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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE and
IDAHO RIVERS UNITED,
Plaintiffs,
vs.

UNITED STATES FOREST SERVICE,
Defendant,

and

RESOURCES CONSERVATION COMPANY INTERNATIONAL,
Defendant-Intervenor.

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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: Monday, September 9, 2013
Time: 4:30 pm

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INTRODUCTION

The Forest Service does not identify any irreparable harm that might occur to it if the Court grants interim injunctive relief to preclude further mega-load shipments within the Nez Perce-Clearwater National Forests and Middle Fork Clearwater/Lochsa Wild and Scenic River corridor. Neither does the Forest Service attempt to refute Plaintiffs' factual showing that irreparable procedural harms as well as harms to scenic, aesthetic, and cultural values are likely without an injunction.

Only Intervenor Resource Conservation Company International (a wholly-owned subsidiary of General Electric, the world's fourth largest corporation) claims harm from an injunction, alleging it would lose money if its next planned mega-loads are precluded from using U.S. Highway 12. But RCCI studiously ignores the facts that it was advised of this Court's February 2013 *IRU v. USFS* ruling confirming the Forest Service's authority to regulate mega-loads in the Wild and Scenic corridor; was informed in April 2013 that any further mega-load shipments up the corridor would be vigorously challenged; and was instructed by the Forest Service on August 5, 2013 that mega-loads were not authorized. *See* Second Sedivy Declaration, filed herewith. By defying those warnings, and acting in disregard of the Forest Service's instruction, RCCI assumed the risk of its own actions and cannot now preclude entry of injunctive relief. *See, e.g., National Forest Preservation Group v. Butz*, 485 F.2d 408, 411 (9 th Cir. 1973) (party with notice "acts at his peril" and "subject to the power of the court" to enter equitable relief).

Moreover, RCCI's filings acknowledge that its mega-load shipment in early August sparked massive public opposition and protests along U.S. Highway 12, which created substantial hazards to public health and safety. Those conditions will likely become more

intense with further mega-load shipments, as the accompanying supplemental declarations confirm. This fact alone supports the Court's entry of injunctive relief while this case is litigated on the merits.

The main focus of the response briefs is that Plaintiffs are unlikely to prevail on their claims because the Forest Service has supposedly exercised discretionary authority here, and the Court should await the outcome of the review process that the Forest Service says it has launched. As explained below, that argument is unfounded. The record shows that the Forest Service determined that it lacks enforcement authority over the mega-loads; and Plaintiffs are likely to prevail in their legal challenges that the Forest Service has again erred in that position by failing to consider and evaluate its regulatory authority. But even if the agency did exercise enforcement discretion, as the Ninth Circuit just confirmed in *Drakes Bay Oyster Co. v. Jewel*, 2013 WL 4712736 (Sept. 3, 2013), the Court has jurisdiction to review and determine that the Forest Service erred by failing to heed legal requirements, including its duties to consult with the Tribe over potential impacts to treaty-reserved rights and cultural and historical resources.[1]

Accordingly, the Court should grant Plaintiffs' injunction motion and enter interim injunctive relief precluding further mega-loads pending resolution of this case on the merits.

SUPPLEMENTAL FACTS

1. First RCCI mega-load shipment. The first RCCI mega-load was transported up U.S. Highway 12 in the period August 5-9, 2013, even though the Forest Service specifically advised RCCI's shipper, Omega Morgan, that the mega-load was unauthorized. The mega-load

[1] On August 29, 2013, the Forest Service denied the Tribe's August 22nd petition to conduct consultation under Section 106 of the National Historic Preservation Act regarding mega-load impacts to historic and cultural properties of deep concern to the Tribe. *See* Second Lopez Declaration, Exh. 6 and Declaration of Nakia Williams, filed herewith. Plaintiffs have thus filed a First Amended Complaint adding NHPA claims, which are addressed briefly below.

entered Forest Service lands in the early hours of August 8, 2013, without any action by the Forest Service to enforce its own June 2013 directive prohibiting the transport of such mega-loads until consultation with the Nez Perce Tribe and a corridor impacts study are completed, as described in Plaintiffs' opening brief and declarations (*Docket Nos. 5-15*).

This mega-load was in the Wild and Scenic corridor more than 30 hours, including while it was parked during the day at Syringa; and it completely blocked U.S. Highway 12 for extensive periods of time, well beyond the 15-minute delay required under its permit from Idaho Transportation Department. *See* Second Sedivy Decl., ¶ 8-11. For example, the mega-load blocked traffic for almost an hour and a half crossing the Fish Creek bridge in the Wild and Scenic corridor. *Id.*

The RCCI mega-load triggered large protests along the highway its entire route, including hundreds of Nez Perce Tribal members and non-Tribal members who live and work in the area and care deeply about protecting Tribal lands and the scenic, cultural, natural and other values of the Clearwater/Lochsa corridor. The irreparable impacts of this first RCCI mega-load, and the passions it aroused among the protesters, are vividly described in the accompanying Declarations of Tribal members Paulette Smith and Angela Picard, who were arrested for engaging in peaceful demonstrations of the mega-load; and the Second Declaration of William Sedivy, who describes the irreparable harm caused by the RCCI mega-load to scenic and other values that he and other IRU members treasure in the Wild and Scenic corridor.

2. The Forest Service's August 12, 2013 letter to the Nez Perce Tribe. (Second Lopez Decl., Exh.1). On August 12, 2013, Nez Perce-Clearwater National Forests Supervisor Rick Brazell sent a letter to Nez Perce Tribal Chairman Silas Whitman which purported to "clarify any misconceptions that may have arisen regarding the Forest Service response

associated with Omega-Morgan's recent transport of an oversized load along U.S. Highway 12."

It stated:

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

As explained below, this August 12 letter is a post facto attempt to rewrite history which cannot preclude this Court's judicial review.

3. The Nez Perce Tribe's August 15, 2013 letter to the Forest Service. (Second Lopez Decl., Exh. 2). The Tribe responded to the Forest Service's August 12th letter on August 15, 2013, stating:

> The Tribe remains extraordinarily disappointed that the Forest Service – after reasonable initial steps in the exercise of jurisdiction over the use of U.S. Highway 12, including the adoption of megaload-defining criteria and a decision that no megaload transportation would be authorized until a corridor impacts study and Nez Perce Tribal consultation were completed – then decided to allow the first megaload shipment of August 5-9, 2013 across the National Forest and Wild and Scenic River corridor.
>
> Your statement that the Forest Service recognized its enforcement authority but discretionarily chose not to exercise it as to the first megaload is not an acceptable or reasonable explanation. (The Tribe did not misconceive statements: all Forest Service representations to date, to the Tribe and to the public, have been that the Forest Service lacked the authority to enforce its jurisdiction.). The issue will be addressed in court, but the Tribe observes that the legal context surrounding this matter is one in which the Forest Service does not have the discretion to choose not to enforce any or all of the (multiple) protective federal authorities Congress has delegated to it regarding the National Forest, the Wild and Scenic River, and the U.S. Treaty-reserved rights and resources of a federally-recognized Indian Tribe. An assertion of discretion in the legal context of this case will be found to be either inapplicable or illegitimate as a matter of controlling law.

The Tribe then explained the Forest Service's duties to consult with the Tribe, and concluded:

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

> with its federal law and U.S. Treaty obligations to both the U.S. public and the Nez Perce Tribe.

4. Forest Service's August 15, 2013 letter to Federal Highways Administration. (Second Lopez Decl., Exh. 3). On August 15, 2013, Regional Forester Faye Krueger wrote the Federal Highway Administration's Idaho Division Administrator requesting "assistance in resolving issues concerning the issuance of over legal-sized load permits on U.S. Highway 12 by the Idaho Transportation Department." The letter cited this Court's ruling that the Forest Service and FHWA "have authority and jurisdiction to enforce all relevant legal authorities … within the right-of-way for U.S. Highway 12 held by ITD," and stated that the Forest Service's "desire is to establish an administrative mechanism, by which we can redeem our review authority." The letter proposed that "ITD add a stipulation to their over legal-sized permits that meet our criteria, requiring the permittee to obtain written consent from the USFS prior to transporting their cargo and in order to validate the permit." To Plaintiffs' knowledge, the FHWA has not yet responded to this request.

5. Forest Service's August 16, 2013 meeting with ITD. (Second Lopez Decl., Exh. 4). On August 16, 2013, Forest Supervisor Brazell met with officials from the Idaho Transportation Department. The Lewiston Morning Tribune reported that:

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

6. Nez Perce Tribe's August 22, 2013 letter to the Forest Service. (Second Lopez Decl, Exh. 5). On August 22, 2013, the Tribe wrote the Forest Service seeking consultation under Section 106 of the National Historic Preservation Act, and requested that the agency:

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

See also Declaration of Nakia Williamson, filed herewith (Tribal expert on historical and cultural values of the Clearwater/Lochsa corridor requiring NHPA Section 106 consultation).

7. Lewiston Morning Tribune report of additional mega-loads. (Second Lopez Decl., Exh. 6). On August 27, 2013, the Lewiston Morning Tribune reported additional mega-loads are being planned for Highway 12, in addition to RCCI's eight further mega-loads:

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

8. Forest Service's August 29, 2013 letter to the Nez Perce Tribe. (Second Lopez Decl., Exh. 6). On August 29, 2013, the Forest Service declined to initiate NHPA Section 106 consultation as requested in the Tribe's August 22 letter, stating:

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

REPLY ARGUMENT

I. DEFENDANTS' RESPONSE BRIEFS MISUNDERSTAND THE REVIEWABLE AGENCY ACTION AT ISSUE.

Both response briefs question the final agency action in this case, in varying ways that misunderstand the facts before this Court. It is undisputed, however, that the Chairman of the

Nez Perce Tribe made a request for relief directly to the Chief of the U.S. Forest Service on August 5th, requesting that the Forest Service exercise its authority and prohibit mega-load shipments until tribal consultation and a corridor impacts study were complete; but that request for relief was denied. *See* Whitman Declaration (*Docket No. 10*). Just as in the prior *IRU v. USFS* decision of this Court, such denial of a petition for relief constitutes final agency action for purposes of judicial review under the APA. *See* 5 U.S.C. § 551 (13) ("agency action" includes agency "relief" "or denial thereof"); *IRU v. USFS*, 2013 WL 474851, at *8 (D. Idaho 2013).

As the Ninth Circuit held in *Ore. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977 (9th Cir.2006), "[f]or an agency action to be final, the action must (1) 'mark the consummation of the agency's decisionmaking process' and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" To determine whether the consummation prong of the test has been satisfied, the court must make a pragmatic consideration of the effect of the action, not its label. *Id.* at 982, 985. The finality requirement is satisfied when an agency action imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. *Id.* at 986–87. "An agency action may be final if it has a 'direct and immediate . . . effect on the day-to-day business' of the subject party." *Id.* at 987. The facts here fully conform with these standards, since the initial RCCI mega-load was allowed to proceed through the National Forests and Wild and Scenic corridor, causing injury to Plaintiffs.

Moreover, it is undisputed that the Forest Service denial was based on the agency's conclusion it lacked enforcement authority to actually stop a mega-load shipment. *See* Whitman Declaration (stating this fact). The Forest Service now seeks to characterize the decision as either interim/non-final, or as a discretionary decision not to enforce its authority. The latter

point is addressed in the remainder of Section I below. The former is refuted by the fact that the shipment was in fact allowed to move across the Reservation and the National Forest. The presence of RCCI's second mega-load at the Port of Wilma, which it intends to move in a matter of days, followed by additional loads over the coming fall and winter, demonstrate that Plaintiffs' claim remains live and is not moot.[2]

II. *HECKLER V. CHANEY* DOES NOT CONTROL HERE.

The Forest Service's August 12 letter (discussed above) was transparently designed – after the fact of the Forest Service's actual August 5 decision that it lacked authority to enforce its mega-load directives – to place this case into the framework of the U.S. Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). Defendants' response briefs unsurprisingly follow suit. That case merits up-front explication. The Forest Service's action does not trigger application of *Chaney*, and the response briefs misapply *Chaney* to the unique facts of this case. As explained below, *Chaney* is not a monolithic obstacle to agency action challenges, and it involved unique facts that are frequently distinguished in subsequent case law.

A. The Limited Ruling of *Chaney*.

Chaney involved a petition to the FDA by prison inmates sentenced to death by lethal injection. The petition claimed the FDA was violating the Federal Food, Drug and Cosmetic Act (FDCA) by allowing the use of drugs that, while approved by the FDA for other uses, had not

[2] RCCI's argument that this case should be governed by APA § 706(1) and *Norton v. SUWA*, 542 U.S. 55 (2004) is meritless: that section and that case apply to an agency's "failure to act." *See* 542 U.S. at 62-3. Again, this case centers on a specific agency *denial* of a request for *relief*, which is categorically distinct from a failure to act under the APA, as *SUWA* recognized. *Id.* at 63 ("A 'failure to act' is not the same thing as a 'denial.' *The latter is the agency's act of saying no to a request.* The former is simply the omission of an action without formally rejecting a request[.]" (emphasis added)).

been "approved for use in human executions." *Id.* at 823. The FDA rejected the petition, asserting its "inherent discretion" not to pursue enforcement of certain matters. *Id.*

The *Chaney* decision first noted the distinction formed by § 701(a)(1) and (2) of the APA. The former precludes judicial review where Congress has expressly stated that intention. *Id.* at 830. The latter covers those cases where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* The Court recognized that the latter exception had already been described in *Citizens to Preserve Overton Park, Inc.v. Volpe*, 401 U.S. 402 (1971), as a "very narrow exception" to judicial review for cases where there is "no law to apply." *Id.* *Chaney* in essence inserted into the *Overton Park* § 701(a)(2) "very narrow exception" – with its presumption of reviewability – a specific presumption of unreviewability for cases where the agency action was a decision "not to undertake certain enforcement actions." *Id.* at 831.

Unlike the instant case, where Forest Service concededly has *no* prior expertise in the enforcement of mega-loads on Highway 12, *Chaney* emphasized the "peculiar expertise" of an agency making day-to-day enforcement decisions:

> [T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32.

And unlike the instant case, where multiple U.S. public and Nez Perce tribal rights and interests are at stake from non-enforcement, *Chaney* reasoned that non-enforcement (as opposed to enforcement) typically does not involve "*coercive* power over an individual's liberty or

property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832 (emphasis in original).

The Court recognized that its *Overton Park* "law to apply" rule remained, and that the non-enforcement discretion it was recognizing would be overcome "meaningful standards for finding the limits of that discretion." *Id.* at 834. In the case before it, it found no such standards: instead the FDCA gave "complete discretion" over enforcement to the FDA. *Id.* at 835. The Court did allow that an agency rule, as distinct from a statute, could provide an "adequate guideline" for review; Justice Brennan in his concurrence emphasized this basis for review, *id.* at 839; and subsequent case law has established that an agency itself may provide the guidelines for judicial review. *E.g., Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988) ("When an agency chooses to so fetter its discretion [by regulation], the presumption against reviewability recognized in *Chaney* must give way."); *see also Drakes Bay*, *supra*, slip op. at 16 ("[E]ven where the substance or result of a decision is committed fully to agency's discretion, 'a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions.'")

Chaney notably distinguished three alternative scenarios. The first is "a refusal by the agency to institute proceedings based solely on the belief that it lacks [enforcement] jurisdiction." *Id.* at 833 n. 4. The second is where "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." U.S. at 833 n. 4. The third is where a case presents a "colorable claim . . . that the agency's refusal to institute proceedings violated any constitutional rights." *Id.* at 838.

Plaintiffs show below that the instant case does provide meaningful standards for judicial review – i.e., "law to apply" – even if the Court accepts the Forest Service's (reinvented) assertion of discretion. The case also arguably involves all three *Chaney* exceptions, depending on the facts the Court finds: whether the Forest Service is in fact denying it has enforcement authority rather than exercising particular discretion over that authority; or whether its claimed 'discretion' in fact amounts to a policy of abdication.

B. THE FOREST SERVICE IS NOT EXERCISING ENFORCEMENT DISCRETION ENTITLED TO A *CHANEY* "PRESUMPTION OF UNREVIEWABILITY" – ITS ACTIONS ARE THOSE OF AN AGENCY THAT HAS DECIDED IT LACKS ENFORCEMENT AUTHORITY.

Defendants attempt to reinvent the Forest Service's actual August 5 agency decision in this case, and avoid judicial review, with an ex post facto rationale that the Forest Service exercised its "discretion" to allow the first RCCI mega-load to be shipped in violation of the Forest Service's June 2013 directive requiring study and consultation before any mega-loads would be authorized to cross Forest Service lands.

The Forest Service is not entitled to *Chaney* deference from this Court. In the bluntest sense, these are simply not *Chaney*-applicable facts. The agency here stood down not through the application of its "peculiar expertise" (*Chaney's* key predicate) but through a decision that it lacked enforcement authority over a matter in which it concededly had no expertise or experience. As the Ninth Circuit just reconfirmed, § 701(a)(2) discretion is predicated on the "informed judgment" of an agency. *Drakes Bay, supra*, slip op. at 16. Here, the Forest Service has only barely begun to inform itself as to adverse mega-load impacts, through the informal corridor study discussed in the Brazell Declaration. In the words of *Chaney*, this is an instance of "a refusal by the agency to institute proceedings based solely on the belief that it lacks [enforcement] jurisdiction." 470 U.S. at 833 n. 4.

The facts of the Forest Service's conduct leading up to, and following, its actual August 5 decision also refute its subsequent August 12 letter reinvention. The Forest Service consistently represented to the Nez Perce Tribe and the public that it lacked enforcement authority to stop the mega-load. Supervisor Brazell, in an August 2 interview with the Lewiston Morning Tribune, is quoted as saying, "[w]e don't have authority to stop the megaloads. You read the court ruling and it says we have authority to review the state permits. We have reviewed them and made our interim criteria." Lopez Decl. Exh. 11, pg. 2 (*Docket No. 9*, p. 66). On August 5, 2013, Nez Perce Tribal Chairman Silas Whitman called Forest Service Chief Tom Tidwell and requested relief in the form of immediate action consistent with the Forest Service's directives to stop the mega-load from travelling through the National Forest. Chief Tidwell responded, "the Forest Service does not have the authority to close the State highway." Whitman Decl. ¶ 16. On Friday, August 16, the Forest Service met with ITD officials in Boise, Idaho; according to the Lewiston Morning Tribune, Supervisor Brazell "asked [ITD] not to issue any megaload permits during the next six weeks," but "that request was denied." Brazell stated, "[w]e really pleaded with them to give us the six weeks but they feel like their regulations don't allow that."

Brazell's comments regarding the meeting with ITD reveal the true nature of the Forest Service's August 5 decision. There was no mention of the Forest Service discretionarily choosing not to enforce its own directives prohibiting mega-loads on the National Forest until the completion of tribal consultation and a corridor impacts study.

Similarly, the Regional Forester's August 15th letter to the FHWA requested assistance "in resolving issues concerning the issuance of over legal-sized load permits on U.S. Highway 12 by the Idaho Transportation Department." Second Lopez Decl., Exh. 3. Regional Forester Krueger explained: "Our desire is to establish an administrative mechanism, by which we can

redeem our review authority. We seek your assistance in establishing that mechanism." *Id.* (emphasis added). By asserting a need to "redeem [the Forest Service's] review authority," Krueger is asking FHWA to exercise *its* enforcement authority because the Forest Service has transparently concluded it lacks enforcement authority.

The Forest Service's repeated conduct and public statements are consistent with the fact that the August 5 denial of relief was based on a conclusion that the agency lacked enforcement authority. The Forest Service's repeated public conduct and statements, and its specific denial of the Tribe's request for relief, reveal an agency that denied relief "based solely on the belief that it lacks [enforcement] jurisdiction," and hence judicial review is not precluded under *Chaney*. *Id.* at 833 n. 4.

C. THE FOREST SERVICE IS NOT EXERCISING ENFORCEMENT DISCRETION ENTITLED TO *CHANEY* DEFERENCE; INSTEAD IT IS EMBARKED ON A POLICY OF ABDICATING ITS ENFORCEMENT AUTHORITY OVER U.S. HIGHWAY 12.

As discussed above, this is not a case in which the Forest Service is in fact exercising technical expertise *Chaney* discretion. Moreover, if the Forest Service is permitted to reinvent its actual decision in this manner, the Forest Service will be embarking – as to future RCCI mega-loads intended to be shipped very shortly and throughout the fall and winter – on just the sort of "policy" of non-enforcement "amounting to abdication of statutory responsibilities" that *Chaney* itself distinguished from its ruling. It is apparent the Forest Service will do nothing to enforce its regulatory authority and will continue to clothe that abdication in ex post facto assertions of "discretion." As a matter of law this is impermissible.

In *Chaney*, before applying its rule of presumption to the facts before it, the Court noted that the case was not one where an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S.

at 833 n. 4 (emphasis added). Such a "policy of abdication" has since been interpreted to include not only formally expressed policies, but the "inference" of such a policy from an agency's conduct that allow a court to "discern from them an abdication of responsibilities conferred [on an agency by statute]." *Riverkeeper, Inc. v. Collins* 359 F.3d 156, 167 (2nd Cir 2004).

Here the public interest and the interests and treaty-reserved rights of the Nez Perce Tribe and its people are of such weight that this Court should review the Forest Service's decision to stand down from enforcement of its regulatory authority over U.S. Highway 12. The Court must ensure that the Forest Service is not embarking on a policy – express or de facto – of abdicating its protective statutory responsibilities as to the National Forest, the Wild and Scenic River corridor, and the treaty-reserved rights of the Nez Perce Tribe. Again, if the Court finds that the agency *in fact* has concluded that it lacks enforcement authority, the Court should, with no *Chaney* deference, review and declare and enjoin the agency's exercise of its enforcement authority (discussed further below). Alternatively, if the Court finds that the Forest Service is embarking on a de facto policy of non-enforcement of its statutory obligations and the multiple federal and treaty-reserved values and interests at stake, it should, again with no *Chaney* deference, declare and enjoin the agency to exercise its multiple statutory responsibilities, including the enforcement necessary to fulfill them.

D. THE FOREST SERVICE IS NOT ENTITLED TO A "PRESUMPTION OF UNREVIEWABILITY" WHERE THE INJURIES AT ISSUE ARE TO CONSTITUTIONALLY-PROTECTED INDIAN TREATY RIGHTS.

Even assuming the Forest Service did exercise enforcement discretion here, the third *Chaney* exception noted above applies because this case uniquely involves injuries to an Indian tribe's treaty-reserved rights protected under the U.S. Constitution. These injuries have occurred and are likely to continue, but remain unexamined by the Forest Service precisely because it will

not exercise enforcement authority prior to completion of required consultation with the Tribe. The Forest Service may not avoid judicial review of its actions – and is not entitled to a *Chaney* "presumption of unreviewability" – under these facts.

Chaney twice noted – in the majority opinion and in the concurrence of Justice Brennan – that the decision did not apply to cases alleging the violation of constitutional rights. 470 U.S. at 838 and 839. While (unsurprisingly) not mentioned in *Chaney*, Indian treaty rights are a form of constitutional right meriting similar entitlement to protection through judicial review: treaties and the rights embedded in them are protected under the U.S. Constitution, Article VI, as part of "the supreme law of the land."

The U.S. Supreme Court has long recognized – dating back to Justice Marshall's opinions in *Cherokee Nation v. Georgia* 30 U.S. 1 (1831) and *Worcester v. Georgia* 31 U.S. 515 (1832) – the unique constitutionally-protected status of Indian tribes and their treaty-reserved rights. The Court in its 1979 decision in *Washington v. Washington Commercial Passenger Fishing Vessel Association*, summarized well-established principles as follows:

> [T]his Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, *e. g., Tulee v. Washington, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115; United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089*, [1905] and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's "unique obligation toward the Indians." *Morton v. Mancari, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290. See United States v. Antelope, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701; Antoine v. Washington, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129.*

443 U.S. 658, 673 n. 20.

The legal principle that the process of consultation between the United States and an Indian tribe regarding prospective adverse impacts to Indian treaty rights and interests may be defective – or omitted – and so require judicial review and the setting aside of agency action is well-established in federal Indian case law. The Eight Circuit in *Oglala Tribe of Sioux Indians v.*

Andrus, 603 F.2d 707(8th Cir. 1979), for example, in a case involving a tribal challenge to the reassignment of a Bureau of Indian Affairs (BIA) reservation superintendent, stated:

> By holding that the Bureau failed to comply with its own procedures, we are not, as the government asserts, holding that the Oglala Sioux Tribe is entitled to a superintendent of its choice. We hold only that where the Bureau has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, *See United States v. Caceres, supra,* 440 U.S. at 751 n. 14, 99 S.Ct. at 1471 n. 14, 59 L.Ed.2d at 743 n. 14, Citing *Morton v. Ruiz, supra*, 415 U.S. at 235, 94 S.Ct. 1055, but also violates " 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Morton v. Ruiz, supra* at 236, 94 S.Ct. at 1075, Quoting *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942).

Id. at 721.

It is worth noting that the constitutional rights exception discussed in *Chaney* was required by the very factual limitations of Court's reasoning. *Chaney* is at bottom about those enforcement situations in which an agency is addressing factors "peculiarly within its expertise" and where an agency "generally *cannot act against each technical violation* of the statute it is charged with enforcing." 470 U.S. at 831 (emphasis added). The Court took the time to expressly exempt "colorable claims" of violation of constitutional rights from its opinion because the prospect of having created a "presumption of unreviewability" as to actions affecting rights protected by the Constitution would have been untenable. Claims of injury to rights protected by the Constitution have to be recognized and preserved as a categorically different matter, entitled to judicial review, or at least not subject to a new "presumption of unreviewability." The idea that a "presumption of unreviewability" could apply to cases in which injuries to Indian treaty-reserved rights are at stake is equally untenable.

There are multiple legal bases on which an Indian tribe could assert an obligation on the part of a U.S. agency to ensure as a matter of procedure, when it acts or makes decisions, that it does not injure the tribe's treaty-reserved rights. In this case the Nez Perce Tribe has chosen to focus particularly on the Forest Service's obligations under NFMA (in the original complaint) and the NHPA (added in the First Amended Complaint). The structure of those obligations, and the manner in which they trigger the constitutionally-protected obligations of the United States to an Indian tribe, is not complicated.

For example, NFMA requires that the Forest Service develop Forest Plans, *see* 16 U.S.C. § 1604(a), and it requires that use and occupancy of National Forest lands "shall be consistent with" Forest Plans. *Id.*, § 1604(i). *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005) (discussing this NMFA "consistency" requirement). The Forest Service adopted the Clearwater Forest Plan in 1987, which established in Section E forest-wide standards "that are considered as minimum requirements that must be met." Forest Plan at II-20. Among these is standard E1(d):

> Insure proposed practices and management activities are coordinated with other governmental entities and *Indian Tribes to insure requirements of all laws and regulations are met and terms of Indian Treaties are upheld*

Forest Plan at II-21 (emphasis added). The Forest Plan also includes standard E3(g):

> [e]nsure that Forest actions are not detrimental to the *protection and preservation of Indian Tribes' religious and cultural sites and practices and treaty rights*.

Id. at II-23 (emphasis added).

The Forest Service's actions in this case are directly contrary to its Forest Plan and NFMA, and involve the unexamined (un-consulted) likelihood of injury to Nez Perce treaty-reserved rights and resources. The Tribe has repeatedly informed the Forest Service of its concerns regarding the likelihood of injury to its treaty-reserved rights and resources from the

shipment of mega-loads across the Nez Perce Reservation[3] and the National Forest and Wild and Scenic Corridor. As a result, the Tribe has been deprived of the required opportunity to explain – through complete meaningful government-to-government consultation with the Forest Service – its multiple concerns about the adverse impact mega-load shipments on its treaty-reserved rights and resources on the National Forest corridor, which is within the aboriginal and treaty-reserved territory of the Nez Perce Tribe.

Because of the Tribe's claim of injury to treaty-reserved rights protected by the U.S. Constitution, the Forest Service's action in this case – regardless whether it was a decision that it lacked enforcement authority or whether under its re-characterization it was a decision not to enforce its authority – must be reviewed by the Court under the standards of APA § 706(2). Any argument by the Forest Service that it is entitled to a "presumption of unreviewability" under *Chaney* must be rejected based on *Chaney's* own exemption of agency decisions affecting constitutional rights.

E. THE FOREST SERVICE'S DECISION IS ALSO NOT IMMUNE FROM JUDICIAL REVIEW UNDER *CHANEY* BECAUSE THERE IS MEANINGFUL LAW TO APPLY.

Moreover, even if the Court concludes that the Forest Service did exercise discretion, the agency's decision allowing mega-load transport through the Nez Perce-Clearwater National Forest is only presumptively unreviewable. *Chaney*, 470 U.S. at 837. The presumption against review is "rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id*. at 832-33. "Such a standard exists, for example, where the law establishes that the government's authority 'should be used universally' or

[3] By allowing and in effect inviting (through its stand-down) additional mega-load traffic across U.S. Highway 12 on the National Forest, the Forest Service is necessarily allowing and inviting additional mega-load traffic across the Nez Perce Reservation as the access to that corridor.

provides 'a basis for distinguishing between the instances in which [those powers should and should not be exercised].'"' *Beaty v. FDA*, 853 F.Supp.2d 30 (D.D.C.2012) (*quoting Hinck v. United States*, 550 U.S. 501, 504 (2007)).

There is substantial law to apply in this case. As explained in Plaintiffs' opening brief, the Forest Service established an interim process for reviewing the transport of mega-loads through the Nez Perce-Clearwater National Forests on U.S. Highway 12, which provides substantial direction as to when and under what conditions a mega-load shall have agency authorization to access the National Forest. The Forest Service established three interim criteria that the agency will apply to determine which oversized loads require additional Forest Service review, and further specified that no loads meeting these criteria will be authorized for travel through the National Forest until a corridor impacts study and consultation with the Nez Perce Tribe are completed. *See* Lopez Decl., Exhs. 3 & 6 (*Docket No. 8*, pp. 27-29 & 41-43).

The Forest Service also has discrete, mandatory duties under NFMA, its implementing regulations and forest plans requiring that the Forest's actions are not detrimental to tribal rights and interests. *See* Plaintiffs' Opening Brief (*Docket No. 6*), pp. 13-15. Similarly, the Forest Service interim criteria for mega-loads are intended to protect the "outstandingly remarkable values" for which the Middle Fork Clearwater/Lochsa Rivers were designated under the Wild and Scenic Rivers Act; and the duties imposed by that Act on the Forest Service likewise demonstrate that there is substantive "law to apply" under that *Chaney* exception. Those duties are explicated in Plaintiffs' opening brief, pp. 15-16.

The National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, also provides the Court with meaningful standards against which to evaluate the Forest Service's actions. NHPA requires that federal agencies "with direct or indirect jurisdiction over a proposed Federal or

federally assisted undertaking…shall, prior to the approval of any federal funds on the undertaking or prior to the issuance or any license…take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470(f). Section 106 requires that, if historic properties are "[p]roperties of traditional religious and cultural importance to an Indian tribe," the federal agency consult with that tribe. *Id.* § 470(d)(6)(A). Under this consultation process, federal agencies must "make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register…; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).

Based on the importance of the Locsha River corridor to Nez Perce culture and identity and the Tribe's recognition of the area as a Traditional Cultural Property, *see* Declaration of Nakia Williamson, the Tribe on August 22, 2013 requested that the Forest Service conduct NHPA Section 106 evaluation of the impacts of mega-loads on historic properties, including TCPs. Second Lopez Decl., Exh. 5. In its August 27th response, the Forest Service denied the Tribe's request to initiate the Section 106 process, reasoning that "[g]iven the litigation and upcoming hearing before Judge Windmill (sic), the Forest Service will wait to see what comes from that before engaging in discussion of Section 106 issues." *Id.* Exh. 6. Because the NHPA again provides "law to apply" in connection with the Forest Service's refusal to consult with the Tribe and evaluate potential impacts on cultural and historic properties, the *Chaney* presumption of unreviewability is again refuted in this case.

In summary, the legal arguments raised by the Forest Service and RCCI in an attempt to avoid judicial review are unavailing here, in light of the facts, claims and injuries presented in this case. And because the Forest Service has failed to conduct required consultation with the Tribe, and is disregarding its own June 2013 interim criteria that would allow it to authorize mega-loads only after full study and consultation, Plaintiffs are likely to prevail in their challenges to the Forest Service's action as being arbitrary, capricious, and contrary to law under APA Section 706(a)(2).

III. AN INJUNCTION IS NEEDED TO PREVENT IRREPARABLE HARM.

A. Procedural Harms Are Occurring.

Plaintiffs' opening injunction brief showed that several types of irreparable harm will occur unless the Court issues injunctive relief, including procedural harms from the Forest Service's failure to conduct consultation with the Tribe over mega-load shipments. *See* Opening Brief, pp. 16-22. As discussed above, these procedural harms flow from the Tribe's treaty rights as well as statutory directives under NFMA/Clearwater National Forest Plan, the Wild and Scenic Rivers Act, and the NHPA.

The Forest Service's failure to consult with the Tribe fully about its decisions on mega-loads strikes at the heart of the sovereign interests of the Tribe and its members. These interests are so profound that the entire leadership of the Tribe were arrested protesting RCCI's first mega-load in early August, along with many ordinary Tribal members who are deeply passionate about protecting their Tribal integrity, reservation, and ancestral lands from industrialization through mega-load transports. *See* Smith, Picard and Second Sedivy Declarations. More protests and civil disobedience can be expected if future mega-loads are allowed to roll through the heart of the Nez Perce Tribe's region of historical, cultural and religious importance. *Id.*

The opposition briefs try to downplay these procedural injuries by pointing to the meeting held on August 20 between the Forest Service and Tribal leadership, as if that solves or moots this issue.[4] But that meeting occurred after the Forest Service made its decision to "stand down" on the first mega-load, and after Tribal Chairman Whitman unsuccessfully implored the Chief of the Forest Service not to allow it; the August meeting did not resolve any issue whatsoever about the Tribe's concerns over impacts to cultural, historic and religious values. *See* Second Lopez Declaration, Exhs. 2 & 5. Moreover, the Forest Service has declined to initiate NHPA Section 106 consultation, on grounds that it wants direction from this Court before taking any further steps. *Id.*, Exh. 7. The Court should provide that direction by enjoining more mega-loads until the Forest Service has satisfied its statutory duties.

B. Other Irreparable Harms Warrant Injunctive Relief.

In addition, Plaintiffs documented through their detailed declarations that harms to the scenic, cultural, environmental and other values associated with the Wild and Scenic corridor would occur, as they have with past mega-load shipments. *See* Whitman, Sedivy, Lewis, Hendrickson, Laughy, Grubb Declarations (*Docket Nos. 10-15*). The Forest Service and Intervenor do not refute these showings.

The Forest Service only asserts that, because permanent changes have already been made to the physical highway corridor to allow mega-load passage, subsequent mega-load shipments are "transitory" and have no lasting irreparable impact. Intervenor RCCI similarly contends that there are no environmental injuries from its mega-loads because no physical modifications are needed to the highway. But these arguments fail to address the real and lasting impacts of mega-

[4] Intervenor also argues that Plaintiffs lack standing because they cannot show injury or redressability. But the ongoing procedural harms documented by Plaintiffs are both real and redressable by the requested relief from this Court, and thus alone establish Plaintiffs' standing.

loads to the scenic and aesthetic values of the Wild and Scenic corridor and to the persons – including many members of the Plaintiffs – who desire to enjoy them, including by camping, hiking, fishing, boating, and even parking in the Wild and Scenic corridor. The disruptions caused by the lights, loud noises, and long convoy of vehicles accompanying the mega-loads mar these experiences forever, and are by definition irreparable. *See* Second Sedivy Decl. (describing these impacts).[5]

Moreover, the record before the Court underscores the serious public health and safety harms that are threatened if no injunction is issued. The fact is that the U.S. Highway 12 mega-loads trigger strong emotions and protests from many people – Tribal members and non-members alike – who live, work or recreate along the U.S. Highway 12 route. According to Intevenor's own declarant Pete Uhler, protests occurred each night of the first RCCI mega-load shipment and required large numbers of state police just to clear the route for the mega-load to proceed. *See* Uhler Decl. (*Docket No. 26-3*), ¶¶ 5-10. As Uhler stated, the "activities of the protesters on August 6 were the most dangerous I have ever seen," and included "children running in the road, heckling, and throwing objects." *Id.*, ¶¶ 5-6.

These events can be expected to recur and even intensify with future mega-loads, as the concerns and passions of those most affected by them – Tribal and non-Tribal members alike – remain unaddressed by any public process from any agency, including the Forest Service. *See* Smith, Picard and Second Sedivy Declarations. The very real risks to the public from the mega-loads thus again warrant injunctive relief.

[5] A graphic illustration of the disruption caused by the first RCCI mega-load in the Wild and Scenic corridor from its bright lights, loud noises, and long slow convoy can be seen on a video taken by professional photographer Roger Ingram, which is available on the internet at: http://sayingnotogoliath.blogspot.com/2013_08_01_archive.html. Second Sedivy Decl., ¶ 11.

C. The Balance of Harms and Equities Favor An Injunction.

In contrast to these many forms of irreparable harm shown by Plaintiffs, the Forest Service has not articulated any type of harm that would allegedly affect it from injunctive relief. Forest Supervisor Brazell – the only Forest Service declarant – conspicuously says nothing in this regard, even while noting that the Idaho Transportation Department refused to support federal funding for a corridor study that the Forest Service sought. *See* Brazell Declaration (*Docket No. 27-1*). Where the Forest Service contends that it is launching a corridor study on its own anyway, *id.*, there can be no prejudice to the Forest Service from an injunction prohibiting new mega-load shipments while that process is completed.

That only leaves Intervenor RCCI, which alleges that it conducted an extensive investigation before choosing Highway 12 and that it faces losses in the millions of dollars from an injunction. *See* Heins Declarations I & II (*Docket Nos. 21-2 & 26-2*). Surprisingly, RCCI does not even mention the following key facts:

• RCCI's shipping agent Omega Morgan learned of this Court's February 2013 ruling in *IRU v. USFS* and immediately inquired of Idaho Transportation Department whether that ruling affected availability of Highway 12 for its planned mega-load shipments, numbering nine or more in 2013, *see* Lewis Decl. (*Docket No. 15*), Exh. 1 & Second Sedivy Decl., ¶ 2;

• In early April, counsel for Plaintiff IRU sent a letter to Omega Morgan responding to that inquiry, and specifically advised that Forest Service approval would be required and that IRU and others intended to vigorously challenge any future mega-loads in the Wild and Scenic corridor, *see* Second Sedivy Decl., Exh. 1;

• Most importantly, on August 5, 2013, Supervisor Brazell wrote Omega Morgan to advise that the planned mega-loads triggered the Forest Service's interim criteria, thus requiring

Forest Service evaluation and consultation (including with the Tribe); and that the mega-load shipments were not authorized. *See* Lopez Declaration, Exh. 9 (*Docket No. 9*, pp. 59-60). Yet RCCI and its shipper flouted this federal instruction by proceeding to transport their first mega-load up Highway 12 in early August anyway.

Having defied the Forest Service once already, RCCI now has the temerity to contend that the Court cannot grant an injunction because its second planned – and federally unauthorized – mega-load will cost it money if it cannot use U.S. Highway 12.[6] The Court, sitting in equity, must reject this claim that RCCI's financial exposure weighs against an injunction. RCCI willingly subjected itself to the jurisdiction of the Court by intervening in this case; and it assumed the risk of shipping its two initial mega-loads up the Snake River to the Port of Wilma for transport along U.S. Highway 12 even when it knew of the Court's *IRU v. USFS* ruling, had been advised that they would be vigorously challenged, and was instructed by the Forest Service that they were not authorized. On notice of these facts, Intervenor cannot now complain about the Court exercising its equitable authority to enjoin the second and other future planned RCCI mega-loads. As the U.S. Supreme Court held many years ago, in an analogous situation:

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

[6] RCCI's arguments as to the posting of bonds should be rejected based on the public interest nature of this case and RCCI's own assumption of the risk. Moreover, the Tribe notes that Indian tribes possess sovereign immunity from suit in state and federal court: the only exceptions are 1) explicit authorization by Congress and 2) explicit waiver by a tribe itself. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The doctrine applies regardless whether the issue arises on or off a tribe's reservation. *Id.* at 754. A tribe's waiver of its sovereign immunity cannot be implied and must be clear. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Even where an Indian tribe initiates a legal action, it does not waive its sovereign immunity as to (even compulsory) counterclaims by a defendant. *Id.* at 509-10.

> they may be ultimately decided * * *." *Jones v. SEC*, 298 U.S. 1, 17, 56 S.Ct. 654, 658, 80 L.Ed. 1015 (1936).

Porter v. Lee, 328 U.S. 246 (1946). *See also National Forest Preservation Group v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973); *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000) (all following *Porter* and *Jones* in holding that a party with notice of proceeding who takes action does so at their own risk, and the action may be reversed or enjoined by court sitting in equity). As the Ninth Circuit just held, equity does not favor a party that "is largely responsible for their own harm" where that party simply assumed it would receive a permit and "refus[ed] to hear the message" that it might not. *See Oyster Bay, supra*, slip op. at p. 37.

CONCLUSION

For the foregoing reasons and those explained in their opening brief, Plaintiffs Nez Perce Tribe and Idaho Rivers United respectfully request that this Court grant their Motion for Preliminary Injunction.

DATED: September 6, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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