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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION**

**GREATER HELLS CANYON
COUNCIL, et al.,**

Plaintiffs,

v.

HOMER WILKES, et al.,

Defendants,

and

**AMERICAN FOREST RESOURCE
COUNCIL and EASTERN OREGON
COUNTIES ASSOCIATION,**

Defendant-Intervenors.

Case No. 2:22-CV-00859-HL

**BRIEF OF *AMICUS CURIAE* NEZ
PERCE TRIBE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

The Nez Perce Tribe (“Tribe”), a federally-recognized Indian tribe, writes separately as *amicus curiae* in support of Plaintiffs’ Motion for Summary Judgment¹ with respect to Count One of Plaintiffs’ Second Claim For Relief in Plaintiffs’ First Amended Complaint (Failure to Hold an Administrative Objection Process as Required by 36 C.F.R. § 219, Subpart B)² and to provide the Court with the Tribe’s unique perspective regarding the Defendants’ administrative process for the Forest Plans Amendment: Forest Management Direction for Large Diameter Trees in Eastern Oregon and Southeastern Washington (“Plans Amendment”).

I. Introduction

Defendants’ issuance of a Decision Notice for the Plans Amendment on January 15, 2021, was based on an arbitrary reading of U.S. Forest Service regulations, including 36 C.F.R. § 219.51(b). Defendants’ Decision Notice is, therefore, not entitled to deference by this Court. Although regulation 36 C.F.R. § 219.51(b) does waive the Forest Service’s regulatory requirement to provide an objection period when the USDA Secretary or Under Secretary proposes land management plans, plan amendments, and plan revisions, 36 C.F.R. § 219.51(b) does not waive the Forest Service’s obligation to comply with the public notice requirements contained in 36 C.F.R. Part 219, Subpart A, prior to issuing a Decision Notice. A holistic reading of the Forest Service’s land management planning rules makes clear that Defendants were required to provide public notice—prior to the comment period on the Plans Amendment Environmental Assessment—of the USDA Under Secretary’s proposal of the Plans Amendment, of the USDA Under Secretary’s designation as the responsible official for the Plans Amendment, and of the cancellation of the objection process.

¹ Dkt. No. 41.

² Dkt. No. 12.

II. Forest Service's Responsibilities to the Tribe

The United States has a legal trust responsibility to faithfully advance longstanding United States policies supporting tribal sovereignty, self-determination, welfare, rights, and resources.³ Today, the trust responsibility is understood to include the United States' overarching legal and moral obligation to protect tribes' ability to self-govern as well as their welfare, legal rights, and resources, under the strictest of fiduciary standards.⁴

Pursuant to the trust responsibility, Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), charges all executive departments and agencies with “establish[ing] regular and *meaningful* consultation and collaboration with tribal officials” that ensures “timely input by tribal officials in the development of regulatory policies that have tribal implications.”⁵ In formulating or implementing policies that have tribal implications, agencies are required to adhere to foundational principles dating back to the formation of the republic. These principles reflect the United States' commitment to work with Indian tribes on a government-to-

³ The United States' trust responsibility for all federally-recognized Indian tribes is separate and broader in scope than any one, specific legal agreement with a tribe. Instead, the trust responsibility stems from its broader commitments to provide Indian tribes with health care, education, public safety, and other social services in exchange for tribes' surrender of land and facets of sovereignty. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983). *See also Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. State of Georgia*, 31 U.S. 515 (1832); Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

⁴ *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (“[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”); *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (“The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship.”); President Richard M. Nixon, Special Message to Congress on Indian Affairs, 213 Pub. Papers 564 (Jul. 8, 1970); Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

⁵ Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 250 (Nov. 6, 2000) (emphasis added).

government basis; and for federal agencies to respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments. The Presidential Memorandum of November 5, 2009, (Tribal Consultation) requires each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175.⁶

In response to Executive Order 13175 and the 2009 Presidential Memorandum, the USDA issued Departmental Regulation 1350-002 on Tribal Consultation, Coordination, and Collaboration on January 18, 2013. The Departmental Regulation states that “[e]ach USDA agency shall provide an opportunity for Tribes to participate in policy development to the greatest extent practicable and permitted by law. Each Tribe will be provided the opportunity for timely and meaningful government-to-government consultation regarding policy actions which may have tribal implications.”⁷ The Regulation further states: “Government-to-government consultation only occurs between USDA senior officials, or their designees, and the official leadership of the Federally recognized Tribes, or their designated representative(s).”⁸ The Forest Service’s National Forest Management Act of 1976’s (“NFMA”) implementing regulations at 36 C.F.R. § 219.4 also expressly acknowledge the Forest Service’s trust responsibilities to tribes and to provide

⁶ Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 87,879 (Nov. 5, 2009).

⁷ USDA, Departmental Regulation Number 1350-002, *Tribal Consultation, Coordination, and Collaboration* (Jan. 18, 2013), at 4, https://www.usda.gov/sites/default/files/documents/USDA_DR_Tribal_Consultation_Coordination_and_Collaboration_OTR_final_1_18.pdf.

⁸ *Id.* at 7.

opportunities to engage in government-to-government consultation⁹ and encourage tribes to seek Cooperating Agency status in plan development, amendment, and revision.¹⁰

III. Forest Service Representations Regarding Objection Period

On June 4, 2020, members of the Nez Perce Tribal Executive Committee (“NPTEC”), the governing body of the Tribe, and Tribal staff met with the Forest Service at the Tribe’s request to discuss the proposed Plans Amendment.¹¹ At that meeting, former NPTEC Chairman Shannon Wheeler and other NPTEC members emphasized the importance of the Forest Service working closely with the Tribe on the Plans Amendment proposal given its geographic location within the Tribe’s aboriginal homeland and the potential for the proposal to affect the Tribe’s treaty-reserved rights and resources.¹² A NPTEC member also asked at the meeting why one Forest Supervisor would be issuing the Plans Amendment decision for multiple National Forests.¹³ A Forest Service line officer present at the meeting responded that the Pacific Northwest Regional Forester had delegated his decision-making authority to Forest Supervisor Jeffries to keep the decision at a local level and so that administrative objections to the Plans Amendment would be reviewed by the Regional Forester.¹⁴

On July 7, 2020, the Tribe, citing the location, scope, scale, and potential for the Plans Amendment to affect the Tribe’s treaty-reserved rights and resources, requested formal

⁹ 36 C.F.R. § 219.4(a)(2).

¹⁰ *Id.* at § 219.4(a)(1)(v).

¹¹ Declaration of Shannon F. Wheeler (“Decl. Wheeler”) ¶ 3.

¹² *Id.*

¹³ *Id.* at ¶ 4.

¹⁴ *Id.*

Cooperating Agency¹⁵ status on the Plans Amendment.¹⁶ On August 7, 2020, Supervisor Jeffries accepted the Tribe's request on behalf of the Forest Service¹⁷ stating:

The Regional Forester, Glenn Casamassa, has delegated to me the authority to serve as the responsible official for the development and approval of amendments for this multi-forest project We recognize and welcome the expertise of the Nez Perce Tribe related to treaty-reserved resources and restoration of fish, wildlife and other culturally significant species on national forest lands.¹⁸

On August 11, 2020, the Forest Service released the Preliminary Environmental Assessment for the Plans Amendment for public comment through a notice in the Federal Register. The Federal Register notice stated: "This [Environmental Assessment] is subject to Forest Service regulation 36 CFR 219, Subpart B, known as the administrative review, or objection, process."¹⁹ The draft Environmental Assessment stated: "Region 6 (Pacific Northwest Region) Regional Forester, Glenn Casamassa, has designated the Forest Supervisor for the Ochoco National Forest as the Decision Maker for this analysis."²⁰

In its capacity as a Cooperating Agency and through its government-to-government relationship with the Forest Service, Tribal staff participated in weekly meetings with Regional and Forest-level Forest Service personnel regarding the Plans Amendment between August 2020 and December 2020.²¹ On October 13, 2020, the Tribe submitted comments to then-responsible official Forest Supervisor Shane Jeffries on the Plans Amendment's Preliminary Environmental

¹⁵ See 40 C.F.R. § 1501.8.

¹⁶ Decl. Wheeler ¶ 5; AR 33166-68 (Citations to the record are to the Revised Administrative Record ("AR"), see Dkt. Nos. 36 and 37).

¹⁷ Decl. Wheeler ¶ 5; AR 33575-76.

¹⁸ AR 33575.

¹⁹ Pacific Northwest Region; Oregon; Land Management Plan Amendment; Forest Management Direction for Large Diameter Trees in Eastern Oregon, 85 Fed. Reg. 48,500. 48,501 (Aug. 11, 2020).

²⁰ AR 33221.

²¹ Decl. Wheeler ¶ 6.

Assessment.²² The Tribe's comments did not support the Forest Service's proposed action or the alternatives contained in the draft Environmental Assessment. Rather, the Tribe's comments proposed a new alternative for the Forest Service's consideration and identified issues and concerns with the Forest Service's analysis.²³

On December 22, 2020, Ochoco National Forest Supervisor Shane Jeffries and Forest Service staff met with the NPTEC and Tribal staff in government-to-government consultation to discuss the Tribe's comments and next steps on the proposed Plans Amendment.²⁴ The NPTEC requested that Supervisor Jeffries be present at the consultation since he was the responsible official who would issue the Plans Amendment decision. Had NPTEC known that Supervisor Jeffries would not be the responsible official for the Plans Amendment, NPTEC would have requested government-to-government consultation with the responsible official.²⁵

During the consultation, Supervisor Jeffries confirmed for the NPTEC members that he was the responsible official who would be making the final decision on the Plans Amendment and informed the NPTEC he had not yet made a decision.²⁶ Supervisor Jeffries also assured Tribal leadership that the Final Environmental Assessment and Decision Notice would be published in January 2021 and would be followed by a 45-, or possibly, 90-day objection period, prior to signing.²⁷ At no time up to and including the December 22, 2022, consultation did Supervisor Jeffries or any Forest Service official inform the Tribe that the USDA Under Secretary had either

²² *Id.*

²³ *Id.*

²⁴ Decl. Wheeler ¶ 7.

²⁵ *Id.*

²⁶ *Id. at* ¶ 8.

²⁷ *Id.*

proposed the Plans Amendment or that the USDA Under Secretary could or would be responsible official for the Plans Amendment.²⁸

At the conclusion of the December 22, 2020, consultation with Supervisor Jeffries, several unresolved issues and concerns remained between the Tribe and Forest Service, including whether the Forest Service would adopt the new alternative the Tribe had developed and correct other issues the Tribe had identified with the Forest Service's analysis.²⁹ Given Supervisor Jeffries' assurances during the consultation, Chairman Wheeler reasonably believed the Tribe would have the opportunity, if needed, to pursue resolution of any outstanding issues and concerns through the objection process.³⁰

Just days later, however, on December 28, 2020, Supervisor Jeffries contacted then NPTEC Chairman, Shannon Wheeler, to rescind his previous statements.³¹ Mr. Jeffries informed Chairman Wheeler that he was no longer the responsible official for the Plans Amendment.³² Instead, he told Chairman Wheeler that the USDA Under Secretary would sign the Decision Notice without an objection process.³³ Supervisor Jeffries asked the Chairman to keep this information confidential since it was not yet publicly available.³⁴ On January 5, 2021, Forest Service staff informed Tribal staff that the USDA Under Secretary would sign the Plans Amendment decision and would not hold an objection period. The Tribe was very disappointed and felt misled by the Forest Service.³⁵

²⁸ *Id.* at ¶ 9.

²⁹ *Id.* at ¶ 10.

³⁰ *Id.*

³¹ *Id.* at ¶ 11.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at ¶ 12.

On January 15, 2021, the Forest Service, Pacific Northwest Region, issued a Decision Notice and Finding of No Significant Impact for the Plans Amendment signed by James Hubbard, former USDA Under Secretary. The Decision Notice included a statement claiming that the Plans Amendment was final and not subject to administrative objection under 36 C.F.R. § 219.51(b) “because it is *signed* by the Under Secretary for Natural Resources and Environment.”³⁶

The Tribe had engaged in good faith in the Plans Amendment development and analysis process as a Cooperating Agency. This required the Tribe to commit substantial staff time and resources to the undertaking. The Forest Service’s decision to abruptly, and without explanation, cease pre-decisional intergovernmental dialogue over the proposed Plans Amendment and to bypass the objection process disrespected the Tribe’s status as a Cooperating Agency and undermined its government-to-government relationship with the Forest Service. To this day, neither the Forest Service nor USDA has provided the Tribe with any explanation for its non-transparent conduct.

IV. Argument in Support of Plaintiffs

Meaningful notice and tribal and public participation are bedrock principles of federal land management and the unique government-to-government relationship between federally-recognized tribes and United States agencies. The NFMA’s³⁷ implementing regulations for land management planning on National Forest System lands, found at 36 C.F.R. Part 219, support tribal and public collaboration in land management planning by emphasizing fairness, transparency, and robust public and tribal engagement during all stages of agency decision-making.³⁸

³⁶ AR 34762 (emphasis added).

³⁷ 16 U.S.C. § 1601 et seq.

³⁸ NFMA requires that “[t]he Secretary shall provide for public participation in the development, review, and revision of land management plans” 16 U.S.C. § 1604(d)(1). And, a core purpose and need for the Forest Service’s regulations interpreting NFMA was to “[p]rovide for a

Against this backdrop, the Forest Service’s regulation 36 C.F.R. § 219.51(b)³⁹ implementing NFMA exempts planning decisions *proposed* and *decided* by the USDA Under Secretary from the pre-decisional objection process. The regulation, however, does not exempt such planning decisions from regulatory public notice requirements contained under 36 C.F.R. Part 219, Subpart A. Defendants were, therefore, required to provide public notice of the USDA Under Secretary’s proposal of the Plans Amendment, notice of the USDA Under Secretary’s designation as the responsible official for the Plans Amendment, and notice of the cancellation of the objection process *prior* to the comment period on the Plans Amendment’s Environmental Assessment. To interpret 36 C.F.R. § 219.51(b) and the requirements contained under 36 C.F.R. Part 219, Subpart A, otherwise would fundamentally undermine fairness and transparency by precluding the public and Tribe from meaningfully responding *before* a decision is rendered.

transparent, collaborative process that allows effective public participation.” National Forest System Land Management Planning, 77 Fed. Reg. 21,162, 21,164 (Apr. 9, 2012). The regulations found in Subpart A also require extensive public notice and participation. For instance, the regulation at 36 C.F.R. § 219.13 titled “Plan amendment and administrative changes” states: “For every plan amendment, the responsible official shall: (2) Provide opportunities for public participation” 36 C.F.R. § 219.13(b). And, the regulation titled “Requirements for public participation” states:

When developing opportunities for public participation, the responsible official shall take into account the discrete and diverse roles, jurisdictions, responsibilities, and skills of interested and affected parties; the accessibility of the process, opportunities, and information; and the cost, time, and available staffing. The responsible official should be proactive and use contemporary tools, such as the Internet, to engage the public, *and should share information in an open way with interested parties.*

36 C.F.R. § 219.4(a) (emphasis added).

³⁹ 36 C.F.R. § 219.51(b) states in full: “Plans, plan amendments, or plan revisions *proposed* by the Secretary of Agriculture or the Under Secretary for Natural Resources and Environment *are not subject to the procedures set forth in this section.* A decision by the Secretary or Under Secretary constitutes the final administrative determination of the U.S. Department of Agriculture.” (emphasis added).

A. USDA Secretary and Under Secretary Are Not Exempt From the Forest Service's Land Management Public Notice Requirements

Regulation 36 C.F.R. § 219.51 titled “Plans, plan amendments, or plan revisions not subject to objection” exempts those land management actions “proposed” and “deci[ded]” by the USDA Secretary or Under Secretary from the objection process “procedures set forth in this section.”⁴⁰ The regulation does not exempt the USDA Under Secretary from the Forest Service’s regulatory requirements regarding public notice for land management proposals.

NFMA’s implementing regulations regarding land management planning are divided into two subsections: “Subpart A—National Forest System Land Management Planning” (36 C.F.R. §§ 219.1-219.19) and Subpart B—Pre-Decisional Administrative Review Process” (36 C.F.R. §§ 219.50-219.62). Regulation 36 C.F.R. § 219.51(b) is found in Subpart B. The regulations pertaining to public notice are found in Subpart A. Regulations 36 C.F.R. § 219.2(b)⁴¹ and 36 C.F.R. § 219.16(c)⁴² found in Subpart A explicitly control actions by the USDA Secretary and Under Secretary. And, none of the regulations found in Subpart A requiring public notice and

⁴⁰ 36 C.F.R. § 219.51(b).

⁴¹ “National Forest System unit planning . . . (3) The supervisor of the national forest, grassland, prairie, or other comparable administrative unit is the responsible official for development and approval of a plan, plan amendment, or plan revision for lands under the responsibility of the supervisor, unless a regional forester; the Chief; the *Under Secretary*, Natural Resources and Environment; or the *Secretary* acts as the responsible official. Two or more responsible officials may undertake joint planning over lands under their respective jurisdictions.” 36 C.F.R. § 219.2(b) (emphasis added).

⁴² “How public notice is provided. The responsible official should use contemporary tools to provide notice to the public. At a minimum, all public notifications required by this part must be posted online, and: (1) When the Chief, the *Under Secretary*, or the *Secretary* is the responsible official, notice must be published in the Federal Register. (2) For a new plan or plan revision, when an official other than the Chief, the *Under Secretary*, or the *Secretary* is the responsible official, notice must be published in the Federal Register and the applicable newspaper(s) of record . . . (4) For a plan amendment when an official other than the Chief, the *Under Secretary*, or the *Secretary* is the responsible official, and for which a draft EIS is not prepared, notices must be published in the newspaper(s) of record.” 36 C.F.R. § 219.16(c) (emphasis added).

participation exempt the USDA Under Secretary from compliance.⁴³ Thus, the “procedures” and “section” to which 36 C.F.R. § 219.51(b) states that “[p]lans, plan amendments, or plan revisions *proposed* by . . . the Under Secretary . . . are not subject” must necessarily be only those objection procedures found in Subpart B of 36 C.F.R. Part 219—not all land management planning regulations.

B. Public Notice of USDA Secretary or Under Secretary’s Proposal or Designation as the Responsible Official Should Occur Before the Last Public Comment Period

In the Plans Amendment Decision Notice, the former USDA Under Secretary arguably both proposed and decided the Plans Amendment. Collapsing the proposal and decision requirements in 36 C.F.R. § 219.51(b) into one document is contrary to the letter and spirit of the land management planning regulations in Subpart A of 36 C.F.R. Part 219 requiring public notice and participation—to which the USDA Under Secretary is subject.

The plain text of 36 C.F.R. § 219.51(b) requires two preconditions before the objection process for a land management action can be bypassed. First, the plan, plan amendment, or plan revision must be “proposed” by USDA Secretary or Under Secretary. Secondly, the plan, plan amendment, or plan revision “decision” must be made by the USDA Secretary or Under Secretary. Proposing a land management plan, plan amendment, or plan revision in the same document that

⁴³ This reading is further supported by 36 C.F.R. § 219.60 which provides: “Nothing in this *subpart* restricts the Secretary of Agriculture from exercising any statutory authority regarding the protection, management, or administration of [National Forest System] lands.” (emphasis added). Under 16 U.S.C. § 1604(g) of NFMA, the USDA Secretary of Agriculture is directed to promulgate regulations that set up the process for the development and revision of land management plans. The USDA Secretary, and by delegation USDA Under Secretary, is, therefore, required to comply with its own land management regulations found in Subpart A of the land management planning regulations.

apprises the public of a land management decision renders the regulation’s first precondition—that the USDA Secretary or Under Secretary propose a plan, plan amendment, or plan revision—obsolete and devoid of meaning. The use of the word “proposed” in regulation 36 C.F.R. § 219.51(b) as an intransitive verb further suggests a linear timeline. Merriam Webster defines “propose” as “to form or put forward a plan or intention.”⁴⁴ Proposals—announcements of a plan or intention—necessarily come before the execution or fulfillment of a plan or intention. Thus, the text of 36 C.F.R. § 219.51(b) suggests that USDA Secretary and Under Secretary proposals should occur before issuance of the Decision Notice.

Regulation 36 C.F.R. § 219.16(d), found in Subpart A of 36 C.F.R. Part 219, proscribes minimum public notice requirements by requiring notice of all opportunities for public participation in land management proposals. It states:

Public notices required by this section . . . must clearly describe the action subject to notice and the nature and scope of the decisions to be made; identify the responsible official; describe when, where, and *how the responsible official will provide opportunities for the public to participate in the planning process*; and explain how to obtain additional information.⁴⁵

This regulatory language appears intended to ensure that the public fully understands when and how they will be able to participate in the planning process. To achieve such regulatory intent, notice of public participation opportunities would be given at the beginning of the planning process and prior to the last public participation opportunity. Noticing the public that the nature or number of public participation opportunities has changed after the last public participation opportunity is

⁴⁴ “propose: to form or put forward a plan or intention.” *Merriam-Webster.com*. Retrieved Jan. 19, 2023, from <https://www.merriam-webster.com/dictionary/proposed> (1st definition).

⁴⁵ 36 C.F.R. § 219.16(d) (emphasis added).

nonsensical. Such delayed notification would deprive the public of the opportunity to adjust its participation and input regarding a land management planning proposal in response to the change.

Regulation 36 C.F.R. § 219.16 “Public notifications” also found in Subpart A of the land management planning regulations, specifically requires public notice when the USDA Under Secretary becomes the responsible official for a land management decision: “When the Chief, the Under Secretary, or the Secretary is the responsible official, notice must be published in the Federal Register.”⁴⁶ This regulation, read in concert with 36 C.F.R. § 219.16(d) provided above, requires that the public be notified before the final comment period should the Under Secretary be designated as a responsible official on a land management proposal, since the Under Secretary has the power to invoke 36 C.F.R. § 219.51(b) and bypass the public’s objection process. If notice is not given when the Under Secretary becomes a responsible official and before the final comment period, the public will not be fully aware of how and when they can participate in the planning process.

This common-sense construction of the Forest Service land management planning regulations is not theoretical or novel. The Forest Service has previously construed this regulation to require a public notice of a USDA Under Secretary’s designation as the responsible official for a land management proposal *before* commencement of the public comment period. On December 1, 2020, around the same time that the USDA Under Secretary released his Decision Notice for the Plans Amendment, the Forest Service provided public notice in the Federal Register that the USDA Under Secretary was assuming the role of responsible official in another management

⁴⁶ 36 C.F.R. § 219.16(c)(1). Subpart A at 36 C.F.R. § 219.2 titled “Levels of planning and responsible officials” provides that the USDA Under Secretary may act as the responsible official “for development and approval of a plan, plan amendment, or plan revision for lands.” 36 C.F.R. § 219.2(b)(3).

planning process. The Forest Service published a corrected Notice of Intent to “update the responsible official for the [Forest Service], to update the applicability of the [Forest Service] predecisional administrative review process, and to update contacts for both parties” for review of a proposal to construct and operate a natural gas pipeline across the Jefferson National Forest in West Virginia.⁴⁷ Previously, the Jefferson National Forest Supervisor had been the responsible official for the proposal. The Forest Service’s Federal Register notice also explicitly stated that the Forest Service “decision to amend the Forest Plan will not be subject to either the 36 CFR 218 or 36 CFR 219 pre-decisional administrative review because the responsible official is the Under Secretary of Agriculture, Natural Resources and Environment (36 CFR 218.13(b); 36 CFR 219.13(b)).”⁴⁸

To provide fulsome and consistent interpretations of 36 C.F.R. § 219.51(b), 36 C.F.R. § 219.16(d), and 36 C.F.R. § 219.16(c)(1), the Forest Service must provide public notice, prior to the last comment period, whenever the USDA Under Secretary proposes a land management action, assumes the role of responsible official for a land management proposal, or changes the type, number, or nature of the public participation opportunities.

V. Conclusion

From the beginning of the Plans Amendment proposal process until late December 2020, the Forest Service consistently represented to the Tribe—in written correspondence, meetings with Tribal staff, and in a government-to-government consultation with Tribal leaders—that Ochoco National Forest Supervisor Shane Jeffries would be the responsible official signing the Plans

⁴⁷ Jefferson National Forest; Monroe County, West Virginia, Giles and Montgomery County, Virginia. Mountain Valley Pipeline and Equitrans Expansion Project Supplemental Environmental Impact Statement, 85 Fed. Reg. 77,142, 77,142 (Dec. 1, 2020).

⁴⁸ *Id.* at 77,144.

Amendment decision and that he would only reach a decision *after* the Forest Service completed an objection process. The Forest Service’s August 2020 Federal Register Notice announcing availability of the Draft Preliminary Environmental Assessment for the public also contained this representation.

USDA Under Secretary Hubbard replaced Supervisor Jeffries as the responsible official just days before Defendants issued the Decision Notice. The Tribe was informed through government-to-government communications of the change a few weeks before Defendants released the Decision Notice. The public was not notified before the Forest Service announced in the Federal Register on January 15, 2021, that USDA Under Secretary James Hubbard had issued a Decision Notice for the Plans Amendment, bypassing the default objection process for land management decisions. This occurred months after the public comment period had ended and shortly before the presidential transition. The January 15, 2021, Decision Notice prevented the Tribe and over 300 other commenters from raising, and potentially resolving, their outstanding concerns with the proposal through the objection process.

The regulation 36 C.F.R. § 219.51(b) does not waive the Forest Service’s regulatory requirement to provide public notice when the USDA Secretary or Under Secretary proposes land management plans, plan amendments, and plan revisions or any of the Forest Service’s other public notice requirements. To ensure meaningful commitment to the principles of fairness, transparency, and robust public engagement in the planning process, Defendants were required under regulations 36 C.F.R. § 219.16(c)(1), 36 C.F.R. § 219.16(d), and 36 C.F.R. § 219.51(b) to provide—prior to the comment period on the Plans Amendment’s Environmental Assessment—public notice of the USDA Under Secretary’s proposal of the Plans Amendment, public notice of

the USDA Under Secretary's designation as the responsible official for the Plans Amendment, and public notice of the cancellation of the objection process.

The Tribe relies upon timely public notice to strategically and efficiently advocate for its rights and resources in Forest Service planning processes. Without timely notice, the administrative review process becomes opaque and difficult, if not impossible, to navigate.

Dated: January 20, 2023.

Respectfully submitted,

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