

1 Thomas Dimitre SBN 103721
2 Thomas Dimitre Attorney at Law LLC
3 PO Box 801
4 Ashland, OR 97520
5 Phone: 541 890 5022
6 Fax: 5412 488 4601
7 Email: dimitre@mind.net
8 Attorney for Plaintiffs

9 **UNITED STATES DISTRICT COURT**

10 **OREGON DISTRICT**

11 **MEDFORD DIVISION**

12 KLAMATH FOREST ALLIANCE, a California
13 domestic non profit, APPLGATE
14 NEIGHBORHOOD NETWORK, an Oregon
15 public benefit non Profit, LUKE RUEDIGER,
16 an individual, and ERIC NAVICKAS, an
17 individual

18 Plaintiffs,

19 vs.

20 TOM VILSACK, SECRETARY OF THE
21 DEPARTMENT OF AGRICULTURE, and
22 UNITED STATES DEPARTMENT OF
23 AGRICULTURE

24 Defendants

Case No.:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

VIOLATION OF THE NATIONAL
ENVIRONMENTAL POLICY ACT (NEPA)

25 **JURISDICTION**

26 1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 2201
27 (injunctive relief), 2202 (declaratory relief), and 28 U.S.C. § 1346 (United States as a defendant).

28 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF VIOLATION OF THE NATIONAL
ENVIRONMENTAL POLICY ACT (NEPA) - 1

1 The cause of action arises under the laws of the United States, including the Administrative
2 Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*; and the National Environmental Policy Act
3 (NEPA), 42 U.S.C. §§ 4321 *et seq.* An actual, justiciable controversy exists between plaintiffs
4 and defendant. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202, and 5 U.C. 705
5 and 706.
6

7 **VENUE**

8 2. Venue in this court is proper under 28 U.S.C § 1391. Project area is located in Oregon.
9

10 **PARTIES**

11 3. Plaintiff, Klamath Forest Alliance (KFA), is a California domestic non profit, that has
12 offices, members, volunteers, and employees in both California and Oregon. KFA's mission is to
13 act in the public interest by promoting sustainable ecosystems and communities. The Alliance
14 will establish and develop an educational, scientific and charitable base to collect, produce and
15 distribute public interest material and information concerning but not limited to forestry,
16 economic development, community organizing, housing, land use decision, biodiversity,
17 community health, transportation, education, minerals, fisheries, toxics issues and rural
18 community survival. KFA promotes public involvement and activism.
19

20 4. Plaintiff, The Applegate Neighborhood (AN), is an Oregon public benefit non profit that
21 has members, volunteers and employees in Oregon. AN's mission statement is to sustain the
22 integrity of the environment and human communities in the Applegate Valley and surrounding
23 areas through education, collaboration, community activism, stewardship and science. AN
24 promotes wildland conservation, ecological restoration, a sustainable rural economy, and
25 community engagement in federal land management planning.
26
27

1 5. Plaintiff Luke Ruediger has lived his entire life in southwestern Oregon and has been a
2 resident of the Applegate Valley, Oregon for over 20 years. He enjoys the Siskiyou Mountains of
3 southern Oregon and northern California on a regular basis and cherishes both the biological
4 integrity and world-class biodiversity of the region. Mr. Ruediger is author of "The Siskiyou
5 Crest: Hikes, History and Ecology," a hiking and natural history guide for the Siskiyou Crest
6 region including Mt. Ashland and the surrounding watersheds. Luke runs an ecology-based blog
7 about the Siskiyou Mountains, titled "The Siskiyou Crest: Observations, Comments and
8 Perspectives" and has led both botany and ecology hikes in the region since the late 1990's,
9 including the Mt. Ashland area. Currently, Mr. Ruediger works professionally on issues
10 surrounding conservation and environmental stewardship in the Klamath-Siskiyou Mountains of
11 Southern Oregon and Northern California. He intends to continue conducting educational
12 programs, writing about the region, exploring its biodiversity, photographing its scenic values
13 and botanical diversity, recreating in the area, and sharing his love for the region.
14
15
16

17 6. Plaintiff, Eric Navickas, is a resident of Prospect, Oregon and enjoys and recreates in the
18 Siskiyou Mountains of southern Oregon and northern California on a regular basis.

19 7. The plaintiffs and members of each of the plaintiff organizations use and enjoy the land
20 managed by the Rogue River National Forest and the Klamath National Forest, including Mount
21 Ashland and the areas in and around the FS 20 road, FS 20a, FS 40S30 and FS 40S30A roads,
22 including Grouse Gap and the surrounding area, for hiking, photographing scenery and rare
23 plants and wildlife, and engaging in other vocational, scientific and recreational activities.

24 Plaintiffs and Plaintiffs' members derive recreational, inspirational, spiritual, scientific,
25 educational and aesthetic benefit from their activities on these public lands in the Rogue River
26 and Klamath National Forests. Plaintiffs and Plaintiffs' members intend to continue to frequently
27

1 use and enjoy the Mount Ashland area, and the FS 20 road, FS 20a, FS 40S30 and FS 40S30A
2 road areas on an ongoing basis in the future.

3 8. The aesthetic, recreational, scientific, educational, and spiritual interests of Plaintiffs and
4 Plaintiffs' members will be adversely affected and irreparably injured if defendants paving
5 project goes forward without compliance with environmental laws.
6

7 9. These injuries would be redressed by the requested relief.

8 10. Defendant, Tom Vilsack, is the United States Secretary of the Department of Agriculture.

9 11. Defendant, Glenn Casamassa, is the Regional Forester for the Pacific Northwest Region
10 of the U.S. Forest Service.
11

12 12. Defendant, U.S. Forest Service is a federal agency within the United States Department
13 of Agriculture. Defendants are responsible for ensuring that projects implemented on National
14 Forest System lands comply with NEPA, NFMA and the APA.
15

16 **FACTS**

17
18 13. On September 14, 2020, Roberto Beltran made a decision titled: FS 20 Road, File Code:
19 1920, and defined as "routine maintenance and repairs of Forest Service 20 Road, FS 20A, FS
20 40S30 and FS 40S30A" ("Decision"). The Decision was made under a categorical exclusion
21 ("CE").
22

23 14. The Decision authorized the paving of Forest Service 20 Road, FS 20A, FS 40S30 and
24 FS 40S30A ("Roads").

25 15. The Roads are currently unpaved and dirt surfaced, and have historically been unpaved.

26 16. The Decision will convert the unpaved Roads to paved roads.
27

1 17. The Forest Service declared that the project qualified as a categorical exclusion because it
2 was simply routine maintenance. This is simply not true. The project would pave, for the first
3 time, Forest Service 20 Road, FS20A, FS 40S30 and FS 40S30A. The project does not qualify
4 for a categorical exclusion.
5

6 18. Though the project is entitled "Routine maintenance and repairs of Forest Service 20
7 Road, FS 20A, FS 40S30 and FS 40S30A", the project is intentionally misleading. The project
8 would actually pave these roads that are currently unpaved. This is not a "routine maintenance",
9 "repair", or repaving of existing roads. Instead, it would pave these four roads for the first time.
10 A categorical exclusion is not allowed for such an activity.
11

12 19. No scoping, or request for public input was done by the Forest Service for this project.

13 20. The National Environmental Policy Act ("NEPA") requires federal agencies "to consider
14 every significant aspect of the environmental impact of a proposed action. Second, it ensures
15 that the agency will inform the public that it has indeed considered environmental concerns in its
16 decision making process." 40 C.F.R. 1500.1(a).
17

18 21. NEPA and its implementing regulations promulgated by the Council on Environmental
19 Quality require federal agencies to prepare an environmental impact statement ("EIS") for "every
20 recommendation or report on proposals for legislation and other major Federal actions
21 significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C), 40 C.F.R.
22 1508.11.
23

24 22. The primary purpose of an EIS "is to serve as an action-forcing device to insure that the
25 policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the
26 Federal Government." 40 C.F.R. 1502.1.
27

1 23. If the agency does not decide to prepare an EIS from the outset, it must prepare an
2 Environmental Assessment (EA), which must "[b]riefly provide sufficient evidence and analysis
3 for determining whether to prepare an environmental impact statement or a finding of no
4 significant impact," as well as "brief discussions of the need for the proposal, of alternatives as
5 required by sec. 102(2)(E), [and] of the environmental impacts of the proposed action and
6 alternatives." 40 C.F.R. 1508.9. See also 40 C.F.R. 1502.9(c)(1)(ii).

8 24. "NEPA procedures must insure that environmental information is available to public
9 officials and citizens before decisions are made and before actions are taken Accurate
10 scientific analysis, expert agency comments, and public scrutiny are essential to implementing
11 NEPA." 40 C.F.R. 1500.1(b).

13 25. NEPA generally requires federal agencies to prepare an Environmental Impact Statement
14 ("EIS") or an Environmental Assessment ("EA") to evaluate the environmental impacts of
15 proposed major federal actions. 42 U.S.C. 4332(2)(C); 40 C.F.R. 1508.9(a)(1).

17 26. In narrow situations, neither an EA nor an EIS is required and federal agencies may
18 invoke a "categorical exclusion" ("CE") from NEPA. 40 C.F.R. 1508.4 .

19 27. A "categorical exclusion" is defined as "a category of actions which do not individually
20 or cumulatively have a significant effect on the human environment and which have been found
21 to have no such effect in procedures adopted by a Federal agency in implementation of these
22 regulations." 40 C.F.R. 1508.4.

24 28. The Forest Service has developed criteria for categorically excluded activities in its
25 "Environmental Policy and Procedures Handbook" ("Forest Service Handbook," "Handbook," or
26 "FSH"). The Handbook is available at http://www.fs.fed.us/im/directives/dughtml/fsh_1.html
27

1 29. Section 1909.15 of the Forest Service Handbook discusses what constitutes an
2 appropriate use of CE's and specifically documents the agency's list of categorically excluded
3 activities.

4
5 30. The Decision cited to 36 C.F.R. 220.6(d)(4) as the reason that the project was appropriate
6 under a CE.

7 31. 36 C.F.R. 220.6(d)(4) states the following:

8 “(a) General. A proposed action may be categorically excluded from further analysis and
9 documentation in an EIS or EA only if there are no extraordinary circumstances related to
10 the proposed action and if:

11 (4) Repair and maintenance of roads, trails, and landline boundaries. Examples include
12 but are not limited to:

13 (i) Authorizing a user to grade, resurface, and clean the culverts of an established NFS
14 road;

15 (ii) Grading a road and clearing the roadside of brush without the use of herbicides;

16 (iii) Resurfacing a road to its original condition;

17 (iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of
18 the trail; and

19 (v) Surveying, painting, and posting landline boundaries.

20 32. The road paving that was implemented due to the Decision does not meet any of the
21 exceptions in 36 C.F.R. 220.6(d)(4).

22
23 33. In addition, where a project area contains extraordinary circumstances related to the
24 proposed action, the Forest Service may not invoke a CE and instead must prepare an EA or an
25 EIS. The "extraordinary circumstances" that must be considered include, but are not limited to:
26

- a. Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species.
- b. Flood plains, wetlands, or municipal watersheds.
- c. Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas.
- d. Inventoried roadless areas.
- e. Research natural areas.
- f. American Indians and Alaska Native religious or cultural sites.
- g. Archaeological sites, or historic properties or areas.

FSH 1909.15, § 30.3 ¶ 2.

34. The project is located entirely in the Mt. Ashland/Siskiyou Peak Botanical Area (“MASPBA”).

35. 36 CFR 200.6(b)(1)(i) lists “[f]ederally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species” as extraordinary circumstances requiring documentation.

36. The MASPBA is home to numerous sensitive plant species. Jaynes Canyon buckwheat (*Eriogonum diclinum*) is found in about eight sites on the Siskiyou Crest and a few sites in the Marble Mountains. Henderson's horkelia (*Horkelia hendersonii*) is found in about eight sites on the Siskiyou Crest between Mt. Ashland and Dry Lake with the largest population in the world on the face of Mt. Ashland. Finally, the project includes an endemic population of Mt. Ashland Lupine (*Lupinus aridius spp. ashlandensis*). Species such as the Mt. Ashland Lupine,

Henderson's horkelia and Jaynes Canyon buckwheat, which all grow on Mt. Ashland are

1 particularly important examples of regionally endemic species and the protection of their habitat
2 in the Mt. Ashland/Siskiyou Peak Botanical Area is extremely important on both a professional
3 and personal level. Additionally, the only population of white bark pine in the Siskiyou
4 Mountains and one of only two populations of subalpine fir are also located near the summit of
5 Mt. Ashland and within the proposed project area. If these species and their extremely limited
6 populations are impacted by project activities, Mr. Ru appreciation, enjoyment and love for the
7 region and its exceptional biodiversity would be permanently harmed. Paving the access road to
8 and through this sensitive area will increase foot traffic, disturbance, and degradation of this
9 unique Botanical Area.
10

11
12 37. Not only does the Botanical Area include a breadth of sensitive high alpine wetlands but
13 the terminus of one of the roads is at the boundary to the City of Ashland's municipal watershed.
14 Increased access to the Ashland Municipal Watershed will exacerbate problems with recreational
15 mountain bike use that already exist.

16
17 38. 36 CFR 200.6(b)(1)(ii) lists "[f]lood plains, wetlands, or municipal watersheds" as
18 extraordinary circumstances.

19
20 39. The project is adjacent to the Pacific Crest Trail, which is designated as a National Scenic
21 Trail. The paving would cross the trail and parallel it for several miles, increasing noise,
22 automobile traffic and speeds, and degrading the natural experience.

23
24 40. 36 CFR 200.6(b)(1)(iii) lists "[c]ongressionally designated areas, such as wilderness,
25 wilderness study areas, or national recreation areas" as extraordinary circumstances. The modest
26 documentation fails to even mention the Pacific Crest Trail that is designated as a National
27 Scenic Trail.

1 41. The project is also adjacent to the McDonald Peak Roadless Area, an inventoried roadless
2 area, and would degrade the Roadless Area.

3 42. "Inventoried roadless area or potential wilderness area" are also considered
4 extraordinary circumstances under 36 CFR 200.6(b)(1)(iii), the documentation fails to even
5 mention that the project area borders the McDonald Peak Roadless Area.
6

7 **FIRST CLAIM**
8 **Violation of NEPA**
9 **Illegal Use of a Categorical Exclusion**

10 43. Plaintiffs incorporate by reference paragraphs 1 through 42.

11 44. NEPA requires federal agencies to analyze the foreseeable environmental impacts,
12 including direct, indirect and cumulative impacts, of federal activities –42 U.S.C. § 4332(c)(I);
13 40 C.F.R. 1508.7.
14

15 45. In narrow situations, neither an EA nor an EIS is required and federal agencies may
16 invoke a "categorical exclusion" ("CE") from NEPA. 40 C.F.R. 1508.4.

17 46. A "categorical exclusion" is defined as "a category of actions which do not individually
18 or cumulatively have a significant effect on the human environment and which have been found
19 to have no such effect in procedures adopted by a Federal agency in implementation of these
20 regulations." 40 C.F.R. 1508.4.
21

22 47. Each federal agency must develop "specific criteria for and identification of" actions that
23 qualify for a CE. 40 C.F.R. 1507.3.

24 48. Section 1909.15 of the Forest Service Handbook discusses what constitutes an
25 appropriate use of CE's and specifically documents the agency's list of categorically excluded
26 activities.
27

1 49. Even if an action fits within a CE category, the Forest Service "must determine that there
2 are no extraordinary circumstances in which a normally excluded action may have a significant
3 environmental effect" before the agency can forego an EA or EIS. 73 Fed. Reg. 43084, 43091
4 (2008); see also 36 C.F.R. 220.6(a). Federal agencies are therefore required to "provide for
5 extraordinary circumstances in which a normally excluded action may have a significant
6 environmental effect." 40 C.F.R. 1508.4. In promulgating its CE's, the Forest Service has
7 acknowledged that a CE may be used for "only routine actions that have no extraordinary
8 circumstances." 57 Fed. Reg. 43180 (1992). The Forest Service has defined routine as: "the
9 activity will have little potential for soil movement, loss of soil productivity, water and air
10 degradation or impact on sensitive resource values and is consistent with Forest land and
11 resource management plans." 56 Fed. Reg. 19718 (1991).

14 50. The Forest Service has developed criteria for categorically excluded activities in its
15 "Environmental Policy and Procedures Handbook" ("Forest Service Handbook," "Handbook," or
16 "FSH"). The Handbook is available at http://www.fs.fed.us/im/directives/dughtml/fsh_1.html
17

18 51. The Decision stated the following:

19 "This action falls within the category identified in 36 C.F.R. 220.6(d)(4) – Repair and
20 maintenance of roads, trails, and landline boundaries, and does not require documentation
21 in a decision memo, decision notice, or record of decision."

22 52. Yet, 36 C.F.R. 220.6(d)(4) states the following:

23 "(a) General. A proposed action may be categorically excluded from further analysis and
24 documentation in an EIS or EA only if there are no extraordinary circumstances related to
25 the proposed action and if:

26 (4) Repair and maintenance of roads, trails, and landline boundaries. Examples include
27 but are not limited to:

28 (i) Authorizing a user to grade, resurface, and clean the culverts of an established NFS
road;

- (ii) Grading a road and clearing the roadside of brush without the use of herbicides;
- (iii) Resurfacing a road to its original condition;
- (iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of the trail; and
- (v) Surveying, painting, and posting landline boundaries. “

There is no provision for repaving unpaved roads in this section.

53. In contradiction with the Decision, 36 C.F.R. 220.6(d)(4) does not allow for new paving of unpaved roads.

54. Therefore, Defendants violated NEPA when they incorrectly stated that the Project was routine maintenance and declared that 36 C.F.R. 220.6(d)(4) provided them with an exemption from NEPA. The Project is not routine maintenance, and 36.C.F.R. 220.6(d)(4) does not apply.

55. Defendants' actions as described above are arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. Sec. 706.

56. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

PLAINTIFFS SEEK THE FOLLOWING RELIEF:

1. a. a declaration that the Decision violated NEPA and the APA;
- b. a declaration that Defendants failed to comply with NEPA and APA in issuing the Decision;
- c. an injunction enjoining Defendants from undertaking activities related to the Decision, unless and until Defendants have complied with NEPA;

- 1 d. an award to Plaintiffs of their reasonable attorney’s fees and costs incurred in this
2 action, pursuant to the Equal Access to Justice Act, 28 U.S.C. Section 2412; and
3 e. granting Plaintiff such additional relief as the Court deems just and equitable.
4

5
6
7 Thomas Dimitre Attorney at Law LLC

8
9 By: /s/ Thomas Dimitre

10 _____
11 Thomas Dimitre
12 Attorney for Plaintiffs

13 Dated: February 3, 2022
14
15
16
17
18
19
20
21
22
23
24
25
26
27