WENDY J. OLSON, IDAHO STATE BAR NO. 7634
UNITED STATES ATTORNEY
JOANNE P. RODRIGUEZ, IDAHO STATE BAR NO. 2996
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF IDAHO
WASHINGTON GROUP PLAZA IV
800 EAST PARK BOULEVARD, SUITE 600
BOISE, ID 83712-7788
TELEPHONE: (208) 334-1211
FACSIMILE: (208) 334-1414
Joanne.Rodriguez@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE and IDAHO RIVERS UNITED, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	Case No. 3:13-CV-00348-BLW **RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 5)**

INTRODUCTION - Plaintiffs cannot show a strong likelihood of success on the merits, or irreparable harm. The motion for a preliminary injunction should be denied.

LAW - A preliminary injunction is an extraordinary remedy which should not be issued as a matter of course. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987). To succeed, Plaintiffs must show: (1) a strong likelihood of success on the merits; (2) a balance of irreparable harm favoring plaintiffs; and that (3) the public interest favors the issuance of an injunction.

N. Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986). There is no presumption of irreparable injury in an environmental case. *Amoco* 480 U.S. at 542.

Agency decisions to refuse enforcement are generally unsuitable for judicial review. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). "For good reasons, such a decision has traditionally been committed to agency discretion, and we believe that the Congress enacting the APA did not intend to alter that tradition." *Id.* at 832. An agency's decision not to take enforcement action is thus presumed immune from judicial review under 5 U.S.C. § 701(a)(2). *Heckler v. Chaney*, 470 U.S. at 832. A decision not to enforce through civil process is a decision generally committed to an agency's absolute discretion. *Id*. at 831.

> There are many reasons judicial review is unsuitable. "First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the 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 . . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."

Id. 831-832. In refusing to compel the agency to take action, the *Chaney* Court noted that it might intervene if the agency's refusal to act was based on a "consciously and expressly adopted" general policy so extreme as to amount to an abdication of its statutory responsibilities. *Id*. at 833, n.4. Because the agency's refusal was not based on such an extreme policy, the Court declined to intervene.

In *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001), the Sierra Club sued EPA for failing or refusing to take enforcement action against operators of a wastewater treatment plant that was polluting the Santa Cruz River in violation of the Clean Water Act. The plant operators' permit to run the plant had expired, and they violated the permit limitations of pollutant discharges

128 times in 5 years. The Clean Water Act's provision that the EPA "shall issue an order" to comply or "shall bring a civil action" against "any person found in violation" of a permit (33 U.S.C. § 1319(a)(3)), underlay the Sierra Club's suit.

The Court held that the EPA's actions in failing or refusing to take enforcement action against the violators were discretionary decisions that were not subject to judicial review. *Id*. at 900. The primary reason for the holding was the traditional presumption that an agency's refusal to enforce is within the agency's discretion, unless Congress has indicated otherwise. *Id*. at 902. This presumption is not limited to APA cases. *Id*. The presumption may be overcome if Congress indicated that a decision or act is not discretionary. *Id*. However, the use of the word "shall" in a statute does not necessarily denote a mandatory duty. *Id*. at 904. "Shall" may be the equivalent of "may," and merely authorize, not command, action by an agency. *Id*.

The Executive Branch has absolute discretion to decide whether to prosecute a case. *United States v. Nixon*, 418 U.S. 683, 693 (1974). "One of the greatest unilateral powers a President possesses under the Constitution" is the power not to seek charges against violators of a federal law, "essentially under-enforcing federal statutes." *In Re: Aiken County, et al.*, No. 11-1271 (D.C. Cir., August 13, 2013).

ARGUMENT - Plaintiffs' claims are brought under the Administrative Procedures Act, the Wild and Scenic Rivers Act, and the National Forest Management Act. This Court previously dismissed Plaintiffs' claims under the Wild and Scenic Rivers Act (16 U.S.C. § 1281 and 1283) in the earlier litigation on this same issue. Case 11-CV-0095, ECF No. 32. The Court also dismissed the same claims regarding the National Forest Management Act. *Id*. It is unlikely Plaintiffs will succeed on the merits of these claims in this repeat action.

Under the APA, agency action must be final before it may be reviewed by a court. 5 U.S.C. § 704. This Court ruled, only 6 months ago, that the Forest Service has jurisdiction to review the State of Idaho's approvals of "mega-loads" on Highway 12. Despite diminishing budgets in this time of sequestration, the Forest Service has started a process to address the issue.[1] *See* Brazell Decl. It is proceeding with the "complicated balancing of a number of factors" involved in such a decision. These include whether the agency has the necessary resources and how to spend those resources, as well as the likelihood of success and how the action fits the agency's overall policies. *Chaney*, 470 U.S. at 831. It has met with the Idaho Transportation Department, Federal Highways and Plaintiff Nez Perce Tribe to discuss the issue. More meetings are planned. Brazell Decl.

In the instant case, the Forest Service has not made a final decision. Brazell Decl. It has made an interim decision not to act hastily. It has acted, and continues to act, deliberately, in accordance with its' officials' assessment of the best way to proceed on this matter. Plaintiff Nez Perce Tribe itself said it supports the Forest Service's position that a "larger and more comprehensive dialogue" on the issue is necessary. Lopez Decl., ECF No. 8, Ex. 4, Whitman letter. The Tribe said that the Forest Service needs a "full evaluation of the impacts" of mega-loads on cultural and intrinsic values. *Id*. That requires time. Brazell Decl.

Plaintiffs are not the only entities entitled a reasoned, deliberate decision by the Forest Service. Others who will be affected by a Forest Service decision in this matter, such as the State of Idaho and Omega Morgan, are equally entitled to be free of an arbitrary and capricious decision by the agency, just as the Nez Perce Tribe and Idaho Rivers United are. And the Forest Service is

1 Contrary to Plaintiffs' assertion, the Forest Service does not assert that it lacks authority to review the mega-load approvals by the State of Idaho.

just as likely to be sued by those affected entities for violating the APA by acting too hastily as by Plaintiffs for not acting quickly enough.[2]

It is unclear what specific action Plaintiffs expect to the Court to order. Plaintiffs claim Omega Morgan's mega-loads and the State of Idaho's permit to Omega Morgan result in irreparable and substantial harm by violating various laws. The simplest and most direct way to remedy those violations would be to sue Omega Morgan and the State of Idaho. Yet Plaintiffs have chosen not to sue those parties. Plaintiffs also say Omega Morgan has violated the terms of the permit issued by the Idaho Transportation Department. But Plaintiffs have not sued the State of Idaho to force enforcement action for those violations. Instead, Plaintiffs chose to sue only the Forest Service. It appears that they want this Court to order the Forest Service to take precisely the actions that they have chosen not to take.

Because Plaintiffs chose not to sue the State of Idaho, this Court may not enjoin it from issuing permits to move mega-loads. A federal court may issue an injunction only if it has personal jurisdiction over the parties. *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004). It may not attempt to determine the rights of persons not before the court. *Id*. An injunction must be narrowly tailored to affect only those persons over which the court has power. *Id*. It may not enjoin all possible breaches of law. *Id*.

Because Plaintiffs have not specified exactly what remedy they seek, the defense must speculate as to the possibilities. First, they could be asking the Court to review the Forest Service's fledgling process. However, that is not appropriate because the Forest Service has not made a final decision.

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2 It appears that the agency will continue to have to spend its dwindling budget, battered by astonishingly-high demands to fund fighting wildfires, on litigating this issue no matter what it does.

Second, they could be asking the Court to order the Forest Service to file suit against the State of Idaho, or bring some kind of administrative enforcement action against someone. The Court should not interfere with the Attorney General's province of deciding if and when to take the serious step of suing a state or bringing an enforcement action. *See Chaney and Whitman*, supra.

Third, perhaps if Plaintiffs are suggesting that the Court order the Forest Service to take prosecutorial action. It is completely inappropriate for the Court to do so, even if the Court believes the agency is "under-enforcing" federal statutes. *See Nixon and In Re: Aiken County, et al.*, supra. As this Court noted in its February 7, 2013 decision, the decision as to whether the mega-loads violate federal law is committed in the first instance to the Forest Service.

Plaintiffs must show irreparable harm from the Forest Service's actions, not the actions of entities who are not parties to this lawsuit. They cannot do so. First of all, the transport of the mega-loads now has only a transitory impact, at most. Plaintiffs have not shown that the roadway is being altered to allow passage. There are no "corridor modifications" on-going now. Traffic impediments are transitory, and only made worse by protestors.[3] Secondly, if there is any harm, it is from the actions of the State of Idaho or Omega Morgan, as Plaintiffs declarations show, not the Forest Service.

The Forest Service has begun a process. The State of Idaho and Omega Morgan have declined to abide by the agency's requests to delay their actions. The Forest Service has been working diligently on this issue, as Forest Supervisor Rick Brazell's declaration demonstrates. The Forest Service has not, however, made any final decision eligible for review under the APA.

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3 Plaintiff's declarations discuss in extensive detail alleged harms which occurred in 2011, 2012, and early 2013, before the Court's ruling in the prior lawsuit. The only recent alleged harms were traffic delays. Plaintiffs own declarations show those were deliberately caused by protestors. Lopez Decl., ECF No. 8, Ex. 11.

Brazell Decl.

It is unlikely Plaintiffs will succeed on the merits of this claim. Plaintiffs cannot show irreparable, rather than transitory, harm. Therefore, the motion for preliminary injunction should be denied.

Respectfully submitted this 3rd day of September, 2013.

WENDY J. OLSON
UNITED STATES ATTORNEY

/s/ Joanne P. Rodriguez
JOANNE P. RODRIGUEZ
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of September, 2013, the foregoing RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s):

Michael A. Lopez
mikel@nezperce.org

Bryan Hurlbutt
bhurlbutt@advocateswest.org

David J. Cummings
djc@nezperce.org

Natalie J. Havlina
havlinalaw@gmail.com

I HEREBY CERTIFY that on this same day a copy was mailed via United States Postal Service-prepaid to the following person(s):

NA

/s/ Danielle Narkin
Danielle Narkin
Legal Assistant

WENDY J. OLSON, IDAHO STATE BAR NO. 7634
UNITED STATES ATTORNEY
JOANNE P. RODRIGUEZ, IDAHO STATE BAR NO. 2996
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF IDAHO
WASHINGTON GROUP PLAZA IV
800 EAST PARK BOULEVARD, SUITE 600
BOISE, ID 83712-7788
TELEPHONE: (208) 334-1211
FACSIMILE: (208) 334-1414
Joanne.Rodriguez@usdoj.gov

Attorneys for Defendant

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE and IDAHO RIVERS UNITED, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	Case No. 3:13-CV-00348-BLW **DECLARATION OF RICK BRAZELL**

Pursuant to the provisions of 28 U.S.C. § 1746, I, Rick Brazell, declare:

1. I am the Forest Supervisor of the Nez Perce and Clearwater National Forests. I have held that position since October 2009. I have worked for the Forest Service for 35 years.

2. After Judge Winmill ruled on February 7, 2013, that the Forest Service had jurisdiction to review the State of Idaho's approvals of mega-loads, I began to gather the necessary information to responsibly exercise that authority. We learned there was a $400,000 grant potentially available for a corridor study of the uses and impacts along Highway 12. To qualify

for the grant, we needed a letter of support from the Idaho Transportation Department (ITD) since Highway 12 is a state highway. They ultimately refused to give us the letter, so we could not apply for those funds.

3. The Forest Service decided we needed to develop some interim criteria for exercising our authority concerning mega-loads. To this end, in June we sent a letter to ITD to propose interim criteria regarding physical impacts of such loads. Idaho Transportation responded on July 18, 2013. We determined we also needed to consult with the Nez Perce Tribe. I called Tribal Chairman Silas Whitman and suggested a date to meet for consultation. He said the earliest possible date would be August 20, 2013, and that he might not even be able to attend then. We continue to meet with ITD, also.

4. The regional social scientist has been assigned to this project full-time to try to collect the data we need to assess social, cultural and aesthetic impacts associated with "mega-loads". She has been pulled off of all the other projects she was working on. Even working full-time on this, it will take at least several months to complete. We need this type of study in order to try to develop mitigation measures regarding frequency or duration of loads to address potential social, cultural or aesthetic impacts.

5. Given the complexity of this issue, I believe proper and adequate consultation will take time. Taking action here without due consideration, consultation and study would, in my opinion, be acting arbitrarily.

6. Taking legal action against a state is not a matter which I and my agency take lightly. We believe it is incumbent upon us to pursue all avenues for a negotiated resolution before contemplating such action. That is what we are trying to do in this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 29, 2013.

Rick Brazell

Rick Brazell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of August, 2013, the foregoing DECLARATION OF RICK BRAZELL was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s):

Michael A. Lopez
mikel@nezperce.org

Bryan Hurlbutt
bhurlbutt@advocateswest.org

David J. Cummings
djc@nezperce.org

Natalie J. Havlina
havlinalaw@gmail.com

I HEREBY CERTIFY that on this same day a copy was mailed via United States Postal Service-prepaid to the following person(s):

NA

_____
Danielle Narkin
Legal Assistant