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**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
)	SUMMARY JUDGMENT
vs.)	
)	<u>Oral Argument Requested</u>
DISTRICT RANGER JOE HUDSON)	
in his official capacity, and UNITED)	
STATES FOREST SERVICE,)	
)	
<u>Defendants.</u>)	

Plaintiffs Idaho Rivers United and Morgan and Olga Wright respectfully move this Court, pursuant to Fed. R. Civ. P. 56, for entry of summary judgment in their favor on their Claim for Relief as set forth in their Complaint in this matter. *See* Complaint, ¶¶ 67-70.

Specifically, Plaintiffs seek entry of summary judgment holding that Defendants U.S. Forest Service and District Ranger Joe Hudson acted in manner that is arbitrary, capricious, an abuse of discretion, and not in accordance with law in issuing the challenged November 20, 2014

determination that Nez Perce National Forest Road 652 is a “public road,” and hence the Idaho Department of Lands (“IDL”) need not obtain a special use permit or authorization under Forest Service regulations to use the road for access to IDL’s Selway Salvage project. *Id.*

Based on the grant of summary judgment, and in order to provide adequate relief under the facts presented, the Court should reverse and set aside the challenged November 20, 2014 determination pursuant to the APA, and order that the Forest Service must issue a valid special use permit that complies with the National Environmental Policy Act (NEPA), the Wild and Scenic Rivers Act, and the Endangered Species Act (ESA) before IDL may utilize Road 652 in connection with its Selway Salvage project.

This Motion for Summary Judgment is supported by the Complaint on file in this matter (*Docket No. 1*); Plaintiffs’ Motion for Temporary Restraining Order and/or Preliminary Injunction and supporting briefs, declarations, and exhibits (*Docket Nos. 7-8, 16*); the Court’s Memorandum Decision and Order filed July 10, 2015, granting a preliminary injunction (*Docket No. 19*); the Administrative Record lodged by Federal Defendants (*Docket No. 22*); the accompanying Plaintiffs’ Opening Summary Judgment Brief and Plaintiffs’ Separate Statement of Undisputed Material Facts In Support Of Motion for Summary Judgment, filed herewith; and by all other filings and matters submitted to the Court prior to decision in this matter.

Plaintiffs respectfully request oral argument on this motion.

WHEREFORE, Plaintiffs pray that the Court grant this motion; enter summary judgment in their favor; reverse and set aside the challenged November 20, 2014 determination that Forest Road 652 is a “public road” and hence IDL need not obtain a Forest Service permit before utilizing the road in connection with its Selway Salvage project; and order that the Forest Service must issue a valid special use permit before IDL that complies with NEPA, the Wild

and Scenic Rivers Act, and the Endangered Species Act before IDL may utilize Road 652 in conjunction with its Selway Salvage project activities.

Dated this 3rd day of August, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2015, I caused the foregoing PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, along with the accompanying PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (and all attachments thereto) and PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED FACTS to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the counsel of record listed below:

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

IDAHO RIVERS UNITED, and)
MORGAN and OLGA WRIGHT,) No. 3:15-cv-00169-BLW
)
Plaintiffs,) **PLAINTIFFS’ OPENING BRIEF**
) **IN SUPPORT OF MOTION FOR**
vs.) **SUMMARY JUDGMENT**
)
DISTRICT RANGER JOE HUDSON)
in his official capacity, and UNITED)
STATES FOREST SERVICE,)
)
Defendants.)

INTRODUCTION

Plaintiffs Idaho Rivers United and Morgan and Olga Wright respectfully seek entry of summary judgment in their favor reversing and setting aside the November 20, 2014 decision by Defendants U.S. Forest Service and District Ranger Joe Hudson, which determined that Nez Perce National Forest Road 652 is supposedly a “public road,” and hence the Idaho Department of Lands (“IDL”) need not obtain a Forest Service permit to utilize the road as part of IDL’s Selway Salvage project.

As explained below, the Administrative Record shows that the Forest Service initially – and correctly – advised IDL in September 2014 that it would need a Forest Service permit to utilize Road 652 for its planned salvage activities following the August 2014 Johnson Bar wildfire. But as they pursued the permit process, it became clear that the Forest Service would have to engage in NEPA analysis and ESA consultation over the impacts of IDL’s proposed road construction and clear-cutting on state lands. To avoid those potential roadblocks, Defendant District Ranger Joe Hudson took over the project from his staff; and developed a strategy to sidestep all NEPA and ESA obligations by newly declaring Road 652 to be a “public road” requiring no permit for IDL’s use, as reflected in his November 20th decision challenged here.

The Administrative Record confirms the Court’s conclusion in the July 10, 2015 Preliminary Injunction Order (*Docket No. 19*) that this determination was flawed, first, because the underlying statute requires that a “public road” be maintained by a public entity: the record shows no Forest Service maintenance of Road 652 beyond the single culvert replacement in 1987 addressed in the Court’s order. Moreover, the record demonstrates that Road 652 also does not qualify as a “public road” under regulatory

definitions, because it has never been designated as being a publicly available road; it is not accessible to standard passenger vehicles; and it is gated and locked past the IDL parcel – all factors that Hudson failed to address. The Court should thus enter summary judgment for Plaintiffs reversing the November 20th decision on these grounds.

The record reveals another fatal flaw in Defendant Hudson’s rationale – his November 20th determination asserted that Road 652 had no closure order for commercial hauling, such as IDL’s proposed use. In fact, the Regional Forester issued a closure order in May 2014 prohibiting commercial hauling on Nez Perce National Forest roads without a permit. *See* AR 283 (Attachment A hereto). Defendant Hudson simply ignored this closure order in his zeal to facilitate IDL’s salvage operations – a classic example of arbitrary and capricious action, which again requires reversal.

Finally, the Court should grant summary judgment for Plaintiffs because the November 20th decision wholly ignored the 1977 scenic easement covering Road 652, and violated the Wild and Scenic Rivers Act itself. Section 10(a) of the Act expressly requires the Forest Service to place a “primary emphasis” on protecting scenic values. *See* 16 U.S.C. § 1281(a). Instead of fulfilling that statutory duty, the record reveals that Defendants studiously ignored Wild and Scenic values, and instead bent over backwards to facilitate IDL’s project while sidestepping their NEPA and ESA obligations.

Accordingly, the Court should enter summary judgment for Plaintiffs; reverse and set aside the November 20th decision under the APA; and rule that the Forest Service must issue a valid permit that complies with the Wild and Scenic Rivers Act, NEPA, and the ESA before IDL may utilize Road 652 in connection with its Selway Salvage project.

STATEMENT OF FACTS

As set forth in more detail in Plaintiffs' accompanying Separate Statement of Undisputed Material Facts ("SOF"), the Administrative Record (*Docket No. 22*) ("AR") confirms the key facts relevant to this motion:

The Johnson Bar wildfire burned mostly federal lands along the Selway and Middle Fork Clearwater rivers in August 2014. SOF ¶ 28. The fire also burned portions of the IDL state land parcel along the Selway River, which neighbors the Wrights' property there. *Id.*

On September 2, 2014, IDL contacted the Forest Service about using Forest Roads 470 and 652 in connection with its planned salvage logging on the state parcel. SOF ¶ 29 (AR 38). Road 470 is an improved Forest Service road maintained jointly by the Forest Service and the Kidder Harris Highway District, which crosses the Selway River over the Swiftwater Bridge. SOF ¶ 19. Road 470 is unquestionably a public road.

By contrast, Road 652 is the short spur road that intersects Road 470 just after the Swiftwater Bridge, and is unimproved past the 765-foot section that provides access to the Wrights' private property. SOF, ¶ 7-16. The Wrights paid to improve the native dirt track through gravel surfacing of the road across their property in 2010. *Id.* After the Wrights' property, Road 652 is a rough two-track road through the IDL parcel, and is gated and locked where it enters the Ruby Neil private land, and then continues on to Forest Service lands. *Id.*; *see also* Preliminary Injunction Order, pp. 1-3.

Road 652 has not been designated as a "public road" or as being open to all motorized use in any Nez Perce National Forest official document. SOF, ¶ 24-27. The National Forest's Road Access Guides have not even listed Road 652 as a forest road

since at least 1995, much less designated it as open to all motor vehicle use. *Id.* This includes the 2008 Road Access Guide, which remains the official Forest Service guide to open and closed roads until the Nez Perce National Forest completes its ongoing Travel Planning process and adopts a final Motor Vehicle Use Map (“MVUM”). *Id.*

Because Road 652 has never been designated as an open public road, it is unsurprising that IDL’s September 2nd inquiry to the Forest Service voiced uncertainty about the status of Road 652, stating:

There is an old USFS road #652 that leaves the Swiftwater road 470 on the west side of the river and provides access to the bottom of the parcel. I have not ever been given a clear answer on who the road truly belongs to and the roads current status. *[sic]* Private individuals think it is not public and the USFS seems to think it is. To expedite an answer I was wondering if you could look into this so we can move forward with timber sale preparation.

SOF ¶ 29; AR 38.

This request sparked a series of emails between Forest Service staff which reveal the Forest Service’s own internal confusion about the status of Road 652. SOF, ¶ 30-34. In response to IDL’s request, the Nez Perce Forest’s fisheries biologist asked the Forest’s realty specialist “if you could tell me who has jurisdiction for maintenance on Forest Road 652. . . who has overall maintenance responsibilities and do any of the others involved have easements or responsibilities[?]” SOF, ¶ 31 (AR 39). The specialist in turn wrote to Forest engineers, asking if they had information on the road. *Id.* She noted that the Forest Service had no easement over the IDL parcel; and opined that “NEPA may not apply to the State if the road across State is considered a State Road.” *Id.*

On September 8, 2014, a meeting was held with IDL and the Forest Service’s interdisciplinary team addressing post-fire rehabilitation from the Johnson Bar fire. SOF, ¶ 32 (AR 61). Meeting notes reflect the parties’ discussion that the:

State will complete and submit to Forest Service, an application for Road Use Permit across segments of NFS Road 470 and 652, along with Operation and Maintenance Plan, for review and approval by Forest Service. NEPA for permit will be completed by FS Johnson Fire BAER Team. . . State does not have an easement across Roads 470 or 652 and will need a permit to haul commercially.

Id. The notes also show that the Forest Service advised IDL that the “area is within W&S [Wild and Scenic] corridor and proposals will be reviewed for compliance under FS Rules and Regulations.” *Id.*

On October 10, 2014, IDL followed up by submitting a permit application to the Forest Service for use of Roads 470 and 652 in connection with its Selway Salvage project. SOF, ¶ 35 (AR 15). The application sought a permit for “commercial use of roads restricted by order,” and explained that IDL sought to “haul approximately 6,150 MBF of sawlogs associated with the sale and salvage of State of Idaho burnt timber during the Johnson Bar fire in the summer of 2014 across the existing graveled portion of the 652 road to the 470 road and then out to the Selway River Road.” *Id.* A map showing the road network that IDL planned to construct on its land for the salvage logging was attached. *Id.*

By seeking a permit for “commercial use of roads restricted by order,” IDL evidently knew that the Regional Forester, Faye Kruger, issued a closure order in May 2014 which prohibited “[u]sing a National Forest System road for commercial hauling without a permit or written authorization from the Forest Service.” SOF, ¶ 20 (AR 282) (Attachment A). This two-year regional closure order covered the Nez Perce National Forest. *Id.* Remarkably, Defendant Hudson and his staff never once mentioned this closure order in any of the communications contained in the Administrative Record.

In response to IDL's permit application, Defendant Hudson sent an email to his staff on October 16, 2014, stating "I am going to need an ID [interdisciplinary] team to assess and analyze the situation and figure out exactly what our NEPA responsibilities are." SOF, ¶ 36 (AR 63). The ID team included the Forest's fisheries biologist, NEPA specialist, and Wild and Scenic coordinator. *Id.*

The NEPA specialist then wrote the Region's NEPA coordinator, asking for assistance in determining what NEPA compliance was necessary – but advising that "[w]e would like to use a CE [Categorical Exclusion] category for the permit if possible." SOF, ¶ 37 (AR 64). A call was conducted on October 27, 2014 between Forest and Regional Staff to address whether a road use permit could be issued using a CE, in which regional counsel apparently advised (according to notes of the call) that the permit could be issued under a road management CE category but noting: "Possible we could get litigated but let that happen." SOF, ¶ 38 (AR 66; *see also* AR 67).

Meanwhile the Forest's fisheries biologist contacted the National Marine Fisheries Service ("NMFS," also called NOAA Fisheries) to discuss potential Endangered Species Act consultation requirements associated with the permit application. SOF, ¶ 39 (AR 20). Following standard ESA consultation procedures, NMFS advised (and the Forest fisheries biologist concurred), that ESA consultation would be needed over the potential impacts of IDL's road construction and logging activities upon steelhead habitat in the Selway River and tributaries, and could not be covered by prior ESA programmatic road maintenance consultation. *Id.*

This information was communicated to IDL at a site meeting conducted on October 29, 2014, and by email. SOF, ¶ 40 (AR 273 & 22). IDL immediately wrote to

Defendant Hudson to complain about the Forest Service conducting NEPA analysis and ESA consultation over IDL's road construction and logging in connection with the road use permit application. *Id.* Acceding to IDL's opposition, Defendant Hudson wrote his staff on October 31, 2014, instructing that only he (and two other higher level officials) would deal with NMFS in the future, and directing that ESA consultation would not occur over IDL's proposed activities. SOF, ¶ 41 (AR 22). Hudson also stated that: "As the responsible line officer for the road use permit, I will determine how I proceed with NEPA." *Id.*

Following a meeting between Hudson and NMFS on November 4, 2014, NMFS wrote Hudson to confirm its position that ESA consultation would be required over IDL's proposed activities in conjunction with the requested permit. SOF, ¶ 42 (AR 23). After Hudson protested that the permit could be approved under a prior programmatic road maintenance consultation, NFMS disagreed; and reiterated that a site-specific consultation was required. *Id.* (AR 025).

The record shows that Defendant Hudson then embarked on a strategy to avoid having to issue any Forest Service permit – and thus avoid NEPA and ESA compliance – by determining that Road 652 is a "public road" open to public use and has no closure order. He developed this theory in a private email to the Regional NEPA coordinator dated November 17, 2014. SOF, ¶ 43 (AR 329) (Attachment B). Hudson set forth the reasons why he believed that no permit was necessary, writing that:

FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. . . . The proposed activity continues the existing use of the involved land and no change in physical environment or facilities are proposed. Therefore there is no requirement for the Forest Service to issue a road permit.

Id. The Regional NEPA coordinator responded approvingly, saying: “Joe, A+ work from where I sit.” *Id.* Neither Hudson nor the Regional NEPA coordinator mentioned the May 2014 closure in this email exchange; nor is there any indication that either person reviewed the existing Nez Perce National Forest Road Access Guide before determining that Road 652 is supposedly a “public road.” *Id.*

Defendant Hudson then had a call with IDL on November 19, 2014, in which he relayed his new position that no permit was required. SOF, ¶ 4 (AR 117). IDL asked for confirmation in writing, to which Hudson replied: “I need to carefully word.” *Id.* The next day, November 20, 2014, Hudson sent a written confirmation to IDL, stating:

After reviewing your road use permit application for Forest Roads 652 and 470, I have determined that it is not necessary to issue Idaho Department of Lands (IDL) a road use permit for these roads in order for IDL to haul commercial timber from IDL lands. Forest Service managed portions of these roads are recognized as “public roads”; available, except during scheduled periods, extreme weather, or emergency conditions; passable by four-wheel standard passenger signs; 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. Forest Roads 652 and 470 meet the definition of a public road. There are no traffic use restrictions or orders associated with these roads, nor does IDL propose any use on these roads outside what is already authorized by regulation or law. Forest Service Policy in FSM [Forest Service Manual] 7700 does not require a road use permit under these conditions. By this e-mail I am simply acknowledging that IDL has such authorization for their prescribed use and is not required to obtain a road use permit.

As we have previously discussed, The Forest and IDL will need to agree upon a level of road maintenance that IDL will perform commensurate with their use.

AR 116 (Attachment C). This November 20th decision made no mention of the regional closure order; nor of the Wild and Scenic Rivers Act or 1977 easement.

The Forest Service gave no public notice of this November 20th decision; and it only came to light after Plaintiff IRU submitted a Freedom of Information Act requesting

Forest Service documents relating to IDL's proposed project. *See* Lewis Declaration (Docket No. 3).

After Plaintiffs filed this action in May 2015, the Forest Service scrambled to try to justify the November 20th decision. The Administrative Record includes a large number of documents generated in May and June 2015 regarding Road 652, including internal memos that sought to pull together all information in Forest Service files about the past history of the road. SOF, ¶ 46-47. The record materials show that Forest staff, even then, could not figure out whether Road 652 had ever previously been designated in any official Forest map or access guides as being open to motorized use. *Id.*

Rather than being able to point to any Forest Service document that previously designated Road 652 as being open to all motorized use, the agency instead seeks to rely on its draft Motor Vehicle Use Map ("MVUM"), which the Nez Perce National Forest has been working on through its Travel Planning process since 2008. SOF, ¶ 21-23. But that draft MVUM cannot justify the November 20th decision, since it is not yet final. Accordingly, the November 20th decision stands without support in the Administrative Record; and Hudson's attempt to newly designate Road 652 as a "public road" that requires no permit for IDL's proposed commercial hauling activities must be rejected by the Court upon summary judgment.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

This Court reviews the Forest Service's November 20th determination under the APA 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); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002).

Under these standards, a court “will not vacate an agency’s decision unless it ‘has relied on factors which Congress had 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.’” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). *See also Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (requiring “a rational connection between the data before [the agency] and its conclusion”).¹

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT, FIRST, BECAUSE ROAD 652 DOES NOT QUALIFY AS A “PUBLIC ROAD”.

In granting injunctive relief, the Court found that Plaintiffs were likely to prevail in challenging the November 20th decision because Road 652 does not qualify as a “public road” under the statutory definition. *See* Preliminary Injunction Order, pp. 5-6. That ruling was correct, and should be confirmed upon summary judgment.

The term “public road” is defined by statute as “any road or street under the jurisdiction of and maintained by a public authority and open to public travel.” *See* 23 U.S.C. § 101(a)(21) (emphasis added). This definition thus imposes two requirements relevant here: (a) the road must be under the jurisdiction of and maintained by the Forest

¹ The Court has already determined that the November 20th decision is a final agency action subject to judicial review under APA Section 706(2). *See* Preliminary Injunction Order, p. 5. Accordingly, Plaintiffs will not repeat their injunction briefings establishing this point.

Service; and (b) it must be “open to public travel.” *Id.* As explained below, neither of these two statutory prongs is met here.

A . The Record Confirms That The Forest Service Has Not Maintained Road 652.

The Administrative Record confirms the Court’s injunction ruling that Road 652 does not qualify under the first part of the statutory definition, as the Forest Service has not maintained the road. *See* SOF, ¶ 17-19.

Plaintiffs have already demonstrated that the first 765 feet of Road 652, across the Wrights’ property, was improved by the Wrights in 2010 – at their own expense – to gravel surface from the native dirt track that was originally created by the Civilian Conservation Corps in the 1930’s. *See* SOF, ¶ 13. The only evidence of maintenance the Forest Service submitted during the injunction briefing was that it replaced a single culvert along the road back in 1987. *See* Hudson Decl., Ex. 14 (*Docket No. 15-15*). The Court cited this lack of evidence of maintenance in concluding that Plaintiffs were likely to prevail on this issue. Preliminary Injunction Order, pp. 5-6.

The Administrative Record does not show any further maintenance of Road 652 by the Forest Service, other than this single culvert replacement. *See* SOF, ¶ 17-19. The only new information in the record are annual maintenance reports for the Moose Creek District (where Road 652 is located), for years 2002 through 2011. *Id.* (AR 336 to 341). These reports show regular maintenance by the Forest Service and the Kidder Harris Highway District of Road 470 – the improved road that crosses the Selway River over the Swiftwater Bridge. But only the first three years’ reports even mention Road 652; and those three reports say only that the Forest Service might look at the road to evaluate work that might need to be done. *Id.* There is no record of the Forest Service actually

looking at the road or doing any maintenance whatsoever. *Id.*

Because it was the Wrights that improved the short section of Road 652 across their property – not the Forest Service – and because the Forest Service has not maintained Road 652 over many decades, the Court should confirm its injunction ruling and enter summary judgment for Plaintiffs, reversing Defendant Hudson’s “public road” determination under the first prong of the statutory definition above.

B. Road 652 Does Not Qualify As A Public Road Under The Second Part Of The Statutory Definition Either.

In addition, the Court should rule for Plaintiffs that Defendant Hudson’s “public road” determination was arbitrary and capricious under the second prong of the statutory definition, which requires that a public road be “open to public travel.” *See* 23 U.S.C. § 101(a)(21).

The “open to public travel” component of this statutory definition has been fleshed out in federal regulations, which have three requirements. 23 C.F.R. § 460.2. To meet those three requirements, the road must be:

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.

Id. These same three requirements are repeated in the Forest Service Manual definition of “public road.” *See* F.S. Manual, Chapter 7730.5 (AR 281, p. 12).

The Administrative Record confirms Plaintiffs' injunction submissions showing that Road 652 is not "open to public travel" under these requirements. The following facts from the record show that none of these three requirements is met here:

First, Forest Road 652 has never been designated as "available" for public travel on any official Forest Service travel map, transportation atlas, or road access guide. No such official designation appears anywhere in the Administrative Record. To the contrary, the record confirms that Road 652 is not listed at all in the Nez Perce National Forest's Road Access Guides for any year from 1995 (earliest reference in the record) through 2008 (the latest official Access Guide). *See* SOF, ¶ 25-28.²

Second, Road 652 is not "passable by four-wheel standard passenger cars," under the second requirement above. *See* SOF, ¶ 10-15. Beyond the short stretch that was improved by the Wrights across their property, Road 652 is a rough track that cannot be driven by standard passenger cars, as illustrated by the Forest Service's own photographs in the record. *Id.* The Forest Service's internal records likewise show that most of Road 652 is designated only for "high clearance" vehicles. *Id.*

Third, Road 652 is not "open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restriction based on size, weight, or class of registration" under the third requirement of 23 C.F.R. § 460.2. The Forest Service itself approved a sign placed by the Wrights at the beginning of their property warning

² Although the Administrative Record contains materials from the Nez Perce National Forest's ongoing Travel Planning process, these are all draft materials that do not represent any final determination about whether Road 652 is a public road or not. *See* AR 324-28. To date, the Forest has only issued a draft EIS and a draft MVUM. *Id.* According to the Forest Service, road and trail designations contained in the Forest's existing 2008 Road and Trail Access Guides "will remain in place to use until the Forest MVUM map is available to the public." *See* SOF, ¶ 24. Again, the 2008 Road Access Guide does not even list Forest Road 652, much less identify it as an open public road. *Id.*

that Road 652 is a dead end road with no turn around. *See* SOF, ¶ 14. The road is also gated and locked where it enters the Ruby Neil property. SOF, ¶ 16. Although the Forest Service wrote a couple letters in the 1990's complaining about the locked gate, it never took action to remove the gate; and in fact installed its own lock on the gate. *Id.* Where the Forest Service thus agreed to Road 652 being blocked by a locked gate for over 20 years, it cannot now contend it is an ungated road open to public motor use.

In summary, the Court should confirm its Preliminary Injunction Order and enter summary judgment for Plaintiffs, holding that Defendant Hudson's November 20th "public road" determination regarding Road 652 was arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA and the legal authorities above.

II. DEFENDANT HUDSON ALSO PLAINLY ERRED IN ASSERTING THAT NO CLOSURE ORDER APPLIES TO ROAD 652.

On top of these flaws, the Administrative Record reveals another fatal defect in Defendant Hudson's November 20th decision: his plainly erroneous assertion that no closure order prohibits commercial use of Road 652.

As described above, Defendant Hudson first developed his theory that no permit was required for IDL to use Road 652 in a confidential email with the Regional NEPA coordinator, in which Hudson wrote that "FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. . . ." *See* AR 329 (Attachment B). He repeated this conclusion in the November 20th email to IDL, in which he stated: "There are no traffic use restrictions or orders associated with these roads. . . ." *See* AR 116 (Attachment C).

This assertion that Road 652 had no closure order, including "no restrictions on commercial hauling," was flatly wrong. As shown above, the Regional Forester issued a

closure order prohibiting commercial hauling without a permit on all Forest Service roads in Region One, including the Nez Perce National Forest, in May 2014 – just six months earlier. *See* AR 282 (Attachment A). That closure order meant that Road 652 was closed to commercial hauling without a Forest Service permit. Defendant Hudson got it exactly wrong when he concluded that no closure order existed on Road 652, and thus allowed IDL to use Road 652 for commercial hauling without requiring a permit. This obvious error thus compels entry of summary judgment for Plaintiffs, reversing and remanding the November 20th determination on this ground as well.

III. THE NOVEMBER 20TH DECISION FAILED TO ADDRESS THE 1977 SCENIC EASEMENT AND VIOLATED THE WILD AND SCENIC RIVERS ACT.

The final reason why the Court should enter summary judgment for Plaintiffs is that the November 20th decision wholly failed to consider the implications of the 1977 Wild and Scenic easement on the Wrights' property, and violated the Forest Service's duties to protect the Selway river corridor under the Wild and Scenic Rivers Act.

The Selway River was one of the original rivers protected by Congress when it enacted the Wild and Scenic Rivers Act in 1968. 16 U.S.C. § 1274(a)(1); SOF, ¶ 1. Sections 10(a) and 12(a) of the Act direct the Forest Service to ensure its management actions protect Wild and Scenic values within and adjacent to the designated Wild and Scenic corridor. *See* 16 U.S.C. §§ 1281(a) & 1283(a). Section 10(a) imposes the specific duty that the Forest Service must place “primary emphasis” on protecting scenic values:

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

16 U.S.C. § 1281(a) (emphasis added). Similarly, Section 12(a) mandates that the Forest Service “shall take such action respecting management policies, regulations, contracts, plans, affecting such rivers . . . as may be necessary to protect such rivers in accordance with the purposes of this Act.” 16 U.S.C. § 1283(a)(emphasis added).

Pursuant to the Wild and Scenic Rivers Act, the Forest Service has acquired numerous scenic easements to protect the Selway River’s wild and scenic corridor. This includes the 1977 scenic easement that covers all of the Wrights’ property, including where Road 652 crosses it. *See* SOF, ¶ 4-6 (AR 11). The 1977 easement prohibits industrial and commercial activities on the entire property, while also restricting public access to the property only along the riverbank, as reflected in the following provisions:

- * “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.”

AR 11; *see also* Preliminary Injunction Order, pp. 2-4.

The Administrative Record shows that some Forest Service staff debated internally about the potential implications of the 1977 scenic easement in early discussions about IDL’s proposed use of Road 652. *See* SOF, ¶ 31-32. However, after Defendant Hudson took over control of the project and developed his decision path in November, 2014, there is no evidence in the record that he considered the 1977 scenic easement or his duties under the Wild and Scenic Rivers Act at all. Certainly the key decision documents – his November 17th email to the Regional NEPA coordinator, and his November 20th decision itself – make no mention of the easement or the Act. *See* AR 116 & 329 (Attachments B & C).

The Forest Service adopted a 1969 River Plan for management of the Selway as well as the Lochsa and Middlefork Clearwater rivers after they were designated as Wild and Scenic Rivers. *See* SOF, ¶ 2. 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. Ex.1 (*Docket No. 3-1*) at 9 (“Access roads to serve private lands are to be controlled by scenic easements to ensure compatibility with development of the special planning area and with river environment protection”). This provision applies here, since IDL is seeking access to its property via Road 652; and the 1977 scenic easement is in place for the Wrights’ entire property. Yet again, Hudson never considered the 1969 River Plan nor did he evaluate whether allowing IDL to undertake industrial and commercial activities using Road 652 would be consistent with the 1969 River Plan, the 1977 easement, or the Wild and Scenic Rivers Act itself.

By failing even to consider, much less enforce, the 1977 scenic easement – which is certainly a vital consideration in light of the fact that Congress designated the Selway as a Wild and Scenic River in 1968 and directed the Forest Service to protect it – the November 20th determination must again be reversed under the APA. *See Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency determination is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem” 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 lacks authority to regulate industrial 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 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. The broadly-framed terms of the 1977 easement were drafted by the Forest Service to protect scenic, recreational and other values of the Selway Wild and Scenic River corridor. It cannot be simply ignored and unenforced now, as the Forest Service has done.

In short, the Forest Service has violated its statutory duty under the Wild and Scenic Rivers Act to place a "primary emphasis" on protecting scenic values; and the 1977 scenic easement acts as a "restriction on public use" of Road 652 across the Wrights' property, which demonstrates that even this portion of the road does not qualify as a "public road" under relevant definitions. At a minimum, the Forest Service erred by not even considering the impacts of the 1977 Wild and Scenic easement on whether Forest Road 652 qualifies as a "public road" in the November 20, 2014 determination, requiring reversal pursuant to the APA.

IV. THE FOREST SERVICE MUST EVALUATE IDL'S PROPOSED ROAD USE UNDER NEPA, THE WILD AND SCENIC RIVERS ACT, AND THE ESA.

In light of the facts, the appropriate remedy for Defendants' legal violations in this case should include not only reversing and setting aside the November 20th decision, but ordering that the Forest Service must issue a valid special use permit that complies with NEPA, the Wild and Scenic Rivers Act, and the ESA before IDL may utilize Road 652 in connection with its Selway Salvage project. *See NRDC v. Southwest Marine*, 236

F.3d 985, 1000 (9th Cir. 2000)(district courts have “broad latitude in fashioning equitable relief when necessary to remedy an established wrong,” including ordering measures “consistent with, and complementary to, existing permit requirements”).

The Wild and Scenic Rivers Act violations demonstrated here support this requested relief – a court order directing the Forest Service to adhere to its Wild and Scenic River Act duty to place a “primary emphasis” on protecting scenic values of the Selway River’s protected corridor is necessary to remedy its violation of this duty.

Moreover, as the discussion above shows, (NMFS) repeatedly advised that ESA consultation would be necessary over IDL’s proposed use of Forest Road 652, including potential impacts of its planned road construction and logging upon ESA-listed steelhead in the Selway River and tributaries. *See* SOF, ¶ 39, 42. NMFS rejected the Forest Service’s attempt to claim that a prior ESA programmatic consultation over road maintenance would be adequate. *Id.* NMFS’s concerns about potential adverse impacts of IDL’s activities are reinforced by the Forest Service’s own Johnson Bar Draft EIS, which concluded that “there could be measurable cumulative effects to fisheries” due to sedimentation impacts and landslide risks associated with IDL’s proposed road building and post-fire logging. *See* Johnson Bar Draft EIS, pp. 69-70 & 226-227 (*Docket No. 16-1*). The Johnson Bar Draft EIS underscores the need for the Court to direct the Forest Service to comply with its ESA consultation duties here in evaluating whether to issue a permit to IDL.

Similarly, based on the record, the Court should direct that the Forest Service must employ adequate NEPA procedures to fully disclose to the public the proposed action and potential impacts. Even before Defendant Hudson avoided NEPA entirely by

saying no permit was required, his staff were seeking to sidestep NEPA public disclosure through use of a Categorical Exclusion (“CE”). *See* SOF, ¶ 37-38. In light of the national significance of the Selway River Wild and Scenic corridor, and the Forest Service’s duty under the Wild and Scenic Rivers Act to ensure its management actions protect scenic values, the agency must fully assess IDL’s proposed action under NEPA to evaluate consistency with the 1969 River Plan and other resource protections. *See* 36 C.F.R. § 251.54(e)(5) & Forest Service Handbook 1909.15, chapter 31.2 (providing that the “public shall receive adequate notice and an opportunity to comment upon a special use proposal” under NEPA, and that Forest Service must determine whether the proposed activity conforms with resource management plans and does not “materially impact” environmentally sensitive resources or lands, including Wild and Scenic River corridors).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter summary judgment in their favor; reverse and set aside the November 20th decision; and order that the Forest Service must issue a valid permit that complies with NEPA, the Wild and Scenic Rivers Act, and the ESA before IDL may utilize Road 652 in connection with its Selway Salvage project.

DATED: August 3, 2015. Respectfully submitted,

/s/ Laird J. Lucas
Laurence (“Laird”) J. Lucas (ISB 4733)
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United

/s/ Deborah Ferguson
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208-345-5183
daf@fergusondurham.com
Attorney for Plaintiffs Morgan and Olga
Wright

Attachment A

Regional Order Prohibiting
Commercial Hauling
AR 312

Order # R1-2014-02

REGIONAL ORDER
Occupancy and Use Restrictions
Northern Region

Pursuant to Title 16 United States Code ("USC") 551, and Title 36 Code of Federal Regulations ("CFR") 261.50(a) and (b), the following acts are prohibited on all National Forest System lands administered as National Forests or National Grasslands within the Northern Region (Region 1) of the United States Forest Service in the states of Idaho, Montana, North Dakota, South Dakota and/or Washington. This Regional Order is supplemental to and does not rescind or replace those restrictions at 36 CFR 261 Subpart A, and/or any Forest Supervisor Order issued under 36 CFR 261 Subpart B. This Regional Order is necessary to protect public health and safety and to provide the public with consistent restrictions in the Northern Region.

National Forests

Bitterroot
Custer-Gallatin
Helena
Kootenai
Lolo

National Forests

Beaverhead-Deerlodge
Flathead
Idaho Panhandle
Lewis & Clark
Nez Perce-Clearwater

National Grasslands

Dakota Prairie

PROHIBITIONS:

1. Operating any motor vehicle on National Forest System roads in violation of applicable state, county or local government law, regulation and/or ordinance relating to the use and possession of motor vehicles. 36 CFR 261.54(d)
2. Cause or knowingly permit a child under the age of eighteen (18) years to operate a motor vehicle upon any national forest system road when the child or ward is in violation of any applicable state vehicle code provision. 36 CFR 261.53(e)
3. Operating a vehicle carelessly, recklessly or without regard for the rights or safety of other persons or in a manner or at a speed that would endanger or be likely to endanger any person or property on National Forest System roads. 36 CFR 261.54(f)
4. Parking or leaving a vehicle in violation of posted instructions. 36 CFR 261.58(g)
5. Using snow removal or grooming equipment on National Forest System roads without a permit or written authorization from the Forest Service. 36 CFR 261.54(a)
6. Using a National Forest System road for commercial hauling without a permit or written authorization from the Forest Service. 36 CFR 261.54(c)
7. Possessing or consuming a beverage which is defined as an alcoholic beverage by state law in violation of state, county or local law or ordinance. 36 CFR 261.58(bb)

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8. Possessing a drug or other controlled substance, or immediate precursor, included in schedules I, II, III, IV or V of Part B of the Controlled Substances Act (21 USC 812) unless such substance was obtained by the possessor directly, or pursuant to a valid prescription or order, from a practitioner acting in the course of professional practice or otherwise allowed by Federal or State law. 36 CFR 261.53(e)
9. Possessing, discharging or using any kind of firework or pyrotechnic device. 36CFR 261.52(f)
10. Operating or using any internal or external combustion engine without a spark arresting device properly installed, maintained, and in effective working order, meeting either: (1) Department of Agriculture, Forest Service Standard 5100-1a (as amended); or (2) Appropriate Society of Automotive Engineers (SAE) recommended practice J335(b) and J350(a). 36 CFR 261.52(j)

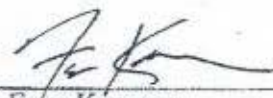
EXEMPTIONS:

Pursuant to 36 CFR 261.50(e), the following persons are exempt from this order:

1. Persons with a Forest Service permit specifically authorizing the otherwise prohibited act or omission.
2. Persons utilizing motorized vehicles to provide incidental services and supplies for holders of National Forest System inholdings, for holders of Forest Service special use authorizations, and/or for authorized public services, are exempt from Prohibition 6. "Incidental" is defined for the purposes of this Regional Order as the occasional delivery of fuel, food and other necessary supplies, or provision of services to the above described holders and/or authorized users.
3. Persons who have attained the age of 21 years are exempt from Prohibition 7 to the extent not otherwise restricted by applicable federal, state or local law.
4. Any Federal, State, or local officer, or member of an organized rescue or fire fighting force in the performance of an official duty are exempt from Prohibitions 1, 4, and 5. Any Federal, State or local law enforcement officer in the performance of an official duty is exempt from Prohibition 7, 8 and 9 when described items are seized as evidence in a criminal matter.

This Regional Order shall be in effect for a period of two years from the date signed below, or until rescinded.

Done at Missoula, Montana this 1st day of MAY, 2014



Faye Krueger
Regional Forester
Northern Region

Violation of Title 36 Code of Federal Regulation ("36 CFR") regulations are punishable as a Class B misdemeanor, by a fine of not more than \$5,000 for an individual or \$10,000 for a legal entity other than an individual, or imprisonment for not more than six (6) months, or both (16 USC 551 and 18 USC 3559 and 3571).

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Attachment B

E-mails Between Hudson
and Zimmerman
November 17, 2014
AR 329

From: [Zimmerman, Peter N -FS](#)
To: [Hudson, Joe B -FS](#)
Cc: [Campbell, Alan - OGC](#); [Krause, Joel -FS](#)
Subject: RE: road use permit
Date: Monday, November 17, 2014 12:34:54 PM
Attachments: [FR_470_652_public_road_designation.docx](#)

Joe, A+ work from where I sit. The definition of road use permit helps a lot. I see no need to issue RUP for the defined purposes of that permit.

That said, the regs. and our manual authorize (and at least encourages us) to protect our investment through maintenance agreement, collections, or the like in the case of commercial haul. The RUP is our normal means to do that, so should we find some other means to cover that need? Something you might consider, but outside my expertise as far as suggestions go.

Notice I'm cc'ing this to Alan and Joel in case they have better read. Call if any questions. Thanks Joe.

Pete Zimmerman
USDA Forest Service, Northern Region
NEPA, Litigation, and Whatnot
(406) 329-3168
See what's new on the [R1 NEPA FSweb](#)

From: Hudson, Joe B -FS
Sent: Monday, November 17, 2014 1:08 PM
To: Zimmerman, Peter N -FS
Subject: RE: road use permit

Hi Pete, Not planning on sharing this widely but wanted to share with you to see if I am on the right track in my interpretation regarding our discussion on Friday. Thanks.

From: Zimmerman, Peter N -FS
Sent: Friday, November 14, 2014 1:46 PM
To: Hudson, Joe B -FS
Subject: FW: road use permit

Pete Zimmerman
USDA Forest Service, Northern Region
NEPA, Litigation, and Whatnot
(406) 329-3168
See what's new on the [R1 NEPA FSweb](#)

From: Adams, Guy H -FS

Sent: Friday, November 14, 2014 1:09 PM
To: Zimmerman, Peter N -FS
Subject: FW: road use permit

Here you go.

Guy H. Adams
Land Adjustments, USFS, Northern Region (R1)
PO Box 7669 (200 E. Broadway) Missoula, MT 59807
Office: 406-329-3581, Fax: 406-329-3536
ghadams@fs.fed.us

From: Joy, Janne M -FS
Sent: Friday, November 14, 2014 1:07 PM
To: Adams, Guy H -FS
Cc: Joy, Janne M -FS
Subject: road use permit

From FSM 7700; Chapter 7730 – Road Operation and Maintenance**7730.5 - Definitions**

Public Road. A road that is:

1. Available, except during scheduled periods, extreme weather, or emergency conditions.
2. Passable by four-wheel standard passenger cars; and
3. Open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration.

FS Road Use Permit: A written authorization issued pursuant to Title 36, CFR, part 212, Subpart A, that ***allows an act or omission on an NFS road or NFS road segment and associated transportation facilities that would otherwise be in violation of a traffic rule in effect on the road, including:***

1. *Use of a closed road to access non-federal property.*
2. *Commercial hauling on a road where that use is otherwise restricted.*
3. *Motor vehicle use on an NFS road that is not designated for that purpose*

FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. The 1936 ROW's were granted "*for the construction, repair, maintenance, and operation of a common, main, or State public highway. . .*". The ROW also states "*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*".

The roads in question meet the definition of public roads. There are no traffic use restrictions or orders on these roads, nor does IDL propose any use outside what is already authorized by regulation or law. The risks associated with road or resource damage involved with the Idaho Department of Land's use of the Forest Service segments of the roads are minimal. The proposed use or action involves existing roads and there will be no changes in the road design standards, road prism (reconstruction) or departures from road traffic rules that are currently in effect. (Resulting land uses remain essentially the same). The proposed activity continues the existing use of the involved land and no change in the physical environment or facilities are proposed. Therefore there is no requirement for the Forest Service to issue a road use permit.

7731.17 – Road Use Permits (7731.17, 3(b),(3))

Road use permits issued for use of NFS roads designated for motor vehicle use (other than when public use is restricted by a designation for motor vehicle use by time of year) are not subject to NEPA or ESA analysis because these roads are available for public use under 36 CFR 212.6(b) and (c).

Access for Owners of Non-Federal Property:

Section 1323(a) of the Alaska National Interest Lands Conservation Act (ANILCA) provides owners of non-federal property within the boundaries of the NFS certain rights of access across NFS lands. The responsible official may prescribe such terms and conditions as the official deems adequate to secure to non-federal property owners the reasonable use and enjoyment of their property.

Key Points:

For all practical purposes, FS roads 470 and 652 need no special authorization or permit for the State of Idaho to use for commercial timber haul because that use is currently authorized since the roads are open, public roads with no traffic use restrictions in place, including commercial haul or other use restrictions. Road use permits are only required when commercial hauling is restricted by a forest supervisor's order.

The State of Idaho proposes to use the FS segments of the roads in basically an as is condition with no significant improvements other than minor, routine maintenance activities. The risks associated with road or resource damage involved with the Idaho Department of Lands use of the Forest Service segments of the roads are minimal.

The primary purpose for issuance of a Road Use Permits is as a mechanism or instrument to collect funds for road maintenance. There are other mechanisms to share costs with users already authorized use.

Attachment C

Hudson's Decision
November 20th, 2014
AR 116

From: Hudson, Joe B -FS
To: zanderson@idl.idaho.gov
Cc: [Hudson, Joe B -FS](#); [Probert, Cheryl -FS](#); [Brazell, Rick -FS](#); [Windsor, Michele A -FS](#)
Subject: FR 470 and 652 Road Use Acknowledgement for IDL Salvage Project
Date: Thursday, November 20, 2014 12:43:00 PM

Zoanne,

After reviewing your road use permit application for Forest Roads 652 and 470, I have determined that it is not necessary to issue Idaho Department of Lands (IDL) a road use permit for these roads in order for IDL to haul commercial timber from IDL lands. Forest Service managed portions of these roads are recognized as "public roads"; 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. Forest Roads 652 and 470 meet the definition of a public road. There are no traffic use restrictions or orders associated with these roads, nor does IDL propose any use on these roads outside what is already authorized by regulation or law. Forest Service Policy in FSM 7700 does not require a road use permit under these conditions. By this e-mail I am simply acknowledging that IDL has such authorization for their prescribed use and is not required to obtain a road use permit.

As we have previously discussed, The Forest and IDL will need to agree upon a level of road maintenance that IDL will perform commensurate with the use.

*Joe B. Hudson
District Ranger
Moose Creek Ranger District
Nez Perce-Clearwater National Forests
208-926-8930 - office
208-983-6467 - cell*

IDAHO RIVERS UNITED, and)
MORGAN and OLGA WRIGHT,) No. 3:15-cv-00169-BLW
)
Plaintiffs,)
)
PLAINTIFFS’ SEPARATE
vs.) **STATEMENT OF**
) **UNDISPUTED FACTS**
)
DISTRICT RANGER JOE HUDSON)
in his official capacity, and UNITED)
STATES FOREST SERVICE,)
)
Defendants.)

Pursuant to Local Civil Rule 7.1(b)(1), Plaintiffs submit this Separate Statement of Undisputed Facts in support of their Motion for Summary Judgment. Documents from the Administrative Record (*Docket No. 22*), are cited below as “AR ___”:

The Selway Wild and Scenic River Corridor

1. The Selway River was one of the original rivers protected by Congress under the 1968 Wild and Scenic Rivers Act. 16 U.S.C. § 1274(a)(1). Under the Act, the Forest Service must take actions to protect the Selway River’s Wild and Scenic values within, and adjacent to the designated Wild and Scenic river corridor. 16 U.S.C. §§ 1281(a) & 1283(a). The river corridor extends for one-quarter of a mile from each side of the Selway River. Gov’t Answer (*Docket No. 20*) ¶ 16.

2. The Forest Service adopted a river management plan for the Selway River in 1969. Gov’t Answer (*Docket No. 20*) ¶ 19. The 1969 River Plan established 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.*; Lewis Decl. Ex.1 (*Docket No. 3-1*) at 9.

The Wright’s Property

3. Plaintiffs Morgan and Olga Wright built and maintain a home at 111 Swiftwater Road, Kooskia, Idaho, immediately east of where the Swiftwater Bridge crosses the Selway River. The Wrights access their property and home via Forest Road 652, which is a short spur road off of Forest Road 470 (Swiftwater Creek Road). AR 52; Wright Decl. (*Docket No. 7-3*) ¶ 3; Hudson Decl. Ex. 2 (*Docket No. 15-3*).

4. The Wrights’ property is located entirely within the Selway River Wild and Scenic corridor, and is encumbered by two easements held by the Forest Service: a

1977 Wild and Scenic Easement that restricts development on the entire property, and a 1937 right-of-way for a forest road. AR 1 & 12; Gov't Answer (*Docket No. 20*) ¶ 21.

5. The 1977 Wild and Scenic easement expressly prohibits industrial and commercial use of the Wrights' property, including the 1937 right-of-way where Forest Road 652 is located. AR 11 & 44; Gov't Answer (*Docket No. 20*) ¶ 24.

6. The Wrights purchased their property because of the Wild and Scenic values of the Selway River corridor, and relied on the scenic easement for assurance that the Forest Service would protect those values. Wright Decl. (*Docket No. 7-3*) ¶¶ 2, 8.

Forest Road 652

7. In 1937, the Wright's predecessor granted an easement to the Forest Service for 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." Forest Road 652 is located within this right-of-way. AR 1; Gov't Answer (*Docket No. 20*) ¶ 22.

8. The easement across the Wright's property has been measured by the Forest Service as 765 feet long. *See* Hudson Decl. (*Docket No. 15-1*) ¶¶ 6, 8.

9. After the initial 765 foot section on the Wright's property, Forest Road 652 enters a parcel of Idaho state endowment land. There are no easements on the state land for Forest Road 652. AR 38, 50; Hudson Decl. (*Docket No. 15-1*) ¶ 9.

10. After the state parcel, Forest Road 652 passes through a locked gate and enters another parcel of private property known as the "Ruby Neil" property. AR 48, 275; Gov't Answer (*Docket No. 20*) ¶ 57. The Ruby Neil property is encumbered by a 1936 easement that contains the same language and was obtained for the same purposes as the 1937 easement on the Wright's property. AR 2.

11. The Forest Service never built the Goddard Point Road #289 Project for which the 1936 and 1937 easements were obtained. Forest Service records indicate the Civilian Conservation Corps constructed less than 2 miles of rough road where Forest Road 652 is located today. AR 34, 52 & 55.

12. Forest Road 652 is designated as a “forest road” because it provides access to National Forest lands. AR 275, 308; Hudson Decl. (*Docket No. 15-1*) ¶¶ 6-8 & Ex. 2 (*Docket No. 15-3*).

13. Forest Road 652 was entirely unimproved dirt surface until 2010, when Plaintiff Morgan Wright graveled the first 765 feet at his own expense. *See* AR 55-57; 2d Ferguson Decl. (*Docket No. 16-2*) ¶ 2.

14. The Wrights have posted a Forest Service-approved sign at the beginning of Forest Road 652 stating: “Dead End. No Turn Around.” AR 226, 227, 231; Gov’t Answer (*Docket No. 20*) ¶ 23.

15. Forest Road 652 is not passable in a standard four-wheel passenger car beyond the initial 765 feet on the Wright’s property; and is shown as suitable only for “high clearance, pickup truck, or four wheel drive” vehicles on Forest Service records. *See* AR 52, 234, 246, 248; Mullinix Decl. (*Docket No. 7-6*) ¶ 34.

16. A locked gate on Forest Road 652 at the Ruby Neil property line has existed for approximately thirty years. The Forest Service maintains a key to that locked gate. AR 251; Gov’t Answer (*Docket No. 20*) ¶ 57; Lewis Decl., Ex. 12, photo 5 (*Docket No. 8-10*).

17. No public authority maintains Forest Road 652. AR 336-341; Answer by Def. Intervenor (Docket No. 3-1) ¶¶ 19, 42; Mullinix Decl. (Docket No. 7-6) ¶ 32-33; 2d Ferguson Decl. (Docket No. 16-2) ¶ 2.

18. The only record of Forest Service maintenance for Road 652 is the replacement of one culvert in 1987. AR 57; Hudson Decl. Ex. 14 (Docket No. 15-15).

19. The Administrative Record contains annual maintenance reports for the Moose Creek District (where Road 652 is located), for the years 2002 through 2011. AR 336-341. These maintenance reports show regular maintenance by the Forest Service and the Kidder Harris Highway District of Road 470, the improved road that crosses the Selway River over the Swiftwater Bridge. But only the first three years' reports even mention Road 652; and those three reports say only that the Forest Service might look at the road to evaluate work that might need to be done. *Id.* There is no record of the Forest Service actually looking at the road or doing any maintenance whatsoever. *Id.*

20. Commercial hauling without a permit is prohibited on all Nez Perce National Forest System roads, including Road 652, by order of the Regional Forester. The Order was signed on May 1, 2014, and is effective for two years. AR 283.

Nez Perce National Forest Travel Planning Process

21. The Nez Perce National Forest, where Forest Road 652 is located, began a travel management planning process in May 2007, when it published a Notice of Intent to prepare an Environmental Impact Statement ("EIS") for Designated Routes and Areas for Motor Vehicle Use ("DRAMVU"). After completion of the DRAMVU EIS, the Forest Service will publish a Motor Vehicle Use Map ("MVUM"). AR 290, 325; Gov't Answer (Docket No. 20) ¶ 34; Lewis Decl., Exh. 14 (Docket No. 8-12).

22. In December 2008, the Nez Perce National Forest released a draft EIS for

PLAINTIFF'S SEPARATE STATEMENT OF FACTS – 4

public comment; and then released a Supplemental Draft EIS in December 2010. Gov't Answer (*Docket No. 20*) ¶ 35; Lewis Decl., Exh. 14 (*Docket No. 8-12*).

23. To date, the Nez Perce National Forest has not issued a final EIS, and no Record of Decision has been issued adopting an MVUM for the Nez Perce National Forest. Gov't Answer (*Docket No. 20*) ¶ 36.

24. According to the Nez Perce National Forest's website, road and trail designations contained in the Forest's existing 2008 Road and Trail Access Guides "will remain in place to use until the Forest MVUM map is available to the public." Gov't Answer (*Docket No. 20*) ¶ 37; Lewis Decl., Exh. 14 (*Docket No. 8-12*). The website also indicates that the 2008 Access Guides were prepared in 2007, and "have not been recently updated by the forest." *Id.*

25. Forest Road 652 is not listed as an open public road on the Nez Perce National Forest's 2008 Road Access Guide; in fact, Road 652 is not listed at all in the 2008 Road Access Guide. AR 150. By contrast, the 2008 Road Access Guide lists many other forest roads as being open to motorized travel, and also shows closures or limits on motorized travel on forest roads. *Id.*

26. Prior Nez Perce National Forest Road Access Guides in the record also did not list Road 652 in 1995, 2003, and 2007. AR 7, 148-150.

27. The 2013 Nez Perce National Forest Map shows the location of Road 652 as an "unimproved dirt" road, but does not include any number for the road or designate it as a highway or access route suitable for automobile traffic. AR 133; Gov't Answer (*Docket No. 20*) ¶ 38; Lewis Decl. Ex. 13 (*Docket No. 8:11*).

The Forest Service's Decision To Allow IDL's Commercial Use of Road 652

28. The Johnson Bar wildfire burned mostly federal lands along the Selway

and Middle Fork Clearwater Rivers in August 2014. *See* March 2015 Johnson Bar Draft EIS (*Docket No. 16-1*). The fire also burned portions of the IDL state endowment land parcel along the Selway River, which neighbors the Wrights' property there. AR 77.

29. On September 2, 2014, IDL contacted the Forest Service about using Forest Roads 470 and 652 in connection with its planned salvage logging on the state parcel. AR 38.

30. This request sparked a series of emails between Forest Service staff that reveal the Forest Service's own confusion about the status of Road 652. AR 38-44.

31. For example, in response to IDL's request, the Nez Perce Forest's fisheries biologist asked its realty specialist "if you could tell me who has jurisdiction for maintenance on Forest Road 652. . . . who has overall maintenance responsibilities and do any of the others involved have easements or responsibilities[?]" AR 39, p. 2. The realty specialist in turn wrote to Forest engineers, asking if they had information on the road. *Id.*, p. 1. The specialist noted that the Forest Service had no easement over the IDL parcel; and opined that "NEPA may not apply to the State if the road across State is considered a State Road." *Id.*

32. On September 8, 2014, a meeting was held with IDL and the Forest Service's interdisciplinary team addressing post-fire rehabilitation from the Johnson Bar fire. AR 61. Meeting notes reflect the parties' discussion that the:

State will complete and submit to Forest Service, an application for Road Use Permit across segments of NFS Road 470 and 652, along with Operation and Maintenance Plan, for review and approval by Forest Service. NEPA for permit will be completed by FS Johnson Fire BAER Team. . . State does not have an easement across Roads 470 or 652 and will need a permit to haul commercially.

Id. The notes also show that the Forest Service advised IDL that the “area is within W&S [Wild and Scenic] corridor and proposals will be reviewed for compliance under FS Rules and Regulations.” *Id.*

33. Reflecting the Forest Service’s ongoing confusion about the status of Road 652, a conference call among Forest Service staff was held on September 26, 2014 to discuss “existing conditions, easements, and proposed road use permit(s) and the associated NEPA and [ESA] consultation that may be necessary. Desired outcome – understanding the procedural requirements necessary for commercial use of road 652 and Elk City Creek Road and a plan for communicating those to State and Private landowners.” AR 41.

34. Similarly, on October 3, 2014, an email exchange with Forest and regional staff (and counsel) sought input on how the 1977 scenic easements for private parcels (including the Wrights’ land) might affect the IDL proposal. *Id.*; AR 44.

35. On October 10, 2014, IDL submitted a special use permit application to the Forest Service for use of Roads 470 and 652 in connection with its Selway Salvage project. AR 15. It sought a permit for “commercial use of roads restricted by order,” and explained that IDL sought to “haul approximately 6,150 MBF of sawlogs associated with the sale and salvage of State of Idaho burnt timber during the Johnson Bar fire in the summer of 2014 across the existing graveled portion of the 652 road to the 470 road and then out to the Selway River Road.” *Id.* A map showing the road network that IDL planned to construct on its land for the salvage logging was attached. *Id.*

36. In response to IDL’s permit application, Defendant Hudson sent an email to his staff on October 16, 2014, stating “I am going to need an ID [inter-disciplinary]

team to assess and analyze the situation and figure out exactly what our NEPA responsibilities are.” AR 63. The ID team included the Forest’s fisheries biologist, NEPA specialist, and Wild and Scenic coordinator. *Id.*

37. The NEPA specialist then wrote the Regional NEPA coordinator for assistance in determining what NEPA compliance was necessary, but stating: “We would like to use a CE [Categorical Exclusion] category for the permit if possible.” AR 64.

38. A call was conducted on October 27, 2014 between Forest and Regional Staff to address whether a road use permit could be issued using a CE, in which regional counsel apparently advised (according to notes of the call) that the permit could be issued under a road management CE category using a programmatic ESA consultation, but noting: “Possible we could get litigated but let that happen.” AR 66 & 67.

39. Meanwhile the Forest’s fisheries biologist on the ID team contact the National Marine Fisheries Service (“NMFS,” also called NOAA Fisheries) to discuss potential Endangered Species Act consultation requirements associated with the permit application. AR 20. Following standard ESA consultation procedures, NFMS advised (and the Forest fisheries biologist concurred), that ESA consultation would be needed over the potential impacts of IDL’s road construction and logging activities associated with the requested Forest Service permit, and could not be covered by prior programmatic road maintenance consultation. *Id.*

40. This information was communicated to IDL at a site meeting conducted on October 29, 2014 and by email. AR 22 & 273. IDL immediately wrote to Defendant Hudson to complain about the Forest Service analyzing IDL’s road construction and logging proposals in connection with the road use permit application. *Id.*

41. In response, Defendant Hudson wrote his staff on October 31, 2014, instructing that only he (and two other higher level officials) would deal with NMFS in the future, and directing that ESA consultation would not occur over IDL's proposed activities. AR 22. Hudson also stated that: "As the responsible line officer for the road use permit, I will determine how I proceed with NEPA." *Id.*

42. Following a meeting on November 4, 2014, NMFS wrote Hudson to confirm its reading that ESA consultation would be required over IDL's proposed activities in conjunction with the requested road use permit. AR 23. After Hudson protested that the permit could be approved under the prior programmatic road maintenance consultation, NFMS disagreed; and reiterated that a site-specific consultation was required. AR 25.

43. Defendant Hudson then developed an approach to avoid having to issue any Forest Service permit – and thus avoid NEPA and ESA compliance – by determining that Road 652 is a "public road," open to public use, and without any closures. He developed this theory in a private email dated November 17, 2014, to the Regional NEPA coordinator. AR 329. As stated in a memo attached to that email, Hudson determined that no permit was necessary because:

FS Roads 652 and 470 are both open, public NFS road segments with no traffic use restrictions, including no restrictions on commercial hauling. . . . The proposed activity continues the existing use of the involved land and no change in physical environment or facilities are proposed. Therefore there is no requirement for the Forest Service to issue a road permit.

Id. The Regional NEPA coordinator responded to this abrupt reversal in the Forest Service's prior position that a permit would be required, saying: "Joe, A+ work from where I sit." *Id.*

44. Defendant Hudson then had a call with IDL on November 19, 2014, in which he relayed this news. AR 117. IDL asked for confirmation in writing, to which Hudson replied: “I need to carefully word.” *Id.*

45. The next day, November 20, 2014, Hudson sent his written decision to IDL, stating his determination that IDL did not require a Forest Service permit to utilize Road 652 in conjunction with its Selway Salvage project. AR 116.

Post-Litigation Record

46. The Administrative Record includes a large number of documents generated in May and June 2015 regarding Road 652, including internal memos that sought to pull together all information in Forest Service files about the past history of the road. AR 28-29, 46-59, 68-69, 141-142, 145, 153-263, 318, 320, 322, 332-334.

47. The record materials show that Forest staff, even then, could not figure out whether Road 652 had ever previously been designated in any official Forest map or access guides as being open to motorized use. *Id.* The Forest created new maps of the road and took new photographs – none of which existed at the time of Hudson’s November 20th decision. *Id.*

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Respectfully submitted,

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