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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
EUGENE DIVISION

**WILD WILDERNESS,**  
an Oregon nonprofit corporation,  
**WINTER WILDLANDS ALLIANCE,**  
a national nonprofit corporation, and  
**BEND BACKCOUNTRY ALLIANCE,**  
a community-based advocacy group,

Plaintiffs,

v.

**JOHN ALLEN,**  
Forest Supervisor of the Deschutes National  
Forest, and  
**UNITED STATES FOREST SERVICE,**  
a federal agency,

Defendants.

**Case No.:**

**COMPLAINT FOR VACATUR OF  
ILLEGAL AGENCY DECISION AND  
INJUNCTIVE AND DECLARATORY  
RELIEF.**

(National Environmental Policy Act,  
National Forest Management Act,  
Executive Order 11644,  
Executive Order 11989, and  
Administrative Procedure Act)

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NATURE OF THE ACTION

1. Plaintiffs Wild Wilderness, Winter Wildlands Alliance, and Bend Backcountry Alliance challenge Defendants John Allen and the U.S. Forest Service's Decision Notice (DN) and Finding of No Significant Impact (FONSI), dated September 14, 2012, and the underlying Environmental Assessment ("EA"), approving the creation and use of the Kapka Butte Sno-Park and related trails in the Deschutes National Forest (DNF) in Oregon. The Kapka Butte Sno-park and trails are designed and intended to be used primarily by snowmobile riders. If built and operated as intended, that sno-park would significantly increase the number of snowmobiles in the surrounding areas of the Deschutes National Forest.

2. Plaintiffs are non-profit and community organizations whose members use the Deschutes National Forest for non-motorized dispersed winter recreational activities such as snowshoeing, cross-country skiing, and backcountry skiing.<sup>1</sup> Because of the noise, air pollution and adverse impacts to untracked snow caused by snowmobiles, those vehicles have long created user conflicts in areas of the Deschutes National Forest where Plaintiffs' members and others are seeking a much quieter, cleaner, and more peaceful type of winter recreational experience.

3. Although the DN is legally flawed in many respects, most significantly the Forest Service did not adequately consider existing user conflicts and the substantial increase in such conflicts that would be created by the approval and operation of the Kapka Sno-Park. The DN/FONSI and EA violate the National Forest Management Act (NFMA) and its implementing regulations, the National Environmental Policy Act (NEPA) and its implementing regulations, and Executive Orders ("EO") 11644 and 11989 and their implementing regulations.

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<sup>1</sup> Backcountry skiing refers to unconfined skiing without trails, as opposed to Nordic cross country or skate skiing, which occur on a trail system.

4. The Deschutes National Forest is an important resource for winter recreational users. The national forest provides for a variety of different uses, some of which are not necessarily compatible with one another.

5. Snowmobiling and non-motorized recreation are both popular winter activities in the Deschutes National Forest. However, many aspects of snowmobile use conflict with the desired elements of non-motorized winter recreation, such as: fresh air, undisturbed snow, peace and quiet, and solitude. Snowmobiles emit air pollution, create high levels of noise in otherwise quiet environments, and destroy the pristine, untracked snow that many non-motorized winter recreationists seek. Additionally, snowmobiles create the possible danger of collisions with other recreation users.

6. For these and other reasons, snowmobiles create conflicts with non-motorized winter recreation users of these same areas, such as cross-country and backcountry skiers and snowshoers. These conflicts have become more significant over time due to the increased use of snowmobiles as well as the increased use of these areas by non-motorized recreationists. Additionally, snowmobiles have become more powerful, allowing them to go off-trail into deep snow and other areas that they previously could not access. Non-motorized users, on the other hand, create little to no impact on snowmobilers. Because the impacts are one-way, snowmobiles displace many non-motorized recreationists who do not wish to recreate in the same areas as snowmobiles because these machines destroy the very qualities non-motorized recreationists seek to experience.

7. The Deschutes National Forest is large enough to accommodate motorized and non-motorized users in a way that avoids, or at least significantly mitigates, conflict between these legitimate and important uses of the national forest and that provides a fair balance of

recreational opportunity to all users. Creating this balance requires protecting low impact, non-motorized users from the adverse impacts of high impact, motorized users by separating motorized and non-motorized users, thereby avoiding conflict in the sno-parks and conflicts on and off the trails.

8. Rather than address the increasing conflicts between different winter recreation user groups on the Deschutes National Forest, the Forest Service has chosen to approve the Kapka Butte Sno-Park which will only exacerbate the user conflict issues. The new sno-park would be located within the vicinity of existing sno-parks where conflict between snowmobiles and non-motorized users already exists. And a new sno-park will only increase the number of users, the number of snowmobiles, and the chances of conflict.

9. The Forest Service rejected a proposal to expand an existing near-by sno-park in 1996 specifically because that expansion would have exacerbated user conflicts; and such conflicts have only increased in the area since 1996 as both snowmobiling and non-motorized recreation have increased in popularity, and snowmobiles have become more powerful and capable of traveling off-trail through deep snow and up steeper inclines. The Deschutes National Forest continues to acknowledge that mitigation of this conflict is a key issue on the forest, specifically in the vicinity of the Kapka Butte Sno-Park.

10. The Forest Service's decision to approve the Kapka Butte Sno-Park makes no attempt to reconcile its conclusions with the opposite conclusions it made in 1996 and its ongoing concern with regard to winter user conflict. Instead, the decision arbitrarily treats the winter recreational conflicts as a parking problem rather than a competing, inconsistent uses problem. By doing so, the Forest Service violated its substantive obligations under NFMA, the Deschutes National

Forest Land and Resource Management Plan, EO 11644 and 11989, and the Forest Service's Travel Planning Regulations to minimize such user conflicts.

11. The Forest Service also violated its obligations under NEPA in numerous ways, including by: (1) failing to adequately disclose and analyze the impacts of the Kapka Sno-Park, and the increased snowmobile use that it will allow, on numerous forest resources including air, water, wildlife, untracked snow and quiet; (2) setting forth an improperly narrow purpose and need statement in the EA that allowed it to ignore many reasonable alternatives that were available to mitigate the sno-park's adverse impacts; and (3) issuing a final EA and an arbitrary FONSI to support its decision to build and operate the Kapka Butte Sno-Park after previously issuing a draft Environmental Impact Statement, which is a document prepared only when an agency has concluded that a proposal may have significant impacts. The Forest Service offered no explanation for this reversal of course in its NEPA process.

12. Plaintiffs seek judicial review under the APA of the Forest Service's approval of the Kapka Butte Sno-Park Project, vacatur of the Forest Service's Decision Notice and Finding of No Significant Impact, and such declaratory and injunctive relief as may be necessary to correct Defendants' legal violations and protect Plaintiffs' legal rights.

13. Plaintiffs also seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

#### JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 (APA); 28 U.S.C. § 1331 (federal question), and § 2201 (declaratory relief); and 28 U.S.C § 2412 (EAJA costs and fees). Plaintiffs have challenged final agency action as defined by the Administrative

Procedure Act (“APA”), 5 U.S.C. § 704. Plaintiffs have exhausted all administrative remedies and are seeking judicial review of a final administrative action of the USFS as defined by 36 C.F.R. § 215.18(c) (appeal disposition constitutes a final agency action) and 5 U.S.C. § 704.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendant Forest Supervisor John Allen resides in this district, all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, and the affected public lands and resources are located in this judicial district.

16. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701.

17. This case is properly filed in Eugene, Oregon, and properly before the Eugene Division of this District pursuant to Civil Local Rule 3-2 because the Forest Supervisor who denied Plaintiffs’ administrative appeals is headquartered in Bend, Oregon. The Kapka Butte Sno-Park Project would occur on the Deschutes National Forest, which is under the jurisdiction of the Forest Supervisor.

#### PARTIES

18. Plaintiff **WILD WILDERNESS** is a nonprofit community-based advocacy organization that serves the interests of undeveloped, non-motorized recreation and has its office in Bend, Oregon. The mission of Wild Wilderness is to ensure that wilderness areas, roadless areas and other areas that are substantially free of development will continue to provide outstanding opportunities for high quality, non-motorized recreation. Wild Wilderness submitted substantial comments on the Kapka Sno-Park DEIS and submitted a timely administrative appeal of the Kapka Butte Sno-Park DN.

19. Plaintiff **WINTER WILDLANDS ALLIANCE** (WWA) is a non-profit national advocacy organization representing interests of human-powered winter recreationists across the U.S. WWA is made up of 14 grassroots groups in 11 states, including Oregon, with more than 28,000 members. Members of WWA and its grassroots groups regularly use the Bend / Fort Rock Ranger District for Nordic and backcountry skiing, backcountry snowboarding, and snowshoeing, including areas along the Cascade Lakes Highway near the proposed Kapka Butte Sno-Park.

20. Plaintiff **BEND BACKCOUNTRY ALLIANCE** is a community-based advocacy organization that supports quiet, human-powered winter recreation in Bend's backcountry and is a member of WWA. Bend Backcountry Alliance works to support unstructured backcountry skiing and snowshoeing opportunities in the Bend area, including the public lands near the proposed Kapka Butte Sno-Park. The group advocates for winter recreation users who seek a self-directed experience (i.e., no defined or maintained trails), quiet and solitude, and a low-cost alternative to activities that might otherwise require purchase of a trail pass, lift ticket, or snowmobile to access desired terrain.

21. Both WWA and Bend Backcountry Alliance submitted comments on the DEIS and a timely administrative appeal of the DN. In addition, 523 members of WWA and Bend Backcountry Alliance submitted individual, substantive comments on a 2008 petition and proposal presented to the Deschutes National Forest Supervisor requesting establishment of a 3,000-acre Tumalo Mountain Backcountry Recreation Zone near the proposed Kapka Butte Sno-Park.

22. Members and volunteers of the plaintiff organizations regularly use the Deschutes National Forest, including the areas near the proposed Kapka Butte Sno-Park and other

surrounding public lands and areas for work, outdoor recreation, especially non-motorized winter recreation, wildlife observation, and other forest-related activities. Implementation of the proposed action approved by the DN and FONSI would adversely affect Plaintiffs because the Kapka Sno-Park would impair their non-motorized recreational use and enjoyment of the areas where they currently and will continue to undertake such activities. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under NFMA, NEPA, and other federal laws. These injuries would be redressed by the relief sought.

23. Defendant **FOREST SERVICE** is an agency of the United States within the Department of Agriculture, and is charged with managing the public lands and resources of the Deschutes National Forest, in accordance and compliance with NEPA, NFMA, and their implementing regulations.

24. Defendant **JOHN ALLEN** is the Forest Supervisor for the Deschutes National Forest, and signed the Appeal Decision denying Plaintiffs' administrative appeals. Those Appeal Decisions were the Forest Service's final agency action regarding the Kapka Butte Sno-Park Project. Defendant Allen is sued only in his official capacity. Defendants Forest Service and Allen are collectively referred to as "Forest Service."

#### STATUTORY FRAMEWORK

##### **National Environmental Policy Act (42 U.S.C. §§ 4321-4370(h))**

25. The primary purposes of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h), are to ensure fully informed decision-making and to provide for public participation in environmental analysis and decision-making. 40 C.F.R. § 1500.1(b)-(c). The Council on Environmental Quality ("CEQ") promulgates regulations implementing NEPA.

CEQ's regulations are binding on all federal agencies. 40 C.F.R. §§ 1500-1518.4. Challenges to agency actions for compliance with NEPA are reviewable by this Court under the APA. 5 U.S.C. §§ 702, 704, 706.

26. NEPA requires an Environmental Impact Statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Environmental information [must be made] available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Among other things, an EIS must consider a reasonable range of alternative actions and assess site specific and cumulative impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.14, 1502.16, 1508.25. An agency must first prepare a draft EIS and offer that draft to the public for their comments. The agency must then consider and respond to the public's comments in its Final EIS.

27. Under CEQ's regulations implementing NEPA, federal agencies may prepare an Environmental Assessment (EA) to assist in the NEPA process. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a more limited review of environmental factors associated with a federal action, performed to assist the agency in determining whether a lengthier and more thorough EIS is warranted because the proposed action may have significant impacts. If the analysis in the EA indicates that there are unlikely to be any significant impacts, the agency issues a Finding of No Significant Impact along with its substantive decision regarding the proposal. When it is clear that a proposal may have significant impacts, federal agencies usually skip the EA process and prepare a draft EIS. When an agency decides to prepare an EIS, it must provide notice of that intent in the Federal Register.

28. One of NEPA's fundamental goals is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42

U.S.C. § 4321. The scope of NEPA review is quite broad, including disclosure and consideration of all reasonable alternatives, 40 C.F.R. § 1502.14(a), and direct, indirect and cumulative effects on “ecological. . . aesthetic, historic, cultural, economic, social, or health” interests. 40 C.F.R § 1508(b). The federal agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated”; “[d]evote substantial treatment to each alternative considered in detail including the proposed action”; and “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. § 1502.14(a)-(c).

29. To satisfy NEPA’s “hard look” requirement, a federal agency must present the environmental impacts of the proposed action and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among the options by the decision maker. 40 C.F.R. § 1502.14. Because the purpose and need statement required by 40 C.F.R. § 1502.13 defines the scope of reasonable alternatives, an agency may not narrowly construe the purpose and need so as to define away competing reasonable alternatives and foreclose consideration of a reasonable range of alternatives.

30. An adequate analysis of the environmental impacts of a project also must include a consideration of the direct, indirect, and cumulative impacts of the project. 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(c). Cumulative impacts are the impacts on the environment that result from incremental impacts of the action when added to all other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions.” 40 C.F.R. § 1508.7.

31. NEPA obligates the agency to make available to the public high-quality information including accurate scientific analyses, expert agency comments, and public comments before decisions are made and actions are taken. 40 C.F.R. § 1500.1(b). The agency's discussion and analysis must be based on professional and scientific integrity. 40 C.F.R. § 1502.24.

**National Forest Management Act (16 U.S.C. §§ 1600-1614)**

32. The National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, is the primary statute governing the administration of national forests. Challenges to agency actions for compliance with NFMA are reviewable under the APA. 5 U.S.C. §§ 702, 704, 706.

33. NFMA establishes a two-step process for forest planning. 16 U.S.C. § 1604(a) and (i). *See also* 36 C.F.R. § 219.2. First, NFMA requires the Forest Service to develop and implement a land and resource management plan ("LRMP" or "Forest Plan") for each unit of the National Forest System. 16 U.S.C. § 1604(a). Forest Plans guide natural resource management activities forest-wide by setting standards, management area goals and objectives, and monitoring and evaluation requirements. The Forest Plan must provide for multiple uses of the forest, including: recreation, range, wildlife, fish, timber, and wilderness. Second, after a Forest Plan is developed, all subsequent agency actions, including site-specific actions, must comply with NFMA and the governing Forest Plan. 16 U.S.C. § 1604(e) and (i); 36 C.F.R. § 219.10.

34. The DNF promulgated its current Forest Plan in 1990 ("DNF Plan"). That plan generally requires the Forest Service to provide a wide variety of quality winter recreation opportunities and specifically requires the Forest Service to address conflicts between motorized and non-motorized users of the DNF and, if necessary, close areas to motorized use to prevent such conflicts. DNF Plan at 4-33.

**Executive Orders 11644 and 11989**

35. The purpose of Executive Orders (EO) 11644 (Feb. 8, 1972) and 11989 (May 24, 1977) is to ensure that the use of off-road vehicles on public lands will be controlled and directed to protect resources, promote the safety of all users of those lands, and minimize conflict with other recreationists. EO 11644 § 1. Executive Orders 11644 and 11989 direct federal agencies to establish procedures for managing off-road vehicles and to close areas to motorized vehicles when considerable adverse effects occur. EO 11644 §§ 3, 9(b); EO 11989 § 2. When designating areas and trails for off-road vehicle use, including snowmobile use, Executive Order 11644 requires that: “[a]reas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.” EO 11644 § 3(3). These EOs are independently enforceable against and binding on the Forest Service.

36. Pursuant to EO 11644, in 2005, the Forest Service promulgated the 2005 Travel Management Rule (TMR), 70 Fed. Reg. 68264 (Nov. 9, 2005), 36 C.F.R. §§ 212.50–212.81. The TMR established rules governing management of off-road vehicles on public lands. The 2005 TMR requires that, when designating trails and areas for off-road vehicle use, the Forest Service must minimize conflicts between motor vehicle use and existing or proposed recreational uses of National Forest lands, and must consider noise, emissions and other impacts of motorized use near populated areas. 36 C.F.R. §§ 212.55(b), 212.81(c).

**Administrative Procedure Act (5 U.S.C. §§ 701-706)**

37. The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, authorizes a court to review final agency actions and hold unlawful and set aside final agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The APA provides a cause of action to challenge any final agency action where there is no other adequate remedy in court. 5 U.S.C. § 704.

38. NEPA, NFMA, and the EOs do not contain specific judicial review provisions, and the Forest Service’s actions governed by those laws, such as the Kapka DN/FONSI, are therefore subject to judicial review under the APA.

**FACTUAL ALLEGATIONS**

**Deschutes National Forest**

39. The Deschutes National Forest is located near Bend, Oregon. The DNF is comprised of about 1.8 million acres. The DNF is an important resource for many recreational users. The DNF receives visits from approximately 8 million people every year who come to enjoy outdoor recreation. Popular activities include snowshoeing, cross-country and backcountry skiing, hiking, camping and many other types of outdoor recreation. Many of these activities are enjoyable because they are removed from the normal activities of modern life, namely the sound and air pollution created by motorized vehicles. The DNF is a refuge for many users of the public lands who seek peace and quiet in their chosen forms of recreation. In fact, non-motorized recreation users far outnumber motorized recreation users on the DNF, and continue to increase in number.

### **Non-Motorized and Motorized Winter Recreation in the Deschutes National Forest**

40. Snowshoeing, backcountry skiing, and cross-country skiing are rapidly growing in popularity and are important types of outdoor recreation for Plaintiffs. These activities are quiet, produce virtually no impact, and provide socio-economic benefits to communities. They are sustainable in that the forest environment can support a substantial amount of such activities without impairment to users' experiences or natural resources. These activities are adversely impacted by snowmobile use.

41. Snowmobiles are another popular form of winter recreation in the DNF. This sport also has been growing in popularity over time, but less rapidly than snowshoeing and other non-motorized forms of winter recreation. Unlike those non-motorized winter recreational activities, snowmobiling creates conflict between different user groups because of the inherent nature of the activity. Snowmobiles create large amounts of noise and pollution in otherwise natural environments. A large part of the appeal of snowshoeing, cross country skiing and other non-motorized winter sports, is to escape the noise and pollution of everyday life. The DNF is a refuge for winter recreationists who seek a healthy and peaceful recreation experience.

42. Snowmobilers are entitled to enjoy the DNF, the same as any other authorized users. However, the problem lies in the fact that snowmobiles create substantial amounts of pollution and conflict with other users. They are one of the most polluting recreational vehicles in use, emitting substantial amounts of air pollution as well as noise, which ruins the clean air and quiet sought by non-motorized recreationists. Snowmobiles can travel at highway speeds, and are frequently used for jumps and high-speed turns. These activities pose a danger for non-motorized users of the DNF who might be unable to get out of the way of a snowmobile traveling at high speeds. Snowmobiles also destroy the undisturbed snow that non-motorized

users rely on to recreate. Even a small number of snowmobiles can ruin the experience of a large number of non-motorized recreationists. For these and other reasons, motorized and non-motorized uses should be separated, so both user groups can fully and safely enjoy the DNF.

43. This lawsuit arises in part because of long-term conflicts between snowmobiles and non-motorized winter recreational users in the Cascade Lakes Corridor of the DNF. The Cascade Lakes Highway (also known as Century Drive) begins in Bend, Oregon and proceeds up into the Cascade Range. During the winter, the road is plowed as far as the Mt. Bachelor Ski area. There are already several existing sno-parks along the Cascade Lakes Corridor, most at a lower elevation and all significantly smaller than the proposed Kapka Butte Sno-Park. Beginning with the lowest elevation sno-park, the existing sno-parks are: Meissner (65,340 sq. feet), Wanoga Snowplay (65,340 sq. feet), Wanoga (130,680 sq. feet), Swampy (74,052 sq. feet), Vista Butte (8,712 sq. feet), and Dutchman Flat (30,492 sq. feet).

44. The proposed 189,600 sq. foot Kapka Butte Sno-Park will be located at the junction of Forest Service Roads 46 (Cascade Lakes Highway) and 45 (Sunriver cutoff), close to the existing Vista Butte Sno-Park and about 5 miles from the higher elevation Dutchman Sno-Park. The site is approximately 19 miles west of Bend, Oregon, at an elevation of 5,900 feet, near Kapka Butte.

45. Because of the elevation, terrain, high-quality snow, open forests, lack of designated trails, and accessibility from a trailhead, the area around Dutchman Flat, Tumalo Mountain, and Kapka Butte is particularly important to backcountry skiers who want an off-trail experience that they can access on a day-trip. Because most backcountry skiers and snowshoers stay within about three or four miles of a trailhead, a three-mile wide corridor between Vista Butte Sno-Park and Mt. Bachelor is the prime recreation area around Bend for these non-motorized

recreationists, including many of Plaintiffs' members, seeking dispersed winter recreational opportunities.

46. Dutchman Sno-Park is the closest existing sno-park to this highcountry. Because that sno-park is relatively small (30,450 sq. ft), it limits the number of users, both motorized and non-motorized, that may park there. Nevertheless, user conflicts in the surrounding areas have existed for a long time and have increased as snowmobiles have become more powerful and able to access more terrain regardless of snow depth and other conditions.

47. Before these machines became so powerful, much of the Tumalo Mountain area was inaccessible to snowmobiles and used exclusively by backcountry skiers. But now, snowmobiles routinely travel through much of this area and have displaced many winter backcountry users, including Plaintiffs' members, from this highly desired location, crowding them into the ever-smaller areas that are still accessible to non-motorized, off-trail skiers and snowshoers but not overrun by snowmobiles. If the Kapka Sno-Park is built, allowing even more motorized users in this small area of the DNF, non-motorized users will be completely displaced from the popular Tumalo Mountain area.

48. The Forest Service has taken some limited steps in the Dutchman Flat and Tumalo Mountain area to separate snowmobiles and non-motorized users, but those measures are not well-enforced and have been ineffective at minimizing user conflicts. Regular incursions of snowmobiles into Wilderness and other prohibited areas already occurs. The proposed Kapka Butte Sno-Park is close enough and provides easy access to Dutchman Flat and Tumalo Mountain that it will greatly expand snowmobile use in these areas, increasing the already existing conflicts with other users and incursions into restricted areas. However, it is far enough away that non-motorized users are unlikely to use it in order to access those same areas, creating

a disproportionate increase in use favorable to snowmobiles that will cause even more displacement of backcountry winter recreationists.

49. Prior to making the decision at issue here, the Forest Service considered several other proposals regarding winter recreation opportunities in the upper Cascade Lakes Corridor area. While these proposals included discussion about additional parking, they also each included discussion about the need to address conflicts between motorized and non-motorized users and potential management options for resolution or mitigation of those conflicts.

50. In 1996, the Forest Service considered a proposal to expand the Dutchman Sno-Park. Ultimately, the 1996 ROD decided not to authorize such an expansion because it would increase user conflicts in the area. Although the current Kapka Butte EA repeatedly cites to the 1996 ROD as a reason for not considering alternatives that might have offered non-motorized users some mitigation, the EA and DN then ignore the conclusion from the 1996 ROD and make the contrary decision to greatly expand snowmobile parking only five miles away.

51. In 2004, the DNF hosted a summit to consider and address motorized/non-motorized user conflict in the vicinity of the Dutchman Flat Sno-Park. Although the DNF instituted some management changes to mitigate such conflict, those measures have not been effective at resolving the conflicts.

52. In 2006, the Forest Service considered a proposal to close the entire area around the Dutchman Sno-Park to motorized uses and separate motorized and non-motorized uses to minimize conflict between users, and addressed this issue in the 2006 Kapka EA. The Forest Service issued no final decision based on the 2006 EA, but the EA showed that the Forest Service was well aware that user conflict was still a serious problem in the area.

53. In 2009, the DNF published a Winter Recreation Sustainability Analysis, which noted the many adverse environmental impacts of snowmobiles as well as their adverse impacts on non-motorized winter recreation. The analysis specifically noted that adding parking capacity to already contentious areas will only diminish some non-motorized visitors' experiences and possibly displace them from the Cascade Lakes Corridor.

### **The Kapka Butte Sno-park Decision**

54. On January 2, 2009, the Forest Service initiated scoping with a Notice of Intent to prepare an EIS for the Kapka Sno-Park Project. Kapka Butte Sno-Park Construction, Notice of Intent to prepare an Environmental Impact Statement, 74 Fed. Reg. 71-01 (Jan. 2, 2009). Unlike the scoping notice for the prior 2006 Kapka EA that included conflict resolution between motorized and non-motorized users as part of the purpose and need, the 2009 notice excluded conflict resolution and focused solely on the need for additional parking as the Project's purpose and need.

55. In April 2011, the Forest Service published a DEIS for the Project and sought public comment. Environmental Impact Statements, Notice of Availability, 76 Fed. Reg. 21345 (Apr. 15, 2011). The purpose and need stated in the DEIS eliminated conflict resolution as part of the proposed action. Despite the Forest Service's prior recognition of the serious user conflicts in the area, this purpose and need statement in the DEIS was limited to simply creating a new, very large sno-park near Kapka Butte, and related connecting trails, primarily for snowmobile users. Therefore, the DEIS proposed no significant provisions for mitigating user conflicts and did not include alternatives to address user conflict. Significantly, the Forest Service had arranged for funding from the Federal Highway Administration for an expanded parking area before even

undertaking the DEIS, but that fact was not disclosed in the DEIS. Each of the plaintiff groups commented on the DEIS at length, focusing particular attention on the user conflict issue.

56. After allowing public comment on the DEIS, the Forest Service, without any additional opportunity for public comment, issued an EA, FONSI and its DN approving the Kapka Butte Sno-Park. Unlike the alternatives considered in the DEIS, the selected alternative in the DN focuses almost exclusively on providing additional parking capacity for vehicles towing or carrying snowmobiles. The Forest Service did not explain why it issued a final EA and FONSI rather than completing a final EIS.

57. The approved Kapka Sno-Park will replace 6 acres of vegetation with a 189,600 square foot, paved parking lot. It would be by far the largest sno-park along the Cascade Lakes Corridor. Exhibit A illustrates the true scale of this Project. This Project is more akin to a parking lot at a major airport than a sno-park in a national forest. The Project will also create a 0.2 mile trail that connects the sno-park to the snowmobile trail system. The result of this Project will be a major expansion in the number of motorized users who can access the Dutchman Flat and surrounding areas.

58. Although there will be nothing to prevent non-motorized users from accessing this new sno-park, the Forest Service has clearly designed it to be used primarily by motorized users. It will be striped to provide at least 70 additional parking spaces for larger vehicles or vehicles towing trailers. In fact, the sno-park's actual capacity is much greater, as demonstrated at other sno-parks where parking of many more vehicles occurs compared to the design and striping of the lot. This increased access will inevitably cause an increase in user conflict beyond the parking lot itself.

59. The Kapka Butte area is currently enjoyed by skiers and snowshoers. It is easily accessed from the adjacent, much smaller, Vista Butte Sno-Park. This area is one of the few undeveloped and easily accessible areas in the region where people seeking a close-in backcountry-style experience can go. If the proposed Kapka Butte Sno-Park is built, those opportunities will be lost and would not be replaced unless the Forest Service considers and adopts an alternative proposal that effectively addresses user conflicts.

60. Plaintiffs submitted timely administrative appeals objecting to the DN, FONSI and EA on numerous grounds. Defendant Forest Supervisor Allen rejected those appeals on or about December 18, 2012, making the Forest Service's decision approving the Kapka Butte Sno-Park final agency action subject to judicial review under the APA.

#### CLAIMS FOR RELIEF

##### **First Cause of Action: Violations of National Environmental Policy Act (NEPA)**

61. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

62. This First Cause of Action challenges Defendants' violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and NEPA's implementing regulations, when analyzing and approving the Kapka Butte Sno-Park Project.

##### **COUNT ONE: The Purpose and Need are too narrowly defined and violate NEPA.**

63. CEQ's implementing regulations for NEPA require an agency's NEPA analysis to include a purpose and need section which "briefly specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13.

64. The DN/FONSI and EA use an overly narrow purpose and need statement that improperly focuses only on providing “additional safe, high elevation parking” in the Cascade Lakes Highway corridor. DN at 8. The problem that needs to be addressed in the Cascade Lakes Highway corridor area in terms of winter recreation is user conflict, not inadequate parking spaces. Despite acknowledging for many years that user conflicts between motorized and non-motorized winter recreationists is an existing and increasing problem in the Dutchman Flat/Tumalo/Kapka Butte area, the Forest Service excluded that issue from consideration when it confined the purpose and need for the Kapka Butte Sno-Park Project to parking.

65. This unduly narrow purpose and need may have been caused in part by the fact that, before issuing its DEIS, the Forest Service had in fact obtained funding from the Federal Highway Administration to be used for construction of a new parking lot at the Kapka Butte location. That key fact was not disclosed in the DEIS and most members of the public had no opportunity to comment on that aspect of the Forest Service’s decision-making process.

66. The DNF has not explained in the DN, EA or FONSI why the conflict between motorized and non-motorized users in the vicinity of the proposed Kapka Butte Sno-Park is no longer a concern or why exacerbation of this conflict and further displacement of non-motorized users does not need to be addressed in conjunction with additional recreational parking.

67. The Forest Service’s decision to define the Project with an improperly narrow purpose and need, reversing course without explanation from its prior conclusions that winter recreation conflict resolution is an important issue in this area of the forest, is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT TWO: The EA considered an unreasonably narrow range of alternatives.

68. In part because of its unreasonably narrow purpose and need statement, the Forest Service's EA examined an unreasonably narrow range of alternatives. The Forest Service refused to consider in detail any alternative that would have actually addressed the user conflict issues that exist and that will only be exacerbated by the selected alternative.

69. Plaintiffs' comments and appeals offered or suggested reasonable alternatives that would have minimized conflicts by, among other things, separating motorized and non-motorized users, but the Forest Service refused to consider and compare the impacts of and benefits from such reasonable and feasible alternatives in the EA.

70. The Forest Service's failure to consider a reasonable range of alternatives is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT THREE: The Forest Service's process for reaching its decision to approve the Kapka Butte Sno-Park Project violates NEPA.

71. The Forest Service initially and affirmatively determined that the Kapka Sno-Park Project may significantly impact the quality of the human environment and prepared a draft environmental impact statement (DEIS). Without notice, or opportunity to comment, the Forest Service then issued an EA and a FONSI on September 14, 2012, and later published its intent to withdraw the DEIS.

72. No NEPA regulation authorizes such a backward process for complying with that statute's mandates. By engaging in this process, the Forest Service has improperly evaded

several applicable CEQ regulations, e.g., 40 C.F.R. §§ 1502.9(b), 1505.2(c), and has denied plaintiffs the opportunity to comment on the FONSI.

73. The Forest Service's decision to issue an EA and FONSI after first preparing and submitting a DEIS for public comment is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT FOUR: The FONSI Violates NEPA.

74. A FONSI must address the significance factors set out in the CEQ regulations. 40 C.F.R. § 1508.27(b). These factors pertain to both context and intensity. Here both the context of the decision and the intensity of several of the significance factors should have prevented the Forest Service from making a Finding of No Significant Impact.

75. The context of the decision that prevents any rational FONSI include the existing, well-documented user conflicts in the area, the Forest Service's initial decision to prepare a DEIS, and the Forest Service's failure to allow the public to comment on the EA and FONSI after the Forest Service abruptly reversed course.

76. The intensity factors that prevent any rational FONSI include, but are not limited to, the proposal's cumulative impacts on numerous forest resources, including wildlife, air quality, and quiet and dispersed recreation; and the proposal's non-compliance with applicable Forest Service regulations, the EOs and DNF Plan provisions.

77. Furthermore, the Forest Service cannot rely on mitigation measures to justify its FONSI because the mitigation described in the EA is not definite, effective, and enforceable, and did not even address user conflicts, which is the biggest problem at issue with this Project.

78. The Forest Service's DN and FONSI are therefore arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT FIVE: The Forest Service did not adequately respond to public comments.

79. The Forest Service has an obligation to respond to public comments that it received during the public comment period. 40 C.F.R. § 1502.9(b).

80. The Forest Service failed to appropriately respond to public comments on the DEIS, particularly those submitted by Plaintiffs, and did not permit comments on the EA and FONSI.

81. These failures are arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT SIX: The NEPA analysis did not use the best available science and did not clearly define what was the best science.

82. CEQ's NEPA regulations provide that information used to inform NEPA analysis "must be of a high quality" and that "[a]ccurate scientific analysis . . . [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The agency's discussion and analysis must be based on professional and scientific integrity. 40 C.F.R. § 1502.24. To take the required "hard look" at a proposed project's effects, an agency may not rely on incorrect assumptions or data.

83. The Forest Service's analysis in the EA does not accurately identify or use science of high quality in making its decisions. For example, the Forest Service uses inconsistent and contradictory information to estimate the number of people at one time ("PAOT") who will be using the DNF because of the greatly expanded capacity for motorized users created by the DN. The Oregon Department of Fish & Wildlife commented that the Forest Service's analysis

underestimated the increased snowmobile use caused by the proposal and the increased impacts from such use on wildlife species such as wolverines. The Forest Service also made no attempt to assess and quantify the impact of the proposed Project on either noise or ambient air quality. These errors caused the Forest Service to significantly underestimate the adverse impacts of its decision.

84. This failure and omission is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT SEVEN: The Kapka decision did not adequately disclose and consider the direct, indirect and cumulative impacts of the Project.

85. CEQ's regulations implementing NEPA require consideration and disclosure to the public of direct, indirect and cumulative impacts not only when determining the scope of the analysis, but also when discussing the "significance" of the action. *See* 40 C.F.R. §§ 1508.7, 1508.25, 1508.27(b)(7). *See also* 40 C.F.R. § 1508.8 (defining "effects") and § 1508.25(c)(2) (stating that indirect impacts are considered in scope).

86. The DN, EA and FONSI fail to properly disclose and analyze many of the Project's direct, indirect and cumulative impacts. For example, the EA does not begin to adequately address the direct and cumulative impacts on air quality, quiet, and untracked snow from the greatly increased snowmobile use that would be caused by this Project. Similarly the EA does not sufficiently address impacts on wildlife and vegetation from such increased motorized uses. Perhaps most significantly, the EA does not adequately address the impacts on dispersed non-motorized recreation despite recognizing for years and admitting in previous NEPA documents that user conflicts between motorized and non-motorized winter recreationists already exist in

the action area. Those impacts would include, but are not limited to, the Forest Service's historic and continued inability to effectively enforce existing restrictions on such motorized use.

87. The DN, EA and FONSI also fail to properly disclose and analyze the Project's compliance with the NFMA, the DNF Plan, applicable Forest Service regulations and applicable EOs.

88. The Forest Service's failure to properly address the Project's direct, indirect and cumulative impacts is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, in violation of 5 U.S.C. § 706(2)(A).

COUNT EIGHT: The Forest Service failed to explain its departure from prior conclusions.

89. NEPA requires that federal agencies take a hard look at all of the impacts of their proposed activities and disclose that information to the public. In prior environmental analyses and reports, the Deschutes National Forest has repeatedly recognized that the conflict between motorized and non-motorized winter recreation users – in particular in the vicinity of the proposed Kapka Butte Sno-Park – is a major issue needing Forest Service attention. The DNF recognizes that prior attempts to address this conflict have not resolved the conflict and that it remains a key issue.

90. Construction of the proposed Kapka Butte Sno-Park will not address this conflict but, rather, will greatly exacerbate and intensify this conflict, further displacing non-motorized users from the Tumalo Mountain area.

91. The DNF has not explained in the DN, EA or FONSI why the conflict between motorized and non-motorized users in the vicinity of the proposed Kapka Butte Sno-Park is no longer a concern or why exacerbation of this conflict and further displacement of non-motorized users

does not need to be addressed. The DNF has failed to explain adequately its change in position and thus acted arbitrary and capriciously.

92. Accordingly, the DN and FONSI are arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

**Second Cause of Action: Violation of National Forest Management Act (NFMA)**

93. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

94. The DN, FONSI and EA are inconsistent with the DNF Forest Plan and are therefore unlawful under NFMA, 16 U.S.C. § 1604(i).

95. The DNF Forest Plan states:

“ **TR-18** Where conflicts develop between non-motorized and motorized winter use the following sequence of steps will generally be taken:

- i. Trails will be designed to encourage the intended user and to discourage others. An inviting system of trails will be provided for both non-motorized and motorized users.
- ii. Intensify educational and indirect management efforts to resolve the conflict.
- iii. Restrict motorized use of Nordic trails.
- iv. *Close the area where the conflict is occurring to motorized use.*”

Deschutes National Forest Plan, 4-33, available at

[http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5347268.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5347268.pdf)

f (last accessed March 26, 2013) (emphasis added).

96. The proposed Kapka Sno-Park reverses the general steps that DNF established for resolving winter user conflict. When there is conflict between user groups, that conflict should be resolved in favor of the non-motorized users. The proposed action is therefore inconsistent with the Deschutes National Forest LRMP.

97. Because the proposed action is inconsistent with the Forest Plan, it is arbitrary, capricious and contrary to NFMA in violation of 5 U.S.C. § 706(2)(A).

**Third Cause of Action: Violation of Executive Orders 11644 and 11989 and the  
2005 Travel Management Rule**

98. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

99. Executive Orders 11644 and 11989 require Defendants to create procedures that will affirmatively minimize conflict between snowmobiles users and other recreationists.

100. In 2005, the Forest Service promulgated the Travel Management Rule (TMR) to implement this direction from EO 11644. 70 Fed. Reg. 68264 (Nov. 9<sup>th</sup>, 2005).

101. This regulation directs the Forest to consider, with the objective of minimizing, damage to natural resources, harassment of wildlife and significant disruptions of their habitats, and conflicts with other existing or proposed recreational uses when designating trails and areas for motorized use. 36 C.F.R. § 212.55(b). This direction applies to designations created for snowmobile areas and trails as well. 36 C.F.R. § 212.81(c).

102. The TMR also provides that when designating National Forest System roads, trails and areas for motor vehicle use, the responsible official “shall consider effects on,” among other things, “conflicts among uses of National Forest System lands[.]” 36 C.F.R. § 212.55(a).

103. Finally, the Forest Service must consider the “[c]ompatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors.” 36 C.F.R § 212.55(b)(5).

104. These regulations apply to the Forest Service’s decision to authorize the Kapka Butte Sno-Park and related trails. The DN/FONSI and EA do not adequately address how the Kapka Sno-Park Project will minimize conflict. Simply asserting that conflict is mitigated by increasing the parking capacity does not satisfy the requirements of the Executive Orders and TMR.

105. The Forest Service did not act consistently with the direction in EOs 11644, 11989 and the TMR when approving the Kapka Butte Sno-Park and its decision is therefore arbitrary, capricious and contrary to law in violation of 5 U.S.C. § 706(2)(A).

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

A. Declare that the Forest Service’s authorization of the Kapka Butte Sno-Park violates NEPA, NFMA, and/or Executive Orders 11644 and 11989 and the 2005 Travel Management Rule, and thus is arbitrary, capricious, an abuse of discretion, and/or not in accordance with law under the APA, 5 U.S.C. § 706(2)(A);

B. Vacate and set aside the agency’s Decision Notice and Finding of No Significant Impact as illegal agency actions under the APA;

C. Enjoin the Forest Service from implementing the Record of Decision or allowing any use of a constructed or partially constructed Kapka Butte Sno-Park until the agency has complied with NEPA and NFMA, and all other applicable laws;

D. Grant such further injunctive relief as requested hereafter by Plaintiffs.

E. Award Plaintiffs their reasonable costs, litigation expenses, and attorneys' fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*;

F. Grant such further relief as the Court deems necessary or appropriate.

Dated: March 27, 2013

Respectfully submitted,

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EXHIBIT A.

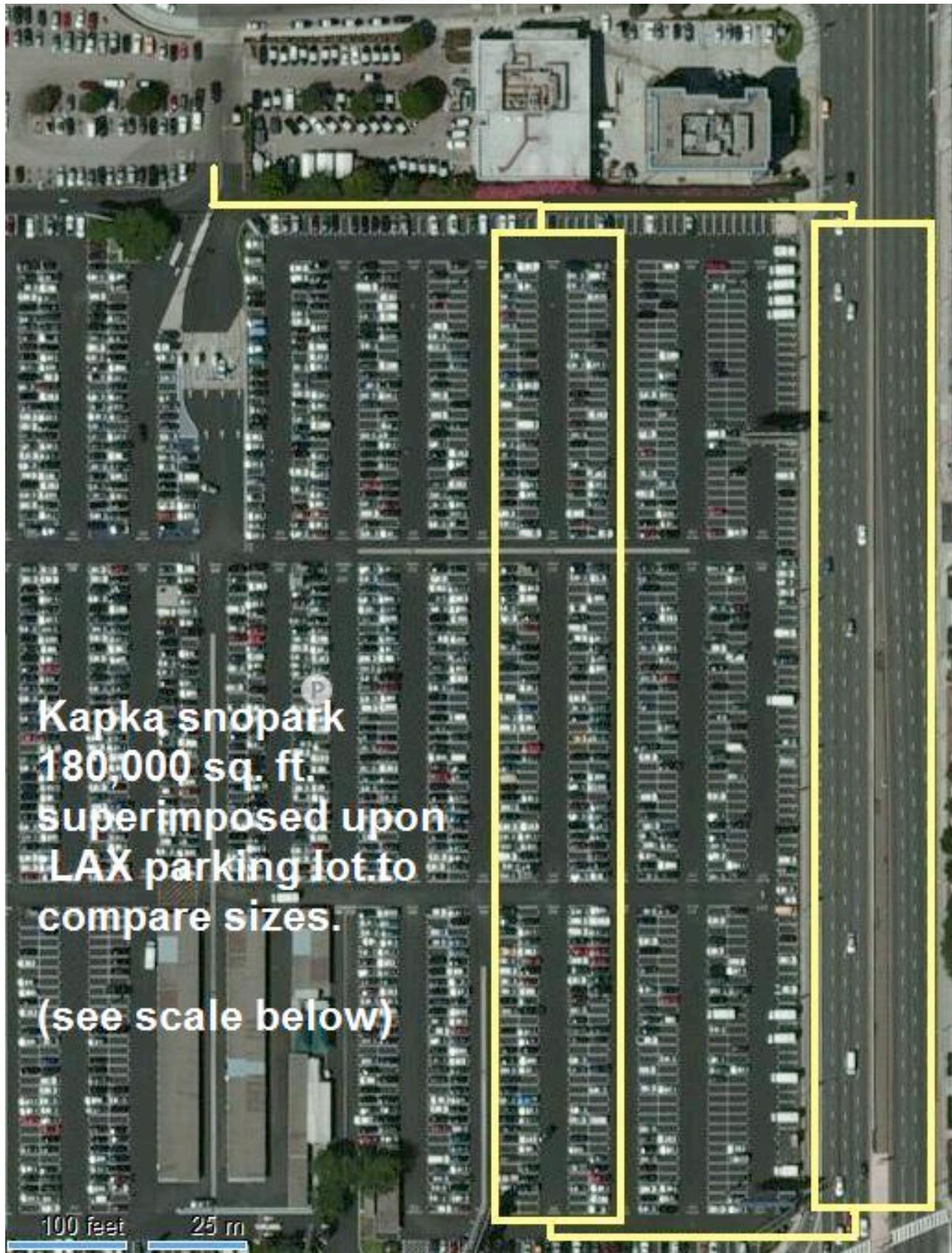


Fig. 1 illustrates the same square footage of the proposed Kapka-Sno Park, relative to a parking lot at the Los Angeles International Airport.