
208-342-7024 ext. 209
llucas@advocateswest.org
*Attorney for Plaintiff Idaho Rivers
United*

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 325
Boise, ID 83702
208-345-5183
daf@fergusondurham.com
*Attorney for Plaintiffs Morgan and
Olga Wright*

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

| | | |
|-----------------------------------|---|---------------------------------|
| IDAHO RIVERS UNITED and |) | |
| MORGAN AND OLGA WRIGHT, |) | No. 3:15-cv-00169-BLW |
| |) | |
| <i>Plaintiffs,</i> |) | DECLARATION OF DARYL K. |
| |) | MULLINIX IN SUPPORT OF |
| vs. |) | PLAINTIFF’S MOTION FOR A |
| |) | TEMPORARY RESTRAINING |
| DISTRICT RANGER JOE |) | ORDER/PRELIMINARY |
| HUDSON, in his official capacity, |) | INJUNCTION |
| And UNITED STATES FOREST |) | |
| SERVICE, |) | |
| |) | |
| <i>Defendant.</i> |) | |

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

Professional Experience and Education

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nez Perce National Forest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 to 80 percent in side slope.

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

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

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

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

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

The FS cancelled a similar sale due to erosion concerns

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

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

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

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

/s/ Daryl K. Mullinix