

1 RICK EICHSTAEDT, WSBA #356487  
2 CENTER FOR JUSTICE  
3 35 W. Main, Suite 300  
4 Spokane, WA 99201  
5 Telephone: (509) 835-5211  
6 E-Mail: ricke@cforjustice.org  
7  
8  
9

10 IN THE UNITED STATES DISTRICT COURT FOR THE  
11 EASTERN DISTRICT OF WASHINGTON  
12

13 DON HAMILTON; LORNA ST.JOHN;  
14 QUENTIN WOOD; AND PRAIRIE  
15 PROTECTION ASSOCIATION, an  
16 affiliation of neighbors and property  
17 owners,

18 Plaintiffs,

19 vs.

20 U.S. DEPARTMENT OF  
21 TRANSPORTATION; MARY E.  
22 PETERS, Secretary, U.S. Department of  
23 Transportation; FEDERAL HIGHWAY  
24 ADMINISTRATION; JAMES RAY,  
Acting Administrator and Deputy  
Administrator, Federal Highway  
Administration; DANIEL M. MATHIS,

) Case No.:

) **COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

) Violations of Administrative  
Procedure Act (5 U.S.C. §  
706(2)(A)); National Environmental  
Policy Act, (42 U.S.C. § 4321 *et*  
*seq.*)); Department of Transportation  
Act (49 U.S.C. § 303)

1 Division Administrator, Federal Highway )  
 2 Administration, Washington Division; )  
 3 DEAN MOBERG, Area Engineer, )  
 4 Federal Highway Administration, )  
 5 Washington Division, )  
 6 Defendants. )

---

**INTRODUCTORY STATEMENT**

7 1. This is an action for declaratory and injunctive relief. Plaintiffs seek judicial  
 8 review of documents prepared for the project known as “the Bigelow Gulch  
 9 Road/Forker Road Urban Connector,” specifically: (1) Finding of No Significant  
 10 Impact (FONSI) and § 4(f) Evaluation, both dated on April 10, 2008 and (2) the  
 11 related Environmental Assessment (EA).  
 12

13 2. Plaintiffs’ claims arise under the National Environmental Policy Act  
 14 (NEPA), 42 U.S.C. §§ 4321-4347, § 4(f) of the Department of Transportation Act  
 15 of 1966 (DOT Act), 49 U.S.C. § 303, and the Administrative Procedure Act  
 16 (APA), 5 U.S.C. §§ 551-559, 701-706, and their implementing regulations.  
 17

18 3. Defendants violated the APA and NEPA by issuing a FONSI and EA on the  
 19 Bigelow Gulch Project that were arbitrary, capricious, an abuse of discretion, or  
 20 otherwise not in accordance with the law under the APA. This action seeks to  
 21 declare unlawful and set aside Defendants’ proposed actions in the FONSI and EA.  
 22 Among other actions, Defendants failed to examine the cumulative impacts  
 23  
 24

1 associated with the project and failed to take a “hard look” at project impacts as  
2 required by NEPA and its implementing regulations.

3 4. Defendants violated the APA and DOT Act § 4(f) by failing to analyze  
4 feasible and prudent alternatives to impacts on recreational areas and historic sites  
5 and failing to minimize impacts to such lands.  
6

7 5. Plaintiffs seek a declaratory judgment that (1) the FONSI for this project  
8 violates NEPA, the DOT Act, the APA, and their implementing regulations; (2) the  
9 EA for this project violates NEPA, the DOT Act, the APA, and their implementing  
10 regulations; (3) the §4(f) Evaluation for this project violates the DOT Act, the  
11 APA, and their implementing regulations.  
12

13 6. Plaintiffs seek an order requiring Defendants to withdraw the FONSI, EA,  
14 and §4(f) Evaluation until they comply with NEPA, the DOT Act, the APA, and  
15 their implementing regulations.  
16

17 7. Plaintiffs further seek injunctive relief barring Defendants and their  
18 contractors, permittees, or agents from proceeding with any component of the  
19 Bigelow Gulch Project, as authorized by the FONSI.  
20

21 8. Plaintiffs seek an award of costs and attorneys’ fees pursuant to the Equal  
22 Access to Justice Act, 28 U.S.C. § 2412.

23 9. Plaintiffs seek other relief as deemed appropriate by this Court.  
24

**JURISDICTION**

1  
2 10. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. §  
3 1346 because this action involves an agency of the United States as a defendant,  
4 and it arises under the laws of the United States, including NEPA, 42 U.S.C. §  
5 1321 *et seq.*, the DOT Act, 49 U.S.C. § 303, the APA, 5 U.S.C. § 701 *et seq.*, and  
6 their implementing regulations. An actual justiciable controversy exists between  
7 Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201-  
8 02 and 5 U.S.C. §§ 705, 706.  
9  
10

**VENUE**

11  
12 11. Venue is proper in the Eastern District of Washington pursuant to 28 U.S.C.  
13 § 1391(e). The property that is the subject of this action is located entirely in  
14 Spokane County. In addition, all Plaintiffs reside in Spokane County.  
15

**PARTIES**

16  
17 12. Plaintiff Don Hamilton, a Spokane County resident, owns and resides at  
18 7208 E. Bigelow Gulch Road, a property that is only accessed using Bigelow  
19 Gulch Road.  
20

21 13. Plaintiff Lorna St. John, a Spokane County resident, owns and resides at  
22 7208 E. Bigelow Gulch Road, a property that is only accessed using Bigelow  
23  
24

1 Gulch Road and jointly owns property abutting Bigelow Gulch Road and the  
2 proposed transportation project.

3 14. Plaintiff Quentin Wood, a Spokane County resident, owns and resides at  
4 6902 North Bradley Road. Plaintiff Wood owns property that will be directly  
5 impacted by the proposed alignment of the Bigelow Gulch Project.  
6

7 15. Plaintiff Prairie Protection Association is comprised of public citizens  
8 residing along or outside of the current Bigelow Gulch roadway. Plaintiff St. John  
9 serves as Chair of the Association and correspondence to the Association is  
10 received at 7208 E. Bigelow Gulch Road.  
11

12 16. The aesthetic, recreational, and economic interests of Plaintiffs have been  
13 and will be adversely affected and irreparably injured by Defendants actions and  
14 inactions, as alleged herein, and if Defendants affirmatively implement the project  
15 that Plaintiff challenges herein. These are actual, concrete injuries caused by  
16 Defendants' failure to comply with mandatory duties under NEPA, the DOT Act,  
17 the APA, their implementing regulations and other federal laws. These injuries  
18 would be redressed by the relief sought.  
19  
20

21 17. Plaintiffs and/or Plaintiffs' members have participated extensively in the  
22 decision-making and planning process regarding the Bigelow Gulch Project for  
23 many years. Plaintiffs submitted written and/or oral comments and attended public  
24

1 meetings prior to the development of the FONSI, EA, and §4(f) Evaluation for the  
2 Project. Plaintiffs have exhausted any available administrative remedies.

3 18. Reviewable final agency action exists that is subject to this Court's review  
4 under 5 U.S.C. § 702, 704, and 706.

5  
6 19. Defendant United States Department of Transportation (DOT) is an  
7 executive department of the United States government. The DOT has overall  
8 responsibility for ensuring that the agencies within it, including the FHWA follow  
9 the requirements of all applicable laws, including NEPA and § 4(f) of the DOT  
10 Act.  
11

12 20. Defendant Mary E. Peters is the Secretary of Transportation. Defendant  
13 Peters oversees the activities of DOT and its agencies, including FHWA, and as  
14 such, is responsible for the actions of DOT and the agencies therein. Defendant  
15 Peters is sued in her official capacity.  
16

17 21. Defendant FHWA is an agency within DOT. Among its directives, FHWA is  
18 obligated to ensure compliance with NEPA and § 4(f) of the DOT Act before  
19 approving a highway project. The FHWA is responsible for overseeing compliance  
20 with the preparation of an EA, reviewing the EA to determine its compliance with  
21 all applicable laws, including NEPA and § 4(f) of the DOT Act.  
22  
23  
24

1 22. Defendant James Ray is the Administrator of FHWA. Defendant Ray  
2 oversees the activities of FHWA and its regional offices, and as such, is  
3 responsible for the actions of FHWA. Defendant Ray is sued in his official  
4 capacity.

5  
6 23. Defendant Daniel M. Mathis, Division Administrator, FHWA, Washington  
7 Division oversees the activities of FHWA in the state of Washington. Defendant  
8 Mathis is sued in his official capacity.

9  
10 24. Defendant Dean Moberg, Area Engineer, FHWA, Washington Division,  
11 signed the FONSI and §4(f) Evaluation approving the Bigelow Gulch Project.  
12 Administrator Moberg is sued in his official capacity.

13 **STATUTORY FRAMEWORK**

14 **The Administrative Procedure Act**

15  
16 25. Under the Administrative Procedure Act (APA), “[any] person suffering  
17 legal wrong because of agency action, or adversely affected or aggrieved by  
18 agency action...is entitled to judicial review....” 5 U.S.C. § 702. By its own terms,  
19 the APA independently authorizes judicial review of “final agency action[s] for  
20 which there is no other adequate remedy in court.” *Id.* § 704. Under the APA,  
21 federal district courts are required to “compel agency action unlawfully withheld or  
22 unreasonably delayed” and “to hold unlawful and set aside agency action, findings,  
23  
24

1 and conclusions of law found to be...arbitrary, capricious, an abuse of discretion or  
2 otherwise not in accordance with law....” *Id.* §§ 706(1), (2)(A).

3 **The National Environmental Policy Act**

4 26. The National Environmental Policy Act (NEPA) and its implementing  
5 regulations require completion of a valid environmental impact statement (EIS) for  
6 every major federal action significantly affecting the environment, including an  
7 assessment of alternatives to the proposed action. 42 U.S.C. § 4332(C), (E). The  
8 EIS is designed to: (1) provide decision makers with enough information to aid in  
9 the substantive decision whether to proceed with a project in light of its  
10 environmental consequences; and (2) disclose information regarding project  
11 impacts and mitigation measures to the public with an opportunity to participate in  
12 gather information. *See* 40 C.F.R. § 1502.1.

13 27. The Council on Environmental Quality (CEQ) has promulgated regulations  
14 to implement NEPA, which are binding on all federal agencies. 40 C.F.R. §  
15 1507.1. The NEPA regulations promulgated by FHWA are also binding on federal  
16 defendants in this case. 23 C.F.R. Part 771.

17 30. NEPA requires agencies to prepare an EIS that addresses a project’s direct  
18 impacts, indirect impacts, and cumulative effects. The cumulative effects analysis  
19 must include: (1) the effects of past connected and cumulative actions; (2) the  
20

1 effects of present connected and cumulative actions; and (3) the effects of  
2 reasonably foreseeable future connected and cumulative actions. 40 C.F.R. §  
3 1508.7.

4 31. NEPA is a procedural statute that requires agencies to demonstrate that “a  
5 reasonably thorough discussion of the significant aspects of the probable  
6 environmental consequences” of a project has been undertaken. *Swanson v. Forest*  
7 *Service*, 87 F.3d 339, 343 (9<sup>th</sup> Cir. 1987). Under this standard, an agency is  
8 required to take a “hard look” at the environmental consequences of proposed  
9 actions. *Id.* NEPA “places upon an agency the obligation to consider every  
10 significant aspect of the environmental impact of a proposed action.” *Baltimore*  
11 *Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97,  
12 103 S.Ct. 2246, 2252 (1983). An agency’s failure to include and analyze  
13 information that is important, significant, up-to-date, available, or essential renders  
14 an EIS inadequate.  
15  
16  
17

18 32. Before deciding whether to complete an EIS, the agency may prepare  
19 a less formal EA that “briefly provides sufficient evidence and analysis for  
20 determining whether to prepare an environmental impact statement or a  
21 finding of no significant impact.” *Anderson v. Evans*, 314 F.3d 1006, 1017  
22 (9<sup>th</sup> Cir. 2002).  
23  
24

1 33. If the EA does raise substantial questions as to whether the project  
2 will significantly affect the environment, the agency must prepare an EIS.

3 *Id.*

4 34. The severity of the impacts of a project on the environment must be taken  
5 into account during the decision-making process, including the “degree to which  
6 the effects on the quality of the human environment are likely to be highly  
7 controversial.” 40 C.F.R. § 1508.27(b)(4).

8  
9 35. Although federal agencies are given considerable discretion to define the  
10 scope of review for an EA or EIS, “connected,” cumulative,” and “similar” agency  
11 actions must be considered together in a single review document to prevent the  
12 agency from dividing the project into multiple actions, each of which individually  
13 has an insignificant environmental impact, but which collectively have substantial  
14 impact. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9<sup>th</sup> Cir. 2002),  
15  
16 *citing* 42 U.S.C.A. § 4321 *et seq.*

17  
18 36. Consideration of cumulative impacts of agency action, pursuant to NEPA,  
19 requires some quantified or detailed information; general statements about possible  
20 effects and “some risk” does not constitute a hard look absent a justification  
21 regarding why more definitive information could not be provided.  
22  
23  
24

1 37. In preparing an EA for a highway expansion project or road project, NEPA  
2 requires agencies to consider cumulative impacts of other projects related to the  
3 project area under NEPA, even though the design of other projects was not  
4 finalized, where agencies' internal documents reflected that expansion was not  
5 only considered foreseeable, but considered inevitable.  
6

7 38. The effects that must be discussed include, among other things, the direct  
8 environmental impacts of the proposed action, the indirect effects of the proposed  
9 action, and the cumulative impacts of the proposed action. Direct effects are those  
10 "which are caused by the action and occur at the same time and place." 40 C.F.R. §  
11 1508.8(a). Indirect effects are those "which are caused by the action and are later in  
12 time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R.  
13 § 1508.8(b). Indirect effects may include "growth inducing effects and other  
14 effects related to induced changes in the pattern of land use, population density or  
15 growth rate, and related effects on air and water and other natural systems,  
16 including ecosystems." *Id.* A cumulative impact constitutes the "impact on the  
17 environment which results from the incremental impact of the action when added  
18 to other past, present, and reasonably foreseeable future actions regardless of what  
19 agency or person undertakes such other actions. Cumulative impacts can result  
20  
21  
22  
23  
24

1 from individually minor but collectively significant actions taking place over a  
2 period of time.” 40 C.F.R. § 1508.7.

3 39. The cumulative impact analysis of an agency action under NEPA must be  
4 more than perfunctory; it must provide a useful analysis of the cumulative impacts  
5 of past, present, and future projects. *Kern v. U.S. Bureau of Land Management*,  
6 284 F.3d 1062, 1076 (9<sup>th</sup> Cir. 2002).

8 40. In determining whether the agency ignored NEPA requirements, the Court  
9 must determine whether the agency’s decision was “based on a consideration of  
10 the relevant factors,” or whether its actions were “arbitrary, capricious, an abuse of  
11 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In  
12 short, the Court must determine whether the agency took a “hard look” at the  
13 environmental consequences of the project. *Blue Mountains Biodiversity Project*  
14 *v. Blackwood*, 161 F.3d 1208, 1211 (9<sup>th</sup> Cir. 1998).

17 **FHWA’s NEPA Regulations**

18 41. FHWA regulations discuss actions that normally require an EIS, as opposed  
19 to an EA.

21 42. 23 C.F.R. § 771.115 defines three classes of action which prescribe the level  
22 of documentation required under NEPA:

1 (a) Class I Environmental Impact Statement (EIS). Actions that  
2 significantly affect the environment require an EIS (40 C.F.R. §  
3 1508.27). The following are examples of actions that normally  
4 require an EIS:

- 5 • A new controlled access freeway.
- 6
- 7 • A highway project of four or more lanes in a new
- 8 direction.
- 9
- 10 • New Construction or extension of fixed rail transit
- 11 facilities.
- 12
- 13 • New construction or extension of a separate roadway
- 14 for buses or high occupancy vehicles not located
- 15 within an existing highway facility.
- 16

17 (b) Class II (Categorical Exclusion). Actions that do not  
18 individually or cumulatively have a significant environmental  
19 effect are excluded from the requirement to prepare an EA or  
20 EIS.  
21

22 (c) Class III (EA). Actions in which the significance of the  
23 environmental impact is not clearly established require the  
24

1 preparation of an EA. All actions that are not Class I or Class II  
2 are Class III. All actions in this class require the preparation of  
3 an EA to determine the appropriate environmental document  
4 required.  
5

6 43. An agency is required to follow its own regulations. *Doe v. Tenant*, 329  
7 F.3d 1135, 1144 (9<sup>th</sup> Cir. 2003).

8 44. CEQ regulations, 40 C.F.R. §§ 1500-1508, address the basic decision-  
9 making framework and action forcing provisions established in the NEPA. The  
10 principles or essential elements of NEPA decision-making include:  
11

- 12 ▪ Assessment of the social, economic, and environmental impacts of a  
13 proposed action or project.
- 14
- 15 ▪ Analysis of a range of reasonable alternatives to the proposed project,  
16 based on the applicants defined purpose and need for the project.
- 17
- 18 ▪ Consideration of appropriate impact mitigation: avoidance, minimization  
19 and compensation.
- 20
- 21 ▪ Interagency participation: coordination and consultation.
- 22
- 23 ▪ Public involvement including opportunities to participate and comment.
- 24
- 25 ▪ Documentation and disclosure.

**Section 4(f) of the Department of Transportation Act**

1  
2 45. Section 4(f) of the Department of Transportation Act (DOT Act), 49 U.S.C.  
3 § 303, prohibits the Secretary of Transportation from approving any highway  
4 project that requires the “use of publicly-owned land of a public park [or]  
5 recreation area. . . or land of an historic site of natural, state, or local significance”  
6 unless “(1) there is no feasible and prudent alternative to the use of such land and  
7 (2) such program includes all possible planning to minimize harm to such. . .  
8 historic site resulting from such use.” 49 U.S.C. § 303; 23 C.F.R. § 771.135(a).  
9  
10 Section 4(f) prohibits the Secretary from approving programs or projects that  
11 require the use of publicly owned land from “a public park, recreation area, or  
12 wildlife and waterfowl refuge of national, State, or local significance,” as  
13 identified by Federal Statute or lands local officials have jurisdiction of. *See, Stop*  
14 *H-3 Ass’n v. Dole*, 870 F.2d 1419, 1422 (9<sup>th</sup> Cir. 1989).  
15  
16

17 46. In addition, in determining the most viable alternative, the agency must also  
18 consider non-§ 4(f) resources. *Office of Planning, Environment and Realty Project*  
19 *Development and Environmental Review*, FHWA § 4(f) Policy Paper (2005).  
20  
21 Examples of non-§ 4(f) resources include the potential taking of an endangered  
22 species or critical habitat, CERCLA or Superfund site problems, the elimination of  
23 valuable wetlands, and/or major environmental justice issues. *Id.*  
24

1 47. Section 4(f) plays a significant role in DOT's decision-making process; as  
2 such, the courts have accepted a "totality of impacts" analysis, taking both § 4(f)  
3 and non-§ 4(f) resources into account. *Committee to Preserve Boomer Lake Park*  
4 *v. USDOT*, 4 F.3d 1543, 1550 (10<sup>th</sup> Cir. 1993).

5  
6 **FACTS GIVING RISE TO PLAINTIFFS' CAUSES OF ACTION**

7 48. Currently, Bigelow Gulch Road is a two-lane primarily rural road, which  
8 runs through a mix of developed and natural landscapes with Mount Spokane  
9 dominating the view to the Northeast.

10  
11 49. The road runs through the historic community of Orchard Prairie and the  
12 Orchard Prairie School District. The district serves approximately 60 students at  
13 its small campus just off Bigelow Gulch Road. This facility also houses the  
14 District's one school bus.

15  
16 50. The Bigelow Project also runs through the East Valley School district; in  
17 particular, through East Valley Middle School grounds.

18  
19 51. The Bigelow Project will impact approximately 3.42 acres of activity fields  
20 for East Valley Middle School and East Valley High School.

21 52. Traffic that is currently accommodated on a two-lane road that runs to the  
22 west and south of East Valley Middle School will be moved onto a four-lane  
23 highway that will run between the two schools.  
24

1 53. The Bigelow Project proposes that the schools and their ball fields will be  
2 connected by a tunnel, which will run under the highway.

3 54. Spokane County has identified this road as a prime candidate for expansion  
4 to accommodate much higher flows of traffic and freight through the region.

5  
6 55. The Bigelow Project begins in the West near the Havana Street/Bigelow  
7 Gulch Road intersection. This intersection is the currently planned termination  
8 point for North Spokane Corridor – a freeway project connecting Interstate 90 to  
9 US Highways 2 and 395.

10  
11 56. In the Bigelow Project’s FONSI, EA, and Final §4(f) Evaluation, Defendants  
12 state that Bigelow Gulch Road will “temporarily” accommodate traffic traveling  
13 from the new freeway to Interstate 90.

14  
15 57. The Washington State Department of Transportation (WSDOT) has  
16 estimated the cost of the Spokane Corridor Project at \$2.1 billion, \$3.3 billion  
17 including risk and inflation costs over the 20-year build out plan. WSDOT states  
18 that these values are subject to price escalation due to market trends in  
19 commodities (oil, steel, concrete), construction costs, real estate prices, etc.

20  
21 58. Funding for the Bigelow Gulch Project is currently at approximately \$491  
22 million. As indicated in the local newspaper, *The Spokesman Review*, Bigelow  
23 Gulch will be an extension of the North-South freeway for at least 20 years until  
24

1 funding is available to complete the freeway. Amy Cannata, *Bigelow Shortcut Just*  
2 *Might Get Longer*, SPOKESMAN REVIEW, February 13, 2006.

3 59. Heading East from the western terminus of the Spokane Corridor Project,  
4 the Bigelow Project, as proposed in the FONSI, is designed to be a four-lane  
5 highway with alternating gravel median to two way left turn pockets and paved  
6 shoulders. Much of the project has a design speed of 60 miles per hour (mph);  
7 however, the posted speed limit is proposed to be 45 mph, except for a 0.75 mile  
8 portion that will be posted at 35 mph to reduce impacts to the historic Karl Paulson  
9 Farmstead.  
10  
11

12 60. Plaintiff Quentin Wood has been contacted by Spokane County regarding  
13 purchase of a portion of his land for right-of-way acquisition. The current  
14 alignment of the Bigelow Project places a four-lane highway in Mr. Wood's front  
15 yard.  
16

17 61. The Bigelow Project will directly impact many acres of native habitat for  
18 wildlife – including wetlands. The Environmental Assessment (EA) on which the  
19 FONSI and Final §4(f) Evaluation are based did not include a detailed field  
20 delineation, description, and categorization of wetlands.  
21

22 62. A final draft of the wetland delineation performed for the Bigelow Project  
23 was not issued until February 2008, six months after the issuance of the EA.  
24

1 63. Defendants based much of its EA wetlands analysis on NWI information,  
2 interpretation of aerial photographs, and field reconnaissance during 2002 and  
3 2007. The FHWA's field reconnaissance did not include all areas that would be  
4 potentially affected by the Bigelow Project. Subsequent work after the EA was  
5 completed indicates the wetlands analysis was incomplete.  
6

7 64. Although the FHWA determined that an EIS was not needed for the project,  
8 it has determined that the project will require significant mitigation and that further  
9 study will be required to determine what mitigation is needed.  
10

11 65. Where Bigelow Gulch Road intersects with North Argonne Road, Spokane  
12 County had already built a new controlled intersection to accommodate four-lanes  
13 of traffic. The intersection also contained right and left turn lanes – a total of six-  
14 lanes on each side of the intersection.  
15

16 66. Prompted by the update of the Spokane County Comprehensive Plan in May  
17 1997, citizens and community leaders started to explore the concept of an urban  
18 connector road system to accommodate projected increases in traffic volumes in  
19 Spokane County. The report, *Our Community—A Regional Study of Urban*  
20 *Connectors*, identified the Bigelow Gulch Road/Forker Road corridor as having a  
21 declining vehicle capacity and high collision rates. As such, the study  
22 recommended transportation improvements that would provide sufficient vehicle  
23  
24

1 capacity, improve traveler safety, improve freight mobility, ease current traffic  
2 congestion, improve the general air quality, and meet the objective of improved  
3 infrastructure under the Washington State Growth Management Act.

4 67. Although alternatives to the selected route and scale of the project were  
5 included in the report, Defendants have not truly examined alternatives to the  
6 scope of project authorized by the FONSI, EA, and Final §4(f) Evaluation.

7  
8 68. FHWA proposed limited alternatives to the preferred alignment, which were  
9 not thoroughly examined. FHWA also failed to fully examine the detrimental  
10 impacts of having a four-lane highway bisect the schools and their recreational  
11 facilities.  
12

13  
14  
15 **FIRST CLAIM FOR RELIEF**

16 **VIOLATION OF NEPA AND APA:**

17 **Failure to Properly Examine Cumulative Impacts**

18  
19 73. Each and every allegation set forth above is incorporated herein by  
20 reference.

21 74. Defendants violated NEPA, the APA, and their implementing regulations  
22 because the EA fails to adequately consider and disclose direct, indirect, and  
23 cumulative effects from the roadway project in relation to projects in the vicinity,  
24

1 including but not limited to, impacts caused by all segments of the roadway  
2 project, traffic impacts, noise impacts, geologic impacts, impacts on historic and  
3 recreational properties, impacts on wetlands, and water quality impacts in Bigelow  
4 Gulch Creek.

5  
6 75. Here, Defendants justify not taking into account the impacts of the freeway  
7 project, because they indicate Bigelow Gulch's connection to the North Spokane  
8 Corridor is a "temporary" one to end in 2025, despite 40 C.F.R. § 1508.2  
9 prohibition on such actions. The County has indicated that Phase II of the North  
10 Spokane Corridor will not be initiated until proper funding has been secured.  
11 Because funding is an integral component of North Spokane Corridor Phase II  
12 completion, DOT's argument that the impact is "temporary" is tenuous at best.

13  
14  
15 76. By arguing that North Spokane Corridor's connection into Bigelow Gulch is  
16 a temporary one, Defendants' failed to consider the incremental impact of the  
17 action when added to other past, present, and reasonably foreseeable future actions  
18 regardless of what agency or person undertakes such actions. Although the impacts  
19 individually may be considered minor; collectively significant actions taking place  
20 over time are significant.

21  
22 77. Defendants' failure to include the North Spokane Corridor in its  
23 environmental analysis provided insufficient quantifications and produced an  
24

1 insufficient analysis of the cumulative impacts surrounding the Bigelow Gulch  
2 Project.

3 78. Defendants' failure to examine the cumulative impacts surrounding the  
4 Bigelow Gulch Project and failure to disclose the environmental effects of the  
5 Bigelow Gulch Project is arbitrary, capricious, an abuse of discretion, or otherwise  
6 not in accordance with the law, 5 U.S.C. § 706(2)(A), when Defendants did not  
7 examine Bigelow Gulch within the context of foreseeable projects and actions.  
8  
9

10  
11 **SECOND CLAIM FOR RELIEF**

12 **VIOLATION OF NEPA AND APA:**

13 **Failure to Take a "Hard Look" at Project Impacts**

14  
15 79. Each and every allegation set forth above is incorporated herein by  
16 reference.

17 80. Defendants violated NEPA, the APA, and their implementing regulations  
18 because the EA and FONSI fail to thoroughly take a "hard look" at potential  
19 impacts resulting from the implementation of the Project.  
20

21 81. The EA and FONSI for the Bigelow Gulch Project are legally inadequate  
22 and in violation of NEPA for a number of reasons, including the following:  
23  
24

- 1 a) the EA and FONSI fail to consider adequately and disclose direct,  
2 indirect, and cumulative effects from the roadway project in relation to  
3 projects in the vicinity, including but not limited to, impacts caused by all  
4 segments of the roadway project, traffic impacts, noise impacts, geologic  
5 impacts, impacts on historic and recreational properties, impacts on  
6 wetlands, and water quality impacts in Bigelow Gulch Creek.
- 8 b) the EA and FONSI fail to consider adequately and disclose the past,  
9 present, and reasonably foreseeable cumulative impacts of the roadway  
10 project, including the impacts of the North Spokane Corridor and other  
11 highway/roadway projects in the vicinity of the proposed project, and  
12 whether other similar projects in the area have failed and/or caused  
13 significant environmental impacts.
- 16 c) the EA and FONSI fail to account for the high degree of controversy  
17 surrounding the Bigelow Gulch project since its inception.

19 82. Defendants' failure to examine the potential impacts surrounding the  
20 Bigelow Gulch Project and failure to adequately disclose the environmental effects  
21 of the Bigelow Gulch Project is arbitrary, capricious, an abuse of discretion, or  
22 otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), when it failed to  
23 adequately consider traffic impacts, noise impacts, geologic impacts, impacts on  
24

1 historic and recreational properties, impacts on wetlands, and water quality impacts  
2 in Bigelow Gulch Creek.

3  
4 **THIRD CLAIM FOR RELIEF**

5  
6 **VIOLATION OF NEPA AND APA:**

7 **Failure to Complete an EIS**

8 83. Each and every allegation set forth above is incorporated herein by  
9 reference.  
10

11 84. Because Defendants failed to take a “hard look” at possible project impacts,  
12 provided an insufficient analysis of cumulative impacts in reasoning that impacts  
13 from the North-South Connector are temporary, and providing an insufficient  
14 alternatives analysis, Defendants’ subsequent decision to complete an EA and  
15 FONSI, as opposed to an EIS, is legally insufficient.  
16

17 85. Defendants’ decision to proceed with an EA and FONSI is not in accordance  
18 with NEPA, its implementing regulations, FHWA’s NEPA regulations, and is  
19 arbitrary, capricious, and contrary to law in violation of 5 U.S.C. § 706(2)(A).  
20  
21  
22  
23  
24

**FOURTH CLAIM FOR RELIEF**

**VIOLATION OF THE DEPARTMENT OF TRANSPORTATION ACT § 4(F) AND APA :**

**Failure to Complete Proper Analysis and Consider Impacts**

86. Each and every allegation set forth above is incorporated herein by reference.

87. Defendants violated DOT Act § 4(f), the APA, and their implementing regulations because the §4(f) Evaluation fails to apply a “totality of the impacts” analysis in its selection of what Defendants assert to be a reasonable alternative.

88. Because the project will impact recreational and historic property, Defendants’ conclusion in the §4(f) Evaluation that the project will have no § 4(f) impacts is erroneous and violates the requirements of the DOT Act.

89. Defendants failed to adequately demonstrate that there is no prudent and feasible alternative to the Bigelow Gulch Project.

90. In failing to apply the “totality of impacts” analysis, Defendants acted arbitrarily, capriciously, and otherwise not in accordance with the law in conducting and issuing the § 4(f) Evaluation and in issuing the EA and FONSI.

91. Defendants’ failure to examine the potential impacts surrounding the Project and failure to adequately disclose its environmental effects is arbitrary, capricious,

1 an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. §  
2 706(2)(A).

3 **RELIEF REQUESTED**

4 Plaintiffs respectfully request that the Court:

- 5
- 6 1. Declare that Defendants' decision to approve and proceed with the
- 7 FONSI, EA, and § 4(f) Evaluation is arbitrary, capricious, an abuse of
- 8 discretion, and in violation of NEPA, § 4(f) of the DOT Act, the APA,
- 9 and their implementing regulations;
- 10
- 11 2. Declare that Defendants' decision not to prepare an EIS in light of
- 12 significant the impacts of the project is arbitrary, capricious, an abuse
- 13 of discretion, and in violation of NEPA;
- 14
- 15 3. Enjoin Defendants from taking any further action to implement any
- 16 portion of the Project, including advertising or awarding any
- 17 contracts, land acquisition, site preparation, design, construction or
- 18 any other action related to implementation of the Project until such
- 19 time as Defendants have complied with NEPA, § 4(f) of the DOT Act,
- 20 the APA, and their implementing regulations;
- 21
- 22 4. Award Plaintiffs their costs, expenses, and reasonable attorney fees
- 23 under applicable law; and
- 24

1 5. Grant Plaintiffs such further relief as may be just, proper, and  
2 equitable.

3 Respectfully submitted this 21st day of October, 2008.

4  
5 *s/Rick Eichstaedt*

6 Rick Eichstaedt, WSBA # 36487

7 Attorney for Plaintiffs

8 35 W. Main, Suite 300

9 Spokane, Washington 99201

10 Telephone: (509) 835-5211

11 Fax: (509) 835-3867

12 E:Mail: [ricke@cforjustice.org](mailto:ricke@cforjustice.org)

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2008, I presented the foregoing COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

Rick Eichstaedt                    [ricke@cforjustice.org](mailto:ricke@cforjustice.org)  
Mary E. Harvill                    [mharvill@cforjustice.org](mailto:mharvill@cforjustice.org)

s/Mary E. Harvill  
Center for Justice  
35 W. Main, Suite 300  
Spokane, WA 99201  
Telephone: (509) 835.5211  
Fax: (509) 835.3867  
E-Mail: [mharvill@cforjustice.org](mailto:mharvill@cforjustice.org)  
Of Attorneys for Plaintiff