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

IDAHO RIVERS UNITED,)	
)	No. 01:11-cv-095-CWD
Plaintiff,)	
)	
vs.)	FIRST AMENDED
)	COMPLAINT
)	
UNITED STATES FOREST SERVICE,)	
UNITED STATES FEDERAL HIGHWAY)	
ADMINISTRATION,)	
)	
_____ Defendants.)	

INTRODUCTION

1. Plaintiff IDAHO RIVERS UNITED (“IRU”) brings this case to protect the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and the Northwest Passage Scenic Byway from the degradation and threats posed by hundreds of “mega-loads” of massive oil refining equipment that have recently been approved for transport up U.S. Highway 12 through the Wild and Scenic River corridor.

2. Specifically, IRU challenges the U.S. Forest Service’s determination that, because the federal government previously granted an easement to the Idaho Transportation Department (“ITD”) to maintain and operate U.S. Highway 12 across the Clearwater National Forest, the Forest Service lacks jurisdiction or authority to enforce

federal laws within the corridor, as set forth in a September 2010 final decision by the Clearwater National Forest Supervisor. IRU also challenges the Federal Highway Administration's ("FHWA") refusal to enforce federal transportation laws and the terms of the Highway Easement Deed to prevent the expansion of the easement.

3. ITD has already authorized over 200 mega-loads – most by Exxon Mobil and its Canadian subsidiary, Imperial Oil ("Exxon-Imperial") – to travel up Highway 12 from Lewiston to the Lolo Pass, along the Clearwater/Lochsa Wild and Scenic river corridor. These loads are so massive that they will take up both lanes of the highway and necessitate the use of a rolling roadblock, as well as modifications to this scenic area's rocks and vegetation. The use of Highway 12 to transport such mega-loads would effectively convert this multi-use, scenic byway into an industrial, high-and-wide corridor, destroying or degrading the scenic and recreational values that led Congress to designate the Middle Fork Clearwater/Lochsa Rivers among the nation's first Wild and Scenic Rivers and that led FHWA to designate Highway 12 as a scenic byway and All-American Road.

4. The Forest Service and FHWA have determined that they have no jurisdiction or authority to regulate the use of Highway 12 by mega-loads. Rather than acting to prevent the establishment of a high-and-wide corridor through the Clearwater National Forest, the Forest Service has cooperated with ITD and authorized modifications to the surrounding forest. FHWA has written the matter off as a "state issue." As a result, the Forest Service and FHWA have facilitated and effectively approved the mega-loads to proceed up Highway 12.

5. Contrary to the Forest Service’s position, the agency not only retains jurisdiction and authority over the Highway 12 right-of-way, but also has a mandatory duty to enforce applicable federal laws and regulations—including the Forest Service’s regulations, the Clearwater Forest Plan, and the Middle Fork Clearwater/Lochsa River Plan—in order to “protect and enhance” the outstandingly remarkable values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor.

6. Likewise, FHWA has a mandatory duty to enforce federal transportation laws and regulations—including the U.S. Highway 12 Highway Easement Deed and the FHWA’s National Scenic Byways Interim Management Policy—to ensure that federally funded projects are properly maintained.

7. By abdicating jurisdiction, facilitating ITD, and refusing to enforce the numerous legal authorities that protect the federal public lands and transportation projects that may be impacted, either directly, indirectly, or cumulatively by these mega-loads and the conversion of Highway 12 into a high-and-wide corridor, the Forest Service and FHWA have violated their responsibilities and mandatory duties under the Wild and Scenic Rivers Act, the National Forest Management Act, Section 116 of U.S. Code Title 23 (“Section 116”), and other provisions of law.

8. Plaintiff IRU accordingly seeks judicial review, as well as declaratory and/or injunctive relief, from this Court in order to forestall the conversion of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and the Northwest Passage Scenic Byway into an industrial, high-and-wide corridor for mega-loads, and to prevent the irreparable injuries to the Plaintiff and its members that would result from this conversion.

JURISDICTION AND VENUE

9. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, the National Forest Management Act, 16 U.S.C. § 1601 et seq. (“NFMA”); the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (“APA”); the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; 23 U.S.C. § 116; 23 U.S.C. § 317; and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq. (“EAJA”).

10. An actual, justiciable controversy now exists between Plaintiff and Defendants. The requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 701-06.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events and/omissions giving rise to the claims herein occurred within this judicial district, and the Plaintiff operates and members reside in this district.

12. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701.

PARTIES

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

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

15. Defendants' violations of law as alleged herein adversely and irreparably injure the aesthetic, commercial, conservation, scientific, recreational, educational, economic, and other interests of Plaintiff's staff, board of directors, and members. These are actual, concrete injuries caused by Defendant's violations of law, for which judicial relief is required to remedy the harm caused to Plaintiff.

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

17. Defendant U.S. FEDERAL HIGHWAY ADMINISTRATION is an agency or instrumentality of the United States, within the Department of Transportation. FHWA is charged with administering federal aid highways, including U.S. Highway 12, and is vested by law with the authority to appropriate and transfer lands owned by the United States to state highway departments for highway purposes.

LEGAL BACKGROUND

A. The Forest Service's Authority to Regulate Activities on Rights-of-Way in the National Forests.

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

19. Congress has exercised this authority in establishing the U.S. Forest Service to manage public lands and resources within the National Forest system. Through the Organic Administration Act of 1897 (codified as amended at 16 U.S.C. §§ 473-82, 551), the National Forest Management Act (“NFMA”) of 1976, 16 U.S.C. 1600 et seq., and other legislation, Congress has vested the Forest Service with broad authority to regulate activities on and occupancy of the National Forests. 16 U.S.C. § 551.

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

21. In adopting NFMA, Congress found, “the Forest Service . . . has both a responsibility and an opportunity to be a leader in assuring that the nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity.” 16 U.S.C. § 1600(7).

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

develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, developing energy resources, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises.

7 U.S.C. § 1010 (emphasis added).

23. Pursuant to this authority, the Forest Service has adopted regulations governing the occupancy and use of the National Forests. Under the regulations, all uses of the National Forests – other than a list of enumerated exceptions not applicable here – “are designated ‘special uses’ and must be approved by an authorized officer.” An individual or entity must obtain a special use permit before making a “special use” of a National Forest. 36 C.F.R. § 251.50(a).

24. The Forest Service’s regulations also prohibit particular activities within the National Forests. 36 C.F.R. §§ 261.1-261.78. These prohibitions extend to activities that would affect Forest Service property or people using the National Forests, as well as acts and omissions that “occu[r] within the designated boundaries of a component of the National Wild and Scenic Rivers System.” 36 C.F.R. § 261.1(a)(2)-(4).

25. Among other restrictions, the Forest Service's regulations prohibit damaging natural features, 36 C.F.R. § 261.9(a); "[p]lacing a vehicle or other object in such a manner that it is an impediment or hazard to the safety or convenience of any person," 36 C.F.R. § 261.10(f); and using a device that produces noise near a campsite "in such a manner and at such a time so as to unreasonably disturb any person." 36 C.F.R. § 261.11(i).

26. With regard to roads located on National Forest land, the Forest Service's regulations prohibit "[d]amaging and leaving in a damaged condition any such road, trail, or segment thereof," as well as "[b]locking, restricting, or otherwise interfering with the use of a road, trail, or gate." 36 C.F.R. § 261.12(c)-(d).

27. Under the Property Clause and other provisions of law, the federal government has broad authority and jurisdiction to regulate easements and other rights-of-way on the federal lands, including use of highways located on the National Forests. *See United States v. Gates of the Mountain Lakeshore Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988); *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993); *United States v. Jenks*, 22 F. 3d 1513, 1518 (10th Cir. 1994); *Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994); *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584, 589 (8th Cir. 1995); *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005)(all confirming federal government's broad authority to regulate rights-of-way or easements on federal lands). *See also Lauran v. U.S. Forest Service*, 141 Fed. App'x 515, 519 (9th Cir. 2005) (noting that the Forest Service has authority to regulate activities within state rights-of-way for highways that travel through the National Forests).

B. The Wild and Scenic Rivers Act.

28. Congress delegated additional authority over the federal lands to the Forest Service through the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287.

29. As stated in Section 1(b) of the Wild and Scenic Rivers Act, Congress declared it to be,

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

16 U.S.C. § 1271(b).

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

31. The Middle Fork Clearwater, Lochsa, and Selway Rivers of north central Idaho were among the original rivers designated by Congress as part of the Wild and Scenic Rivers System in Section 3(a) of the Wild and Scenic Rivers Act. 16 U.S.C. § 1274(a)(1).

32. For these originally designated rivers, Section 3(b) of the Wild and Scenic Rivers Act directed the Forest Service (as the “agency charged” with their administration) to “designate detailed boundaries” for the rivers and their associated corridors within the Wild and Scenic Rivers system, and provided that such boundaries “shall include an average of not more than 320 acres of land per mile measured from the ordinary high

water mark on both sides of the river.” 16 U.S.C. § 1274(b). Congress also directed the agency to determine which of the protections available under the Wild and Scenic Rivers Act – *i.e.*, wild, scenic, or recreational – apply to these originally designated rivers. *Id.*

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

34. The Forest Service designated the Middle Fork Clearwater and Lochsa Rivers as “recreational” primarily because of the presence of Highway 12 within the river corridor. 34 Fed. Reg. at 15566. The Act defines “recreational river areas” as possessing one or more of the outstandingly remarkable values identified in Section 1, and are “rivers or sections of rivers that are readily accessible by road or railroad, that may have some development on their shorelines, and that may have undergone some impoundment or diversion in the past.” 16 U.S.C. § 1272(b)(3).

35. Section 10(a) of the Wild and Scenic Rivers Act imposes the mandatory duty that agencies administering the Wild and Scenic Rivers System must protect and enhance their outstandingly remarkable values, as follows:

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

16 U.S.C. § 1281(a) (emphasis added).

36. Similarly, Section 12(a) of the Wild and Scenic Rivers Act mandates, “the Secretary of Interior, the Secretary of Agriculture, and the head of any other federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System . . . shall take such action respecting management policies, regulations, contracts, plans, affecting such rivers . . . as may be necessary to protect such rivers in accordance with the purposes of this Act.” 16 U.S.C. § 1283(a)(emphasis added).

37. Section 10(d) further provides that the Secretary of Agriculture, “in his administration of any component of the wild and scenic river system area, may utilize the general statutory authorities relating to the national forests in such manner as he may deem appropriate to carry out the purposes of this Act.” *Id.* § 1281(d). The statutory authorities identified above concerning management of the National Forest, including rights-of-way and easements thereon, thus apply to the Forest Service’s management of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor at issue here.

38. Section 10(e) of the Wild and Scenic Rivers Act further authorizes federal agencies to enter into “written cooperative agreements” with states or state agencies for their “participation in the administration” of components of the Wild and Scenic Rivers System. *Id.* § 1281(e). This provision does not authorize the federal agencies to simply delegate, much less abdicate, their management responsibilities over components of the Wild and Scenic Rivers System to states or state agencies, as the Forest Service has done here.

39. Section 13(g) of the Wild and Scenic Rivers Act provides that the Forest Service “may grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic river system in accordance with the laws applicable to . . . the national forest system,” but imposes the requirement that “any conditions precedent to granting such easements and rights-of-way shall be related to the policy and purpose of this chapter.” 16 U.S.C. § 1284(g) (emphasis added).

C. The Federal Highway Administration’s Duty to Enforce Federal Laws on Federal Aid Highways.

40. The Federal Highway Administration (“FHWA”) is charged with administering the distribution of federal aid to states and other entities for the construction and maintenance of highways. FHWA has enacted regulations governing the implementation of this duty. *See* 23 C.F.R. § 1.1.

41. Highways eligible to receive federal funds under Title 23 of United States Code are considered “federal aid highways.” 23 U.C. C. § 101(a)(5). By statute,

It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State’s obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system

23 U.S.C. § 116(a).

42. Thus, when a state accepts federal aid for a highway project, the state assumes the responsibility to maintain the highway and associated highway projects, “in accordance with the polices and procedures issued by the Administrator.” 23 U.S.C. § 23 C.F.R. § 1.27.

43. FHWA’s regulations define a “project” as

An undertaking by a State highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways.

23 C.F.R. § 1.2.

44. The “Federal laws for the administration of Federal aid for highways” with which States must comply include the Surface Transportation Efficiency Act of 1991 (“ISTEA”), under which the Secretary of Transportation must “carry out a national scenic byways program that recognizes roads having outstanding scenic, historic, cultural, natural, recreational, and archaeological qualities.” 23 U.S.C. § 162(a). FHWA administers the National Scenic Byways Program pursuant to its National Scenic Byways Interim Management Policy. Notice of FHWA Interim Policy, 60 Fed. Reg. 26759 (May 18, 1995). This “interim policy” has been in effect since 1995.

45. In order to become a scenic byway or All-American Road, a road must be nominated, and an application for byway designation submitted by the state agency that will be responsible for managing the byway. An application for byway designation must “include a corridor management plan designed to protect the unique qualities of a scenic byway.” 60 Fed. Reg. 26759-60. Once a road has been designated, “It shall be the State’s responsibility to assure that the intrinsic qualities of the National Scenic Byways and All-American Roads are being properly maintained in accordance with the corridor management plan.” 60 Fed. Reg. at 26761.

46. The National Scenic Byways Program provides grants and technical assistance to states and Tribes for projects on National Scenic Byways. 23 U.S.C. § 162.

47. The Secretary of Transportation has an affirmative legal duty to ensure that state transportation departments are maintaining highway projects, including projects funded through the Byways Program, consistent with applicable federal laws.

If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State transportation department. If, within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the State highway district . . . until such project shall have been put in proper condition of maintenance.

23 C.F.R. § 116(c).

48. FHWA may also “withhold approval of further projects in the State, and take such other action that [the Secretary] deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.” 23 C.F.R. § 1.36.

D. The Federal Highway Administration’s Authority to Transfer Interests in Land.

49. FHWA may appropriate an interest in land owned by the United States that it finds “is reasonably necessary for the right-of-way of any highway” and transfer this interest to the appropriate state transportation department. 23 U.S.C. § 317(a)-(b)(“Section 317”).

50. FHWA has entered into two Memoranda of Understanding with the Forest Service establishing the process whereby FHWA may appropriate and transfer interests in Forest Service land for highway purposes. *See* Memorandum of Understanding Related to National Forest Highways Over National Forest Lands 2 (May 11, 1981)(“1981 MOU”); Memorandum of Understanding Between the United States

Department of Agriculture Forest Service and United States Department of Transportation Federal Highway Administration Regarding the Appropriation and Transfer of National Forest System Lands for Highway Purposes 1 (June 9, 1998)(“1998 MOU”). While the 1998 MOU “amends and supplements” the 1981 MOU, it does not replace it. 1998 MOU at 1.

51. Pursuant to the 1998 MOU,

The highway easement deed issued by the FHWA will incorporate and subject the conveyance to the conditions and terms provided by the FS [Forest Service]. The FS, acting as the Agent for the FHWA, will work directly with the Highway Agent in monitoring these conditions. If a Highway Agent is not complying with FS conditions, the FS will give notice of noncompliance. If the noncompliance is not corrected within 30 days, the FHWA upon notice from the FS will secure compliance informally or, if necessary, take action pursuant to 23 CFR 1.36.

Id. at 4.

52. The 1981 MOU states, “Nothing in this MOU is to be construed as conflicting with existing laws, regulations, and prescribed responsibilities.” *Id.* at 3. The 1998 MOU is consistent: “Nothing in this MOU or the contractual guidance between the FHWA and the State shall affect the authority of the FS pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et. seq., or any other law.” 1998 MOU at 3 (emphasis added).

FACTUAL ALLEGATIONS

A. The Clearwater/Lochsa Wild and Scenic River Corridor.

53. The Lochsa River rises on the western side of the Bitterroot Mountains and flows west through north/central Idaho to the town of Lowell. The Lochsa occupies the bottom of a narrow, steep-sided canyon full of cliffs and rock outcrops that reach down to the waterline.

54. At Lowell, the Lochsa joins with the Selway River to form the Middle Fork of the Clearwater River. The Middle Fork Clearwater flows west approximately twenty-three miles to the town of Kooskia, where it joins with the South Fork of the Clearwater River.

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

56. The Middle Fork Clearwater and Lochsa Rivers also have historic and cultural importance to the Nez Perce Tribe. The rivers parallel sections of the Nez Perce National Historic Trail administered by the Forest Service, a route that commemorates the flight of the Nez Perce from the U.S. Army in 1877 and overlays the ancient trail to the buffalo used by the Nez Perce since time immemorial.

57. In 1964, the Forest Service prepared and published a report entitled, "Middle Fork Clearwater River Wild River Study." The goal of this report was to determine whether certain segments of the Lochsa and Middle Fork Clearwater Rivers should be included in any nationwide wild river system that might subsequently be adopted by Congress. The report concluded,

The Middle Fork Clearwater River above Kooskia and Lochsa River below Powell Ranger Station have outstanding recreation qualities in their

free-flowing condition and offer unique availability of access for boating, fishing, and sightseeing.

Id. at 22. The Forest Service recommended that these river segments be “included for protection in a national system of wild rivers if such a system is established.” *Id.* at 24.

58. Thereafter, Congress designated the Middle Fork Clearwater and Lochsa as two of the nation’s first “Wild and Scenic” rivers when it adopted the Wild and Scenic Rivers Act in 1968. 16 U.S.C. § 1274(a).

59. With the exception of the thirteen miles of the Middle Fork Clearwater just east of Kooskia, the Lochsa and Middle Fork Clearwater Wild and Scenic Rivers occur entirely within the boundaries of the Clearwater National Forest, an area of 1.8 million acres of National Forest land in Idaho between the Palouse Prairie and the Bitterroot Mountains.

60. Shortly after the Middle Fork Clearwater and Lochsa were designated under the Wild and Scenic Rivers Act, the Clearwater National Forest adopted “A Design for Wild and Scenic Rivers: Middle Fork Clearwater, Selway, Lochsa” (1969). This River Plan sets forth the “primary management objectives” for the river system and requires that future improvements of “main road routes within the river boundary . . . will recognize that these routes are essentially scenic in character and will strive to maintain and enhance this status.” *Id.* at 21. *See also* 34 Fed. Reg. at 15567 (Oct. 7, 1969).

61. The River Plan further mandates, “Fisherman access shall be assured along the shoreline of the rivers,” and “Future expansion of commercial facilities within the river system will be confined to complexes at Syringa and Lowell.” *Id.* at 23-24.

62. In 1973, the Forest Service adopted Interim Special Planning Area Multiple Use Guides “to be used by the land manager in coordination with the River Plan

and agency directives to assure the future management of the river system is in keeping with the Wild and Scenic Rivers Act.” See “Management Guides: Middle Fork of the Clearwater Including the Lochsa and Selway” (1973) (“Management Guides”).

63. The Management Guides mandate, “Project activities which create noise, dust, air pollution, etc., are to be restricted or otherwise controlled. Special project constraints will be required during the recreation season.” *Id.* at 44.

64. The Forest Service has also incorporated the protection of the Middle Fork Clearwater and Lochsa Rivers’ outstandingly remarkable values into the forest plan that governs its management of the Clearwater National Forest. The Clearwater National Forest Plan of 1987 (“Forest Plan”) requires the Forest Service to manage the Clearwater/Lochsa Wild and Scenic River corridor to “[p]rovide developed and dispersed recreational opportunities in a rural or roaded natural-appearing setting as landownership patterns permit.” *Id.* at III-25.

65. The Forest Plan further directs, “Vegetation management within the right-of-way should allow for the removal of only those trees and vegetation which create maintenance or safety problems.” *Id.* at III-29. The Forest Plan also requires the Forest Service to, “Coordinate with State Highway Department on design of improvements and maintenance of Highway 12 to enhance recreational and viewing opportunities.” *Id.* at III-30 (emphasis added).

B. The Northwest Passage Scenic Byway.

66. U.S. Highway 12 is a paved, mostly two-lane federal highway that runs through Idaho for about 177 miles from the town of Lewiston, Idaho to the Idaho/Montana border at Lolo Pass on the Bitterroot Divide.

67. At approximately mile marker 87.5, Highway 12 enters the Clearwater National Forest. Highway 12 parallels the Middle Fork Clearwater and Lochsa Rivers within the River Boundary for 89 miles. As the Forest Service has observed, “U.S. Highway 12 is a vital part of the Middle Fork and Lochsa Recreation River.” Management Guides at 22, 24.

68. Highway 12’s unique blend of outstanding scenery, proximity to historical sites, and access to recreational opportunities—such as the Middle Fork Clearwater and Lochsa Wild and Scenic Rivers— led the State of Idaho to designate portions of Highway as a State Scenic Byway in 1989.

69. In 1996, FHWA granted the North Central Idaho Travel Association (“NCTIA”) a \$64,000 grant to prepare a corridor management plan for the state scenic byway pursuant to 23 U.S.C. § 162(c). The Corridor Management Plan prepared by NCITA remains in effect today, and focuses on the protection and expansion of north central Idaho’s tourism industry, as reflected in its first stated goal: “Actively project the Northwest Passage identity. Encourage partners in the travel and tourism industry to adopt the byway as a cornerstone of regional marketing, particularly in regard to its scenic, historic, and cultural attributes.” Northwest Passage Scenic Byway Corridor Management Plan 10 (2006 Update).

70. FHWA awarded additional funds to NCITA in following years to develop and distribute interpretive information (\$29,800), improve interpretive sites (\$213,000), construct a Nature Guide to the Lewis and Clark Trail (\$21,870), implement a Decorative Lighting Project (\$176,434), and construct passing lanes (\$2,000,000) on and along

Highway 12. These projects represent a significant investment of federal dollars in Highway 12 in order to make it eligible for designation as a national scenic byway.

71. On January 17, 2002, ITD submitted the Northwest Passage Scenic Byway to FHWA “for National Scenic Byway designation.” Letter from Dwight M. Bower, Director, Idaho Transportation Department, to Stephen A. Moreno, Division Administrator, FHWA (Jan. 17, 2011); The 2002 Guide to the Northwest Passage Scenic Byway (Jan. 18, 2002). FHWA designated the Idaho stretch of Highway 12, along with a portion of Highway 13, as the Northwest Passage Scenic Byway in 2002.

72. In 2005, FHWA gave Highway 12 the additional distinction of naming it as one of the nation’s “All-American Roads,” reflecting that Highway 12 is considered “a destination unto itself” so exceptional that travelers would “make a drive along the highway a primary reason for their trip.” 60 Fed. Reg. 26759, 26760 (May 18, 1995).

73. Since the federal designation of the Byway, FHWA has invested additional federal funds in Highway 12, including through National Scenic Byway Program grants for implementation of the Corridor Management Plan. ITD has also applied for and accepted federal funds to construct the Lolo Pass Visitor Center, as well as passing lanes along the Byway.

74. The activities described in Paragraphs 70-72 and 75 above constitute “projects” as defined in 23 C.F.R. § 1.2. Consequently, ITD has a duty to maintain these projects in a manner consistent with federal transportation statutes, regulations, and FHWA policies; FHWA likewise has a mandatory, affirmative duty to ensure that ITD properly maintains the projects. 23 U.S.C. § 116(a) &(c); 23 C.F.R. §§ 1.27 & 1.36.

75. ITD and the Forest Service jointly administer the Northwest Passage Scenic Byway under the authority of the Corridor Management Plan, as well as numerous special use permits, agreements, management plans, and memoranda of understanding.

76. These documents include the “U.S. Highway 12 Corridor Highway Improvement and Maintenance Strategy and Implementation Guidelines,” which was prepared by a Joint Working Group representing the Clearwater National Forest and ITD and formally adopted by both ITD and the Forest Service in 1993.

77. This Corridor Maintenance Strategy acknowledges the special considerations that arise from the designation of the Lochsa and Middle Fork Clearwater Rivers under the Wild and Scenic Rivers Act, and establishes compliance with the Wild and Scenic Rivers Act as a primary goal for corridor management. *See* Corridor Maintenance Strategy at 2-3. Accordingly, the Desired Future Condition described in the Maintenance Strategy establishes the management direction that “the highway and other transportation facilities within the corridor are enhancing the recreational experiences of visitors to the area.” *Id.* at 19 (emphasis added).

78. The Corridor Maintenance Strategy further mandates, “Because the byway from Kooskia to Lolo Pass travels parallel to the Middle Fork Clearwater and Lochsa Wild and Scenic Rivers, management of the roadway must be consistent with protecting the scenery, water quality, wildlife, historic and cultural resources.” Corridor Maintenance Strategy at 17 (emphasis added).

C. The Highway Easement Deed.

79. Portions of the Northwest Passage Scenic Byway located on National Forest land were constructed by ITD in the late 1950s and early 1960s under the authority

of special use permits issued by the Forest Service. In 1966, the Forest Service terminated all but three of the special use permits with the intent of issuing “an easement to cover maintenance and operational activities.” Negotiations between the Forest Service and ITD stalemated, however, and the Forest Service continued to administer the highway under the authority of three special use permits and two memoranda of understanding for almost thirty years.

80. Negotiations for the issuance of a highway easement deed resumed in 1995, prompting many local residents to raise concerns about ITD’s ability to manage the highway in accordance with the Wild and Scenic Rivers Act and other federal protections. The Forest Service and ITD took the position that the issuance of an easement would do nothing more than formalize existing practices and uses of the highway, including those provided under the 1993 Corridor Maintenance Strategy. At that time, Highway 12 was used by some commercial traffic, but there were no mega-loads using Highway 12; and no “overlegal” shipments that were as long, wide, high, or heavy as the mega-loads at issue in this case. The traffic using Highway 12 in 1995 also produced significantly less noise and light than the mega-loads ITD recently authorized.

81. The Forest Service ultimately consented to the transfer of the easement, provided that certain conditions were included in the deed. Following the procedures set forth in Section 317 and the 1981 MOU, the Forest Service conveyed to the FHWA, which then reconveyed to ITD, an easement deed granting ITD “a right-of-way for the operation and maintenance of a highway . . . on, over, and across, in, and upon [certain] described land of the United States within the Clearwater National Forest.” *See Highway Easement Deed, June 30, 1995.*

82. As the Forest Service required, ITD's easement for Highway 12 is subject to a number of conditions. Specifically, the Highway Easement Deed mandates, "the State shall protect and preserve soil and vegetative cover and scenic and esthetic values on the right of way outside of construction limits" (emphasis added). The Highway Easement Deed also explicitly "does not include the grant of any rights for nonhighway purposes or facilities."

83. In 1997, a revised Highway Easement Deed was issued with slightly different legal descriptions of the land affected by the easement. The conditions imposed by the easement, however, were unchanged and the 1997 Highway Easement Deed governs to this day.

D. The Kearl Module Transport Project.

84. Exxon Mobil, acting through its partially-owned subsidiary, Imperial Resources Ventures Limited ("Exxon-Imperial"), has decided to purchase preassembled equipment from a manufacturer in Korea for use on a tar sands mining and extraction project in Alberta, Canada, known as the Kearl Oil Sands Project. Exxon-Imperial hired Mammoet, a Dutch company that specializes in transporting extremely large loads, to transport the equipment modules from Korea to the tar sands project.

85. More than 200 mega-loads will be required to transport all of the equipment modules from Korea to the tar sands. The loads will vary in size, the largest being over 24 feet wide, 196 feet long, and 30 feet tall. Each module would weigh approximately 300,000 lbs standing alone. For land transport, the modules will be loaded onto trucks and the entire vehicle configuration will weigh more than 500,000 lbs.

86. By virtue of their sheer size, these loads are categorically different from the commercial vehicles and oversize loads that previously used Highway 12.

87. In the past, Exxon-Imperial has shipped large equipment to Canada and then transported it to the tar sands through Canada. Such mega-loads can also be transported through the United States, by shipping them through the Panama Canal to the Gulf of Mexico, unloading them in Texas or Louisiana, and then transporting them to their final destination by truck.

88. Rather than using either of these established routes, however, Exxon-Imperial and/or Mammoet decided to ship the Kearl equipment modules from Korea to the Port of Vancouver, barge them up the Columbia/Snake River to the Port of Lewiston and then truck them to Canada. The overland route they have selected for the Idaho portion of the trip is Highway 12, the Northwest Passage Scenic Byway.

89. When Exxon-Imperial chose the route, there were two gondola cables and numerous utility lines stretched across Highway 12 at heights of less than twenty-nine feet. Despite the numerous highway modifications that would be necessary before mega-loads like the Kearl equipment modules could even theoretically travel on Highway 12, Exxon-Imperial and/or Mammoet nevertheless decided to use the Byway in order to save themselves the additional cost of transporting the equipment using one of the established high-and-wide routes.

90. The Kearl loads exceed the length, width, and weight restrictions for vehicles traveling on highways located in the State of Idaho under Idaho law, as well as the normal capacity of all twenty-one bridges on Highway 12 between Lewiston and Lolo Pass.

91. Exxon-Imperial contacted ITD about the possibility of using Highway 12 for its proposed mega-loads on or before October 2008, and ITD has been working with Exxon-Imperial to make the “Kearl Module Transport Project” possible ever since. ITD helped Mammoet draft and finalize a traffic control plan that, ITD claims, will govern the movement of the Kearl loads.

92. Under Exxon-Imperial’s traffic control plan, the Kearl mega-loads will travel at night, periodically pulling over onto existing turnouts along Highway 12 in order to let the traveling public pass. The loads will be accompanied by a convoy of twenty or more support vehicles, including a super-sized pull truck, a super-sized push truck, at least two police cars, an ambulance, and several $\frac{3}{4}$ ton pickup trucks. This parade of vehicles as much as (or even more than) a mile in length and emit noise significantly louder than the commercial traffic that currently uses Highway 12. In order to facilitate nighttime travel, the equipment modules and their entourage of support vehicles are fitted with numerous lights several times brighter than the high beams of regular traffic.

93. With ITD’s permission, Exxon-Imperial has made numerous modifications to Highway 12 and the surrounding Forest to make room for the passage of the megaloads. In 2009, Exxon-Imperial paid for utility companies to upgrade and relocate at least 40 utility lines that crossed Highway 12 less than twenty-nine feet above the ground in 2009. Exxon-Imperial’s contractor, Kiewit, resurfaced and/or reinforced nine turnouts along Highway 12 to enable the turnouts to bear the weight of the Kearl loads. The same year Kiewit trimmed hundreds of trees, including over 500 within the Clearwater National Forest, in order to create more space for the mega-loads.

E. The Transport of Exxon-Imperial’s “Test Validation Module.”

94. On February 14, 2011, ITD issued a Memorandum of Decision authorizing Exxon-Imperial to transport “200 plus” loads of equipment for the Kearn Module Transport Project up Highway 12. Although there was an administrative appeal pending, ITD also issued a permit authorizing Exxon-Imperial to transport a load it described as a “test validation module.”

95. The test validation module left Lewiston on the night of April 12. It knocked down a tree branch before even making it out of Lewiston.

96. At approximately mile marker 46, the test validation module hit a guy wire on the side of the road. The tension in the guy wire caused the wire to flip up and over the power line, shutting off power to 1300 homes for several hours. ITD and the Idaho State Police stopped all traffic on Highway 12 for an hour. The test validation module was moved to the turnout located at milepost 61, where it remained for over two weeks.

97. During that two-week period, Exxon-Imperial reviewed the highway and, with ITD’s permission, raised many more utility lines and conducted additional tree trimming “to ensure a clearance envelope 3’ off the fog line each direction and an overall height of 32.” Many of the affected trees were located in the Clearwater National Forest and/or the Wild and Scenic River corridor.

F. Conversion of Highway 12 into an Industrial “High-and-Wide” Corridor.

98. Exxon-Imperial’s modifications to Highway 12 have made it an attractive route for other companies seeking to transport mega-loads of similar or greater size. The first company to take advantage of these modifications was ConocoPhillips (“Conoco”).

On February 1, 2011, Conoco began transporting two new coke drums to its oil refinery in Billings, Montana using Highway 12. This process has taken over three months and, as of this filing, the second coke drum still has not reached its destination. The coke drums were broken into four loads. The first two loads were approximately 110 feet long, 27 feet wide, 29 feet high, and weighed 646,204 pounds. The second two loads each measure 225 feet long, 29 feet wide, 27 feet high, and weigh 636,200 pounds.

99. On September 15, 2010, ITD met with representatives from Harvest Energy, a company owned by the Korean government, to discuss Harvest Energy's proposal to use Highway 12 to transport forty to sixty mega-loads of equipment from the Port of Lewiston to Lolo Pass on their way to a new oil refinery in Conklin, Alberta.

100. On December 13, 2010, Premay Equipment Ltd, a Canadian Company, approached ITD about using Highway 12 to transport a number of evaporator units to a Weyerhaeuser pulp mill in Grande Prairie, Alberta. If approved, the Premay loads would measure approximately 24 feet wide, 180 feet long, and 30 feet tall, with a total weight of 564,400 pounds.

101. Later the same month, a company called Nickel Brothers contacted ITD about using Highway 12 to transport seven loads measuring 183 feet long, 26 feet wide, and 26 feet tall, with a total weight of 567,300 pounds, from Lewiston to Canada.

102. These five companies—Exxon-Imperial, Harvest Energy, Conoco, Premay, and Nickel Brothers—are only the beginning. As ITD itself predicted in a 2009 grant request, "If one oil company is successful with this alternative transportation route, many other companies will follow their lead." The Forest Service has likewise opined, "authorizing these loads will ultimately lead to future additional proposals."

G. Impacts of the High-and-Wide Corridor.

103. As soon as the public learned of ITD's intent to authorize the Kearl Module Transport Project in spring of 2010, concerned citizens—including the Plaintiff and many of its members—came forward with concerns about the project's impacts, many of which were shared by the Forest Service. The transport of the test validation module and Conoco's coke drums up Highway 12 have made these shared concerns a reality.

104. The transport of mega-loads like the Kearl equipment modules up Highway 12 degrades the scenic and recreational values of the Wild and Scenic River corridor and the surrounding area. Modules sitting on the side of the highway block the view of the river and, as the Clearwater National Forest Supervisor put it, "introduce[e] overtly industrial elements into the otherwise pastoral environment." During the transport of Exxon's test validation module and Conoco's coke drums, these building-sized pieces of industrial equipment occupied turnouts for weeks at a time, marring the beauty of the Wild and Scenic River corridor and Northwest Passage Scenic Byway for extended periods.

105. The natural views along Highway 12 have been degraded by preparation for the mega-loads, including the "trimming" of numerous trees and the removal of rocks off of cliff faces in an attempt to make room for them. The "trimming" that ITD and the Forest Service authorized in April 2011 produced results that even ITD's employees have admitted are "not quite aesthetically pleasing." Rather than removing entire branches evenly on both sides of the trees, Exxon-Imperial's contractor chopped branches off mid-limb on only one side of the tree.

106. The utility relocations and tree trimming exceed what is required to protect the established normal and customary uses of Highway 12.

107. Still more rocks have been scraped off the cliff faces and tree branches knocked down by the passage of Exxon's test validation module and Conoco's coke drums, bearing out the Forest Service's prediction that "an accident involving a vehicle of this size has the potential to cause damage to the natural resources on adjacent National Forest System lands."

108. The public's experience with Exxon-Imperial's test validation module and Conoco's coke drums also confirmed the Forest Service's prediction that the use of Highway 12 to transport such massive shipments would "jeopardize[e] the experience of the traveling and recreating public." Traffic was delayed for an hour after Exxon's test validation module hit the guy wire at milepost 46, and the public suffered delays as long as 40 minutes due to the tree trimming and utility work. Traffic following the Conoco coke drums and their entourage of vehicles was frequently delayed between twenty and fifty-four minutes, while oncoming traffic was sometimes stopped for periods between thirty and forty-five minutes.

109. More than merely inconveniencing travelers, the transport of mega-loads has included barricading public turnouts and denying the public access to the National Forest, the Wild and Scenic Rivers, and even the highway. Both the Exxon and Conoco loads were parked in turnouts for days or weeks at a time.

110. As the Forest Service has admitted, "the turnouts along Highway 12 in this area are currently used for parking and access to the National Forest. The public uses these turnouts during the summer for dispersed recreation such as hiking, fishing and

hunting. They are also used for cross-country skiing in the winter. Reserving these turnouts for the large loads would decrease the public's access to the National Forest.”

111. The transport of a mega-load also interferes with the public’s ability to travel on the highway in the first place. During the transport of both the Conoco and Exxon maga-loads, Idaho State Police personnel limited citizens' ability to use Highway 12, including near their own residences, under threat of intimidation, harassment, and detention.

112. The passage of large equipment at night disturbs travelers, recreationists, and tourists staying in campgrounds and motels close to the highway, including IRU staff and members. As the Clearwater Forest Supervisor has explained,

there are several campgrounds along Highway 12. The public needs unrestricted access to these sites during the operating season from Memorial Day through September 30th each year. Short and/or long-term blockage of the road could prevent campers from leaving the sites in case of emergency. The potential for disturbance to campers due to idling large trucks, flashing lights, and/or long lines of vehicles passing these areas would be disruptive to campers, and would take away from the natural setting of the National Forest.

113. Allowing additional mega-loads to travel on the Northwest Passage Scenic Byway will further establish Highway 12 as an industrial, high-and-wide corridor. As the Clearwater National Forest Supervisor has explained, “while one or two projects might be tolerated, more frequent occurrences of such loads are not the experience people traveling, living, working, and recreating on US Highway 12 expect. I do not believe this was the intent when Congress passed the Wild and Scenic Rivers Act which did allow states to retain certain right of way rights.”

114. Thus, because of the impacts described above, the use of Highway 12 by mega-loads violates with the requirements to protect the scenic and recreational values of

the corridor and Byway contained in numerous legal authorities including, but not limited to, the Wild and Scenic Rivers Act, the Forest Service's regulations, the River Plan, Management Guides, the Clearwater Forest Plan, the Corridor Management Plan, the Corridor Maintenance Strategy, and the Highway Easement Deed.

115. Using Highway 12 to transport mega-loads also interferes with the Forest Service's ability to manage nearby public lands and, ultimately, "will impede our ability to carry out our public service mission," as the Forest Service has noted. The Forest Service needs access to campgrounds for daily maintenance and to respond to law enforcement situations. Stopping traffic on a regular basis also "has the potential to impede Forest Service responses to emergencies such as wildfires and other law enforcement situations."

116. These circumstances demonstrate that the use of Highway 12 by mega-loads unreasonably interferes with the Forest Service's ability to manage the Clearwater National Forest, the Clearwater/Lochsa Wild and Scenic River corridor, and the public's enjoyment of the federal lands over which ITD holds an easement.

117. ITD has thus acted beyond the scope of the Highway Easement Deed in authorizing the mega-loads. *See* Restatement (Third) of Property § 4.10 cmt. h (2000) ("the easement holder may not use it in such a way as to interfere unreasonably with enjoyment of the servient estate"); *McFadden v. Sein*, 88 P.3d 740, 744 (Idaho 2004) ("an increase in the use of a general easement must be reasonable and not unduly burdensome to the servient estate.")

118. ITD has unlawfully expanded the scope of the highway easement by authorizing the Kearl Module Transport Project and other mega-loads of comparable size.

The Highway Easement Deed must be interpreted in light of the circumstances surrounding the creation of the easement. Restatement (Third) of Property § 4.1 (2000). *See also Latham v. Garner*, 673 P.2d 1048, 1052 (“When an instrument is ambiguous in nature, the intention of the parties as reflected by all of the circumstances in existence at the time the easement was given must be considered in construing the granting instrument.”) The circumstances surrounding the creation of the easement reveal that the Forest Service and ITD did not intend the highway to be used for mega-loads that would alter the fundamental character of the highway and the surrounding area.

119. The public policy of preserving Wild and Scenic Rivers for the enjoyment of future generations likewise indicates that the Forest Service did not intend to consent to an easement for a high-and-wide industrial corridor. The Highway Easement Deed should not be interpreted so as to conflict with this public policy. Restatement (Third) of Property § 4.10 (2000).

H. The Forest Service Has Refused to Act Based on Its Improper Determination that It Lacks Jurisdiction.

120. Plaintiff IRU has repeatedly sought to have the Forest Service adhere to its duties under the Wild and Scenic Rivers Act and other provisions of law to protect the Clearwater/Lochsa Wild and Scenic River corridor and the public resources of the Clearwater National Forest from the adverse impacts posed by the mega-loads, to no avail.

121. On August 11, 2010, for example, the Plaintiff and other concerned parties sent a letter to the Clearwater National Forest Supervisor urging him to notify ITD that the Kearn Module Transport Project would violate multiple legal authorities, including the Highway Easement Deed, the River Plan, the Corridor Maintenance Strategy, and the

Forest Service regulations described above. The letter reminded the Forest Service that it has an affirmative, mandatory duty under the Wild and Scenic Rivers Act to “protect and enhance” the outstandingly remarkable values of the Middle Fork Clearwater and Lochsa Wild and Scenic Rivers, and pointed out that the failure to enforce the terms of these relevant legal authorities would violate this mandatory duty.

122. Rather than enforcing any of the legal authorities cited by the Plaintiff, the Forest Service determined that it has no authority to object to, deny permission for, or otherwise affect ITD’s decision to issue overlegal permits for the Kearl Module Transport Project or other mega-loads seeking to use Highway 12.

123. The Forest Service announced its determination on September 10, 2010, in a letter sent by the Clearwater National Forest Supervisor Rick Brazell to ITD. This letter states that Supervisor Brazell, “recognizes the Forest Service’s limited jurisdiction with regard to what travels the highway within the existing right-of-way, even across the national forest,” and opines, “I believe we are cooperating within the spirit and intent of our MOU and easement deed.” Letter from Rick Brazell, Forest Supervisor, Clearwater National Forest, to Jim Carpenter, District 2 Engineer, Idaho Transportation Department, 1 (Sept. 10, 2011).

124. The Clearwater Forest Supervisor concluded, “I recognize that I have no jurisdiction to stop these shipments, but I do oppose the idea of allowing this precedent to be set. However, I do appreciate your authority and expertise in matters relating to highway travel and safety and have committed my staff to continue to work with you as they have in the past to facilitate your management, operations and maintenance of US Highway 12.” *Id.* at 2.

125. This determination demonstrates that the Forest Service has made a final determination not to take action to protect the National Forest lands and resources from the threats posed by the mega-loads, “based solely on the belief that it lacks jurisdiction.” *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Consequently, the Forest Service’s refusal to enforce applicable legal authorities is subject to judicial review. *Id.*; *Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 898 F.2d 753, 756 (9th Cir. 1990).

126. Based on its improper determination that it has no jurisdiction to protect the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor, the Forest Service has coordinated with ITD throughout the mega-load permitting process and acquiesced to the highway modifications implemented in order to accommodate the mega-loads, including drastic modifications to forest vegetation.

127. For instance, in July 2009, ITD asked the Clearwater National Forest’s Wild and Scenic Rivers Coordinator whether she would “take issue” with any of the trees Exxon-Imperial planned to “get out of the way.” The River Coordinator responded by sending ITD her “requirements” for trimming trees within the Wild and Scenic River corridor, but did not prohibit the removal or trimming of any trees. No studies, environmental documentation, or archeological analysis was prepared in connection with this authorization; and no public notice was given of this approval.

128. Similarly, in April 2010, the Clearwater National Forest’s archeologist unilaterally determined – again without supporting documentation or public notice – that no cultural resources inventory was necessary under the National Historic Preservation Act in connection with the turnout resurfacing that Exxon-Imperial proposed

to conduct within the Clearwater National Forest. Upon information and belief, the Forest Service also failed to consult with the Nez Perce Tribe before approving the turnout resurfacing, even though the Tribe has numerous sacred, religious, cultural and other sites along the Clearwater/Lochsa corridor, for which consultation is required.

129. At the beginning of 2011, Exxon-Imperial and/or ITD sought permission from the Forest Service to “remove all branches encroaching into 30’W x 32’H travel area.” The Forest Service assumed, again without conducting any environmental analysis, that “The work is within the scope of the Highway Easement.”

130. The Forest Service then communicated with the State Historic Preservation Office about the proposed tree trimming within the Lolo National Historic Trail Landmark, representing that, “The activity falls within routine maintenance activities already authorized for the Highway 12 corridor.” Memo from William Ellis, Heritage Program Manager, Clearwater National Forest, to Mary Anne Davis, Associate State Archeologist, Idaho State Historical Society (March 24, 2011).

131. On the basis of this representation, the SHPO agreed, “No further consultation with our office is required for this Forest activity.”

132. After Exxon-Imperial recommenced trimming trees in April, numerous members of the public contacted the Forest Service, describing the adverse effects of the tree trimming on the scenic values of the Forest and Wild and Scenic River corridor and asking the Forest Service to put a stop to it. Although the Forest Service was concerned about the visual effects of the trimming, the Forest Service took no action to stop the trimming.

133. On April 21, IRU formally requested that the Forest Service halt all tree trimming activities within the Wild and Scenic River corridor until the present litigation has been resolved.

134. On April 26, 2011, the Forest Service denied IRU's request on the grounds that, "The easement includes the right to manage vegetation within the construction limits of the highway."

135. Once the test validation module began moving again, it took two more nights to reach a turnout a few miles from Lolo Pass, where it remained for several more days before finally completing its journey to Montana

136. After the tree trimming was completed, the Forest Service identified 80 trees that "could benefit aesthetically from some additional pruning." In early May, Exxon-Imperial's contractor conducted additional trimming and removed whips, stumps, and additional limbs from trees in the Clearwater National Forest.

137. The Forest Service has also allowed the oil industry to make unauthorized use of Forest Service land for the mega-load shipments up Highway 12. Many of the turnouts that are to be used by the mega-loads extend beyond the boundary of ITD's right-of-way and onto Clearwater National Forest land by 100-200 feet. ITD's traffic control plans do not require the mega-loads to stay within the area of ITD's right-of-way, and the Forest Service has not required ITD to obtain a special use permit authorizing this "special use" of Forest Service land. For instance, Conoco parked its second coke drum load on the turnout located at milepost 139 all day on March 3, 2011. This turnout extends outside the easement by 100-200 feet.

138. In addition, turnouts at the following milepost markers extend beyond the right-of-way and onto National Forest land by the area specified: MP 92.8 (10 – 15 feet), MP 94.2 (200 feet), MP 99.4 (20 feet), MP 103.8 (200 feet), MP 106.8 (200 feet), MP 108.3 (100 – 200 feet), MP 116.0 (75 – 100 feet), MP 120.3 (75 – 100 feet), MP 124.2 (100 feet), MP 128.1 (75 feet), MP 130.4 (100 feet), MP 133.5 (100 feet), MP 139.0 (100 – 200 feet). These turnouts may similarly be used to park mega-loads or facilitate their movement up Highway 12, without any special use permit from the Forest Service.

I. The Federal Highway Administration Has Refused to Act Based on the Improper Determination that It Lacks Jurisdiction.

139. By the spring of 2010, the Forest Service was communicating with FHWA about Exxon-Imperial's proposal to transport mega-loads up Highway 12.

140. As a result, FHWA employees were aware of Exxon Imperial's proposal and had begun to raise concerns about whether the use of Highway 12 to transport such mega-loads is consistent with the easement.

141. In the summer of 2010, numerous concerned citizens wrote to the Secretary of Transportation, expressing concern about the impacts that the transport of the Exxon mega-loads would have on the Northwest Passage Scenic Byway.

142. FHWA determined that the conversion of the Northwest Passage Scenic Byway into a high-and-wide corridor was a "state issue." *See* Memo from S. Frey, FHWA, to T. Egenhoff, Forest Service (July 15, 2010)(explaining, "our official line is still that FHWA has no official role or authority over this matter. Our Headquarters is in agreement with this").

143. On August 25, 2010, Congressman Peter DeFazio wrote to the Secretary of Transportation about the Kearsarge Module Transport Project, urging the Secretary to

“investigate the permitting process in both [Idaho and Montana] to ensure the impacts of oversized commercial vehicles are not being underestimated.”

144. FHWA responded to Congressman DeFazio’s letter by stating, “permit issuance for movement of this equipment is the responsibility of the states, not the Federal government.” While FHWA did agree to “review the permitting process,” this review would be limited to “ensuring that proper engineering guidelines are being followed to protect our highways and bridges and to also ensure proper compensation is being paid to the states for any reduction in service life.” Federal size and weight regulations, FHWA said, “allow the states to make their own decisions regarding nondivisible overweight loads as well as overweight and overlength loads.”

FIRST CLAIM FOR RELIEF:
THE FOREST SERVICE HAS IMPROPERLY
DETERMINED IT HAS NO JURISDICTION

145. Plaintiff realleges and incorporates by reference the preceding paragraphs.

146. This First Claim for Relief challenges the Forest Service’s final decisions denying the Plaintiff’s requests that the Forest Service enforce the applicable legal authorities against ITD with regard to the Kearl Module Transport Project and other mega-loads. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

147. On August 11, 2010, as noted, the Plaintiff sent a letter to the Forest Service asking it to “take action to prevent the [ITD] from engaging in illegal activity within the boundaries of the Clearwater National Forest by notify[ing] ITD that the issuance of overlegal permits for the Emmert Project and/or the Kearl Module Transport

Project (‘Kearl’) would violate the authorities listed below and require ITD to seek all necessary and appropriate special use permits.”

148. On September 10, 2010, as noted, Clearwater National Forest Supervisor Brazell issued a letter announcing the Forest Service’s determination that it lacks jurisdiction or authority over the use of Highway 12 for the proposed Exxon-Imperial or other mega-loads, even though Supervisor Brazell expressed concerns about the impacts of the mega-loads on National Forest lands and resources, including the Wild and Scenic River corridor.

149. On April 21, 2011, the Plaintiff requested the Forest Service to stop all tree trimming within the Wild and Scenic River corridor until such time as the legal questions regarding the Forest Service’s jurisdiction at issue in this litigation could be resolved.

150. On April 26, 2011, as noted, the Forest Service denied ITD’s request on the grounds on the grounds that, “The easement includes the right to manage vegetation within the construction limits of the highway.”

151. Contrary to the position the Forest Service took in its determinations of September 10 and April 26, the Forest Service does have authority to enforce relevant legal authorities—including, but not limited to, the Wild and Scenic Rivers Act, NFMA, the River Plan, the Corridor Maintenance Strategy, the Forest Plan, and the Forest Service’s own regulations— within the Highway 12 right-of-way. U.S. Const. art. IV, § 3, cl. 2; 16 U.S.C. § 1281(a); 16 U.S.C. § 1284(g); *U.S. v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *Lauran v. U.S. Forest Service*, 141 Fed. App’x 515, 519 (9th Cir. 2005).

152. The Forest Service's communications of September 10, 2010 and April 26, 2011 finally determined and disposed of Plaintiff's request for the Forest Service to enforce relevant legal authorities against ITD in relation to the proposed mega-loads, and represent final actions by the Forest Service which is subject to judicial review under the APA, 5 U.S.C. § 701 et seq.

153. In determining that it lacks jurisdiction and will not take action to enforce the requirements of federal law, regulations, and policies, as set forth above, the Forest Service has acted in a manner that is arbitrary, capricious, an abuse of discretion, and contrary to law, which has caused or threatens substantial prejudice to Plaintiff and the public, and therefore must be reversed by this Court pursuant to the APA, 5 U.S.C. § 706(a)(2).

154. Moreover, under the Declaratory Judgment Act, the Forest Service's improper determination that it lacks jurisdiction and denial of Plaintiff's request that it take action to enforce federal laws and policies with regard to the mega-loads on Highway 12 within the Clearwater National Forest presents a live, justiciable controversy between the Plaintiff and the Defendant for which entry of declaratory relief is appropriate.

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CLAIM FOR RELIEF:
THE FOREST SERVICE HAS VIOLATED ITS
MANDATORY DUTIES TO PRESERVE
THE WILD AND SCENIC RIVER CORRIDOR

155. Plaintiff realleges and incorporates by reference the preceding paragraphs.

156. This Second Claim for Relief challenges the Forest Service's violation of its mandatory duties under the Wild and Scenic Rivers Act and NFMA by failing to

enforce relevant legal authorities against ITD in order to protect the outstandingly remarkable scenic and recreational values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor, and in order to achieve the objectives set forth in the Clearwater Forest Plan. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706(a).

157. Under the Wild and Scenic Rivers Act, as noted above, the Forest Service has an affirmative, mandatory duty to administer designated Wild and Scenic Rivers “in such manner as to protect and enhance the values which caused it to be included in said system” and give primary emphasis to “protecting its aesthetic, scenic, historic, archeologic, and scientific features.” 16 U.S.C. § 1281(a). The Act also imposes the mandatory duty that the Forest Service “shall take such action respecting management policies, regulations, contracts, plans, affecting such rivers . . . as may be necessary to protect such rivers in accordance with the purposes of this Act.” 16 U.S.C. § 1283(a).

158. The Forest Service has violated these and other mandatory duties, as identified above, in refusing to enforce the requirements of the legal authorities discussed above—including the River Plan, the Corridor Maintenance Strategy, the Forest Plan, and the Forest Service regulations—and by coordinating with ITD to facilitate the development and implementation of the mega-loads, despite the fact that they threaten to degrade the scenic and recreational values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and transform Highway 12 into an industrial, high-and-wide corridor.

159. In facilitating the transport of the mega-loads—including by failing to require ITD to obtain the required special use permits and by authorizing or allowing the

removal of trees and branches that did not create safety or maintenance problems for the established normal and customary uses of Highway 12 – the Forest Service has also violated NFMA, the Clearwater Forest Plan, and NFMA’s implementing regulations.

160. Under the APA, the Forest Service’s violations of its mandatory duties, its refusal or failure to act to enforce the mandates of the Wild and Scenic Rivers Act and the other provisions and requirements of law, and its actions facilitating the mega-loads constitute agency action unlawfully withheld over which this Court may exercise judicial review and compel performance by the Forest Service; and/or constitute final agency actions that are arbitrary, capricious, an abuse of discretion, and contrary to law, for which judicial review and reversal is required under the APA. 5 U.S.C. § 706(a)(1) & (2).

161. Moreover, entry of declaratory relief is appropriate pursuant to the Declaratory Judgment Act, to declare and adjudge that the Defendant must undertake duties required by law in order to protect and enhance the scenic and other “outstandingly remarkable values” of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and the public lands of the Clearwater National Forest from the degradation and threats posed by the mega-loads up Highway 12, as there is currently a live and justiciable controversy between Plaintiff and Defendant over the legal mandates and duties applicable to the Forest Service’s ongoing management of the public lands and resources within the Highway 12 corridor, for which entry of declaratory relief is necessary in order to preserve and protect the federal lands and resources and public interest.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CLAIM FOR RELIEF:
THE FOREST SERVICE AND FHWA HAVE
VIOLATED THEIR DUTIES TO ENFORCE
THE TERMS OF THE HIGHWAY EASEMENT

162. Plaintiff realleges and incorporates by reference the preceding paragraphs.

163. This Third Claim for Relief challenges the Defendants' violations of their duties to enforce the terms of the Highway Easement Deed for Highway 12 in order to prevent the unlawful expansion of the highway easement through the shipment of mega-loads. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

164. Under the Wild and Scenic Rivers Act and implementing authorities—including, but not limited to, the Corridor Maintenance Strategy—the Forest Service has an affirmative, mandatory duty to administer the Highway 12 corridor to “[e]nhance the recreational experiences of visitors” and “protect[] the scenery, water quality, wildlife, historic and cultural resources.” Corridor Maintenance Strategy at 17, 19. *See also* 16 U.S.C. § 1281(a) (“primary emphasis shall be given to protecting its aesthetic, scenic, historic, archeologic, and scientific features.”)

165. Under 23 U.S.C. § 116, the FHWA has an affirmative, mandatory duty to ensure that state transportation departments are maintaining federally funded highway projects consistent with applicable federal authorities, including the National Scenic Byways Interim Management Policy and the Highway Easement Deed for Highway 12. 23 C.F.R. § 116(c).

166. ITD has unlawfully expanded the scope of the easement granted to it by the Forest Service and FHWA for Highway 12 in authorizing mega-loads to travel on

Highway 12 and by authorizing highway modifications necessary to accommodate the transport of the Kearn equipment modules and other mega-loads.

167. ITD's action in approving the mega-loads has also caused, or threatens to cause, impairment, damage, and degradation of the outstandingly remarkable scenic and esthetic values of the Highway 12 right-of-way within the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor, in violation of the easement's provision requiring it to administer the Highway 12 corridor to "protect and preserve . . . scenic and esthetic values on the right of way outside of construction limits."

168. The Forest Service has violated its mandatory duty under the Wild and Scenic Rivers Act, the implementing Corridor Maintenance Strategy, and the 1998 MOU between the Forest Service and FHWA by failing to notify FHWA that ITD is violating the conditions imposed by the Highway Easement Deed and by coordinating with ITD to facilitate modifications to Highway 12 and the Clearwater National Forest in order to accommodate mega-load shipments.

169. FHWA has violated its mandatory duties under Sections 116 and 317, and implementing regulations by refusing to enforce the terms of the Highway Easement Deed.

170. Under the APA, the Defendants' violations of their mandatory duties, their refusal or failure to act to enforce the mandates of the Wild and Scenic Rivers Act, the Highway Easement Deed, and the other provisions and requirements of law, and the Forest Service's actions facilitating the mega-loads constitute agency action unlawfully withheld over which this Court may exercise judicial review and compel performance by the Defendants; and/or constitute final agency actions that are arbitrary, capricious, an

abuse of discretion, and contrary to law, for which judicial review and reversal is required under the APA. 5 U.S.C. § 706(a)(1) & (2).

171. Moreover, entry of declaratory relief is appropriate pursuant to the Declaratory Judgment Act, to declare and adjudge that the Defendants must undertake duties required by law, as there is a currently live and justiciable controversy between Plaintiff and Defendants over the legal mandates and duties applicable to the Forest Service's duty to protect the public lands and resources within the Clearwater National Forest and the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and the FHWA's ongoing authority to enforce the terms of the Highway Easement Deed, for which entry of declaratory relief is necessary in order to preserve and protect the federal lands and resources and the public interest.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CLAIM FOR RELIEF:
FHWA HAS VIOLATED ITS MANDATORY
DUTIES TO ENSURE THAT FEDERAL
PROJECTS ARE PROPERLY MAINTAINED

172. Plaintiff realleges and incorporates by reference the preceding paragraphs.

173. This Fourth Claim for Relief challenges FHWA's violation of its mandatory duties under Section 116 and ISTEA by failing to ensure that ITD maintains federal highway projects consistent with applicable federal laws. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706(a).

174. Under Section 116, as noted above, FHWA has an affirmative, mandatory duty to ensure that state highway departments maintain projects constructed or undertaken with the aid of federal funds in a manner consistent with federal laws and policies. 23 U.S.C. § 116(a), (c); 23 C.F.R. § 1.27. Federal law also imposes the

mandatory duty that the Secretary of Transportation “shall” call the fact that a project is not being properly maintained “to the attention of the State transportation department and take enforcement action, “[i]f, within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance.” 23 U.S.C. § 116(c).

175. Numerous projects associated with Highway 12 have been undertaken with federal funds, including, but not limited to, the development of the Corridor Management Plan, the placement of interpretive signs, and the construction of passing lanes.

176. ITD has authorized the transport of multiple “mega-loads” up U.S. Highway 12 and modified the highway corridor in order to facilitate the movement of mega-loads in violation of multiple federal authorities, including the Corridor Management Plan and FHWA’s National Scenic Byways Interim Management Policy. ITD’s authorization of these transports constitutes a failure to maintain the federal projects associated with Highway 12 in a manner consistent with FHWA’s “procedures and policies.” 23 C.F.R. § 1.27.

177. FHWA has violated its mandatory duty to ensure the proper maintenance of federal projects in refusing to enforce the requirements of these legal authorities and by refusing to review the mega-load projects for compliance with federal laws.

178. Under the APA, FHWA’s violations of its mandatory duties, its refusal or failure to act to enforce the mandates of the Corridor Management Plan and its own National Scenic Byways Interim Management Policy constitute agency action unlawfully withheld over which this Court may exercise judicial review and compel performance by FHWA; and/or constitute final agency actions that are arbitrary, capricious, an abuse of

discretion, and contrary to law, for which judicial review and reversal is required under the APA. 5 U.S.C. § 706(a)(1) & (2).

179. Moreover, entry of declaratory relief is appropriate pursuant to the Declaratory Judgment Act, to declare and adjudge that FHWA must undertake duties required by law in order to maintain the federal projects associated with Highway 12 in a manner consistent with federal law, as there is currently a live and justiciable controversy between Plaintiff and FHWA over the legal mandates and duties applicable to FHWA's enforcement of the National Scenic Byways Interim Management Policy, for which entry of declaratory relief is necessary in order to preserve and protect the federal lands and resources and public interest.

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

Plaintiff IRU respectfully prays that the Court enter the following relief:

A. Adjudge and declare that the Forest Service acted unlawfully in determining that it lacks jurisdiction to regulate the use of Highway 12 for mega-loads within the Clearwater National Forest and the Wild and Scenic River corridor;

B. Adjudge and declare that the Forest Service has authority and jurisdiction to enforce all relevant legal authorities, including, but not limited to, the Wild and Scenic Rivers Act, the Forest Service Organic Act, the National Forest Management Act, and implementing regulations, policies, agreements, and MOUs, as identified above, with respect to mega-load shipments proposed or approved within the right-of-way for U.S. Highway 12 held by ITD;

C. Adjudge and declare that the Forest Service has violated the Wild and Scenic Rivers Act and/or NFMA in allowing ITD to modify aspects of the public lands and resources within the Highway 12 corridor on the Clearwater National Forest to accommodate the Kearsarge Module Transport project and other mega-loads; and in refusing to enforce the terms of the River Plan, Management Guides, Corridor Maintenance Strategy, the Highway Easement Deed for Highway 12, or the Forest Service's regulations against ITD in connection with the proposed mega-loads for Highway 12;

D. Adjudge and declare that FHWA has violated Section 116 and ISTEA in determining that it lacks jurisdiction to regulate the use of Highway 12 for mega-loads in order to ensure the proper maintenance of federal projects and compliance with the Highway Easement Deed;

E. Adjudge and declare that FHWA has authority and jurisdiction to enforce all relevant legal authorities, including, but not limited to, the Highway Easement Deed, the Corridor Management Plan and FHWA's National Scenic Byways Interim Management Policy, with respect to mega-load shipments proposed or approved within the right-of-way for U.S. Highway 12 held by ITD;

F. Order, adjudge and declare that the mega-loads approved by ITD for transport along Highway 12 upon Forest Service lands represent an unauthorized expansion of use of the Highway Easement Deed granted to ITD, and accordingly are unlawful;

G. Enter such temporary, preliminary, or permanent injunctive relief as the Plaintiff may hereafter seek;

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

I. Grant such further relief as the Court deems necessary or appropriate to redress the Forest Service and FHWA's legal violations, ensure the proper maintenance of federal projects, and protect the scenic and recreational values of the Middle Fork Clearwater/Lochsa Wild and Scenic River corridor and the public lands and resources of the Clearwater National Forest.

Dated this 15th day of June, 2011.

Respectfully submitted,

/s/ Natalie J. Havlina
Natalie J. Havlina
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Boise, ID 83701
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2011, I caused the foregoing Amended Complaint 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:

Deborah Ferguson
Deborah.Ferguson@usdoj.gov

/s/ Natalie J. Havlina
Natalie J. Havlina