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

**WILD WILDERNESS,
WINTER WILDLANDS ALLIANCE, and
BEND BACKCOUNTRY ALLIANCE,**

Plaintiffs,

v.

**JOHN ALLEN and
UNITED STATES FOREST SERVICE,**

Defendants,

And

**OREGON STATE SNOWMOBILE
ASSOCIATION and
AMERICAN COUNSEL OF SNOWMOBILE
ASSOCIATIONS.**

Defendant-Intervenors.

Case No.: 6:13-cv-00523-TC

**PLAINTIFFS' OPENING BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs Wild Wilderness, Winter Wildlands Alliance, and Bend Backcountry Alliance challenge the Forest Service's decision approving construction of the Kapka Butte Sno-park in the Deschutes National Forest. That decision would significantly exacerbate existing conflicts between motorized and non-motorized winter recreationists rather than address and mitigate those conflicts, as the law requires. The Kapka Sno-park, which is expressly designed to increase snowmobile use in the area, would be constructed along the Cascade Lakes Highway, just outside of Bend on the way to Mt. Bachelor. This area is already used extensively by both snowmobilers and backcountry skiers and snowshoers, and conflicts between these two user groups have escalated over the years.

Going back twenty years, conflicts have existed between motorized and non-motorized winter recreation user groups in this area, particularly around Dutchman Flat and Tumalo Mountain. The two uses are not compatible because the loud noise, pollution, and tracking of the snow from the machines ruin the clean, quiet recreation experience in fresh powder snow that backcountry skiers and snowshoers seek out. As snowmachines have become faster and more powerful, they have encroached more and more into steeper terrain with deep powdery snow, increasingly displacing the backcountry skiers and snowshoers from the few areas that previously were inaccessible to snowmobiles.

Despite being well aware of the significant user conflicts in this area and the need to address those conflicts, the Forest Service decided to build a new sno-park catering primarily to snowmobilers, thus increasing their use in the Dutchman Flat/Tumalo Mountain area. The Forest Service initially stated it would complete an Environmental Impact Statement (EIS) for this project that would assess increased user conflicts, but later removed that issue from the

analysis, focusing solely on the need for more parking for snowmobile users. After issuing a draft EIS, the Forest Service issued a final Environmental Assessment (EA) and Finding Of No Significant Impact (FONSI) for the sno-park project rather than a more comprehensive final EIS.

By relying on an assessment that ignored the key issue of increased user conflicts caused by the construction of the new sno-park, the Forest Service did not adequately consider the impacts of the project, in violation of the National Environmental Policy Act. Furthermore, by issuing the decision to build the Kapka Sno-park without minimizing such conflicts, the Forest Service was not acting consistent with its Forest Plan or travel management regulations, in violation of the National Forest Management Act and the 2005 Travel Management Rule. Accordingly, this Court should grant Plaintiffs' motion for summary judgment and set aside the Forest Service's decision to construct the Kapka Sno-park.

FACTUAL BACKGROUND

A. History of User Conflicts in the Dutchman Flat/Tumalo Mountain Area.

Conflicts between snowmobile use and backcountry skiers and snowshoers in the area near the new Kapka Sno-park have been occurring for many years. Conflicts arise because snowmobile use is incompatible with use by these non-motorized winter recreationists. Not only do snowmobiles cause safety concerns by traveling at high speeds in areas where others are on foot, but they also ruin the very qualities that backcountry skiers and snowshoers seek out—a quiet, peaceful winter landscape with clean air and untracked powder snow. *See e.g.* AR 4093, 4098, 4113-17; Declaration of Scott Silver ¶¶ 5-6, 10, 12, 16-17, 19, 24; Declaration of Dale Neubauer ¶¶ 2-3, 14-18, 20, 22-25; Declaration of Erik Johnson ¶¶ 3-4, 8-9, 11-12 (attached hereto). Snowmobiles create loud noise and fumes, disturb the peace of the forest in winter, and quickly create tracks through the snow that can ruin an entire area for skiers or snowshoers. *Id.*

Even by the mid-1990's, conflicts in the Dutchman Flat and Tumalo Mountain area were occurring because of heavy use by both snowmobilers and skiers. AR 1830, 4093-99, 4175-77, 4183-91, 4200, 4227-29, 4234, 4236, 4245-46, 12538. Data collected by the Forest Service over the past twenty years shows that in many years skiers outnumber snowmobilers in recreation use on the forest, particularly in the Dutchman Flat area. AR 9502-05 (1992-2000), 10694-95, 15946 (2007-2008), 9739-42, 10529-49, 11980-83, 12269-73 (2007-2010).

Plans to enlarge the Dutchman Flat Sno-park met with resistance from the non-motorized winter recreation community because of the adverse impacts increased snowmobile use would have on their recreation experience. AR 4093-96, 4097-99. Letters to the Forest Service explained that the area was already at or beyond carrying capacity for winter recreation use, and adding more snowmobiles would further displace non-motorized winter recreation users. *Id.*

Indeed, in the Forest Service's 1996 EA for expansion of the Dutchman Flat and Wanoga Sno-parks, it stated that the "Purpose and Need" for the project included not only alleviating parking congestion and problems at the Dutchman Flat Sno-park, but also addressing the expected increase in number of on-snow conflicts between user groups. AR 4278-79. The EA considered the issue of user conflicts in its alternative actions and assessment of impacts, and recognized that the current situation around Dutchman Flat was already above the carrying capacity objective for recreation use due to the high volume of snowmobile and skier use, and increasing use in that area would increase conflicts even more. AR 4282-92, 4306-21.

In light of public comments from motorized and non-motorized recreationists, including Plaintiff Wild Wilderness, expressing concerns about the project, the Forest Service decided to limit the action to just improving the design of the entrance and exit to the Dutchman Flat Sno-park but not increasing parking capacity or adjusting use in the area. AR 4336-40, 4347-48,

4362-65, 4367. The Forest Service rejected the option of expanding the Dutchman Flat Sno-park because it would not adequately resolve conflicts between users resulting from current and increased use of the area, but also rejected closing part of the Dutchman Flat area to motorized use because it was not an “equitable” way to resolve conflicts. AR 4349-50, 4367.

Wild Wilderness and others continued to have concerns about user conflicts in the Dutchman Flat and Tumalo Mountain area and expressed them to the Forest Service over the next several years. AR 4369-79, 4390-92, 5676-77, 5683-84, 6590, 6593-6607, 6619-25, 6635, 6703, 6708, 6710-11, 6734-38, 6773-74, 6793, 6797, 6800. The Forest Service recognized the increasing need to address user conflicts, safety issues and snowmobile infractions in the Dutchman Flat area, and held a snow summit in April 2004 to bring interested parties together to try and find a solution for the Dutchman Flat/Tumalo Mountain area. AR 6630-34, 6636-42, 6712, 6716-18, 6725-29, 6776-82, 6816-27.

In preparation for that meeting, Wild Wilderness submitted a proposal to the Forest Service that would address much of the conflict by closing a 7-square mile area near Dutchman Flat and Tumalo Mountain to off-trail snowmobile use. AR 6784-86. The proposal noted that this backcountry area is close enough to sno-parks to be accessible to those on skis and snowshoes, and would be a relatively small closure area for snowmobiles compared to the hundreds of miles of terrain that would still be open to such use. *Id.*

Following the “snow summit,” the Forest Service received seventy letters and comments further discussing the need to address conflicts between motorized and non-motorized winter recreation use in the Dutchman Flat/Tumalo Mountain area, and opposing the Forest Service’s idea of simply adding more parking capacity. AR 6803-15, 6834-7146. As a result of the summit discussions and subsequent public comments, the Forest Service decided to close part of

the Dutchman Flat area and the southwest side of Tumalo Mountain to motorized use for the 2004-2005 season, and to begin analysis of a new Kapka Butte Sno-park. AR 7149-52. Before the 2004 winter season arrived, however, the Forest Service gave in to pressure from snowmobile groups and opened a snowmobile play area and snowmobile corridor within the newly created non-motorized zone of Dutchman Flat. AR 7430-37, 7439. The order implementing the 2004/2005 management restrictions noted recent increasing contention between motorized and non-motorized users and the goal of segregating these uses in the Dutchman Flat area. AR 7445.

B. Early Stages of Kapka Sno-park Project.

The Forest Service received initial funding for the Kapka Sno-park project in August 2004 and began the planning process in December 2004. AR 7426, 7440. Even with the changes during the 2004/2005 season, the Forest Service recognized it would need to continue to address increased motorized and non-motorized use in this area, and that the area was already near capacity for recreation use even before a new Kapka Sno-park was built. AR 7451-52. Wild Wilderness likewise expressed concerns early on that adding a large new sno-park without addressing how to deal with increased motorized use in the Dutchman Flat/Tumalo Mountain area would only lead to more on-snow conflicts between user groups. AR 8779-80.

In 2006, the Forest Service issued a scoping notice to initiate the NEPA process for the Kapka Sno-park, which it admitted would cater primarily to snowmobilers. AR 8991, 8993. The scoping notice stated the project would also limit the Dutchman Flat Sno-park to vehicles without trailers and close the area surrounding that sno-park to motorized use. AR 8992, 8994. The purpose was “to decrease the congestion and user conflicts in the Dutchman Flat area.” AR 8991. The notice stated that the Kapka Sno-park would fit 70 vehicles with trailers, and that

increased levels of use would be based on 4 snowmobiles per trailer. AR 8992.

Numerous comments to the scoping notice expressed concerns about the large size of the Kapka Sno-park and the amount of new snowmobile use that would result, further increasing conflicts in the Dutchman Flat/Tumalo Mountain area unless the Forest Service took additional steps to segregate use. AR 9034-62, 9072-75, 9090-101, 9105-13, 9207-09, 9215-21. Many comments noted that snowmobile trespass into non-motorized areas was already a frequent occurrence because the Forest Service did not effectively enforce those closures, and increased snowmobile use would exacerbate that trespass. *Id* Based on the size of the new sno-park, there were concerns that it could actually hold far more than 70 vehicles with trailers, creating an even larger increase in snowmobile use than the Forest Service predicted. AR 9039, 9049.

After reviewing public comments, the Forest Service recognized that carrying capacity of the area for recreation use was still an issue and decided to do a winter recreation carrying capacity analysis before completing the NEPA analysis. AR 9210, 9751-55, 9770, 9773, 9774, 10074-76. Wild Wilderness continued to express concerns about the Kapka Sno-park proposal into 2007, noting that the size of the lot would allow for even more new snowmobile use than the Forest Service projected, that the agency could not adequately enforce existing motorized-use closures and control user conflicts in the Dutchman Flat/Tumalo Mountain area, and the new sno-park would only add to those problems. AR 9487-98, 9499-501, 9745, 9747.

Agency discussions during the NEPA process included issues related to motorized and non-motorized conflicts, the size of the new sno-park, and what impacts increased use from snowmobiles would have on conflicts in the Dutchman Flat/Tumalo Mountain area. AR 9773, 10077-81. The Forest Service considered developing an alternative that would address how much additional snowmobile use could occur within the guidelines of the Forest Plan, and later

considered including an alternative that closed Tumalo Mountain to motorized use. AR 9201, 10554-55. Numerous non-motorized recreationists supported closing Tumalo Mountain to motorized use to reduce the conflicts and trespass that would inevitably occur with the increased snowmobile use caused by a new large sno-park near-by. AR 10556-69, 10574-97.

Then in 2008, the Forest Service abruptly decided to narrow the purpose and need of the project to just reducing congestion at Dutchman Flat Sno-park by increasing parking capacity, and not tackle the larger problem of motorized and non-motorized conflicts in the Dutchman Flat and Tumalo Mountain area, because it would “really simplify the analysis.” AR 10652, 10654, 10720. It issued a new scoping notice in January 2009 that limited the proposed action to building the Kapka Sno-park and several short trails for both motorized and non-motorized use leading from the Kapka parking lot. AR 10756. That notice also told the public that the Forest Service intended to prepare an EIS to evaluate this proposal. AR 10757. The new sno-park would have “slots” for 70 vehicles with trailers plus 40 vehicles without trailers. AR 10756.

In contrast to the 1996 Dutchman Flat EA and the 2006 Kapka scoping notice, the 2009 scoping notice did not mention the need to address increasing user conflicts in the Dutchman Flat/Tumalo Mountain area or propose restrictions on vehicles with trailers and motorized use in that area to address conflicts but, rather, focused solely on the need for additional parking. *Compare* AR 10755-56 with AR 4279, 8991. In other words, the Forest Service eliminated any analysis regarding on-snow user conflicts at the same time it was facilitating a significant increase in winter recreation use, particularly snowmobile use, near the Dutchman Flat area.

The Forest Service received more than 500 public comments on its 2009 scoping notice, with many in opposition to the project because the increased snowmobile use would cause increased conflicts with skiers and snowshoers and increased trespass into non-motorized

sections of the Dutchman Flat/Tumalo Mountain backcountry area without any analysis or mitigation of that impact. AR 10792-1585, 11599-600, 11604-782, 11829-32, 11833, 11927-57, 12016-20, 12028-30, 12060-61, 12173-78, 12229, 12532-38. Many of these comments stated that the Forest Service must consider closing all of Tumalo Mountain to motorized use to mitigate for the increasing number of snowmobiles in the area after Kapka Sno-park is built and the Forest Service's inability to keep snowmobiles out of the motorized closure areas on Tumalo Mountain. AR 11620-753, 11927-57, 12060-61, 12173-78, 12229, 12532-33.

Also in 2009, the agency conducted an analysis of winter recreation use on the forest. AR 10728-53. In conducting that analysis, the Forest Service interviewed various agency personnel and interested parties but did not interview anyone from Wild Wilderness or any other non-motorized backcountry user group. AR 10731-53. It issued a Winter Recreation Sustainability Analysis in August 2009. AR 12070. The analysis recognized the increase in both motorized and non-motorized recreation along Cascade Lakes Highway over the years, and the ability of snowmobiles to access more area due to technological advances in the machines. AR 12075. It noted in particular that the Dutchman area has the most congestion and conflicts between user groups. *Id.* The report acknowledged that past attempts to reduce conflict around Tumalo Mountain had marginal success, and adding parking capacity to that already contentious area will further diminish some non-motorized users' experiences and possibly displace them from the Cascade Lakes corridor. AR 12097, 12108. It also admitted that an increase in parking capacity will potentially increase motorized use of non-motorized areas. AR 12104.

C. Kapka Sno-park Draft EIS.

The Forest Service issued a draft EIS for the Kapka Sno-park in April 2011. AR 13339. The agency initially considered including a closure of the Dutchman Flat area to motorized use

during the core winter season. AR 12024, 12025. However, it dropped that from its alternatives considered in the draft EIS. *See* AR 12603. Instead, the draft EIS did not include any alternatives that attempted to reduce motorized use in the Dutchman Flat/Tumalo Mountain area to mitigate for the increased snowmobile traffic, which would inevitably lead to increased trespass into non-motorized areas and conflicts around Tumalo Mountain. AR 13344-45. Indeed, the Forest Service admitted that the Kapka parking lot would increase the capacity for snowmobilers along Cascade Lakes Highway by 61%, and that it would take only five minutes for snowmobilers to reach Dutchman Flat from the new sno-park. AR 16435, 13639.

In order to avoid considering the conflicts caused by increasing snowmobile use, the draft EIS included a narrow purpose and need that focused exclusively on providing additional parking and providing Nordic trails for skiers with dogs. AR 13370. In light of this narrow purpose and need, none of the alternatives in the draft EIS included provisions to close areas or reduce motorized use in the Dutchman Flat/Tumalo Mountain area to address the increasing snowmobile use and user conflicts, stating that such an action was outside the scope of the analysis. AR 13377-98. The Forest Service claimed that it would need to address motorized closures separately in a large-scale assessment. AR 13377. The Forest Service segregated the analysis in this way despite the fact that the only key issue from the scoping comments was “that the proposed action does not go far enough to address user conflict between motorized and non-motorized users in the Dutchman Flat and Dutchman Sno-park areas.” AR 13375.

The only provision in the alternative actions to supposedly address conflict between users was moving the snowmobile play area to the north end of Dutchman Flat and moving part of the motorized corridor that went through Dutchman Flat to the edge of the area. AR 13345, 13382, 13388-98. The Forest Service made sure that the new play area was no smaller than the existing

play area so that there would be no loss of area for snowmobilers, and even admitted that this change “was not a real solution” to the conflicts in the Dutchman Flat area. AR 12062-63, 12541, 12601; *see also* AR 12533 (Wild Wilderness letter stating that moving trail and snowmobile play area would actually make conflicts worse); AR 13344-45, 13347, 13383-85 (draft EIS recognizing that relocating the trail and snowplay area was not expected to reduce conflict between motorized and non-motorized users on Dutchman Flat).

The draft EIS assessed direct, indirect, and cumulative impacts of the four alternative actions on recreation use. AR 13429-56. In doing so, it relied on conclusions from the Winter Recreation Sustainability Analysis about the extent of user conflicts; but that analysis had excluded input from non-motorized backcountry user groups. AR 13422-23, 13438, 13453, 10731-53. The draft EIS also relied on assumptions about the number of additional snowmobile users caused by the Kapka Sno-park, using 70 vehicles and 2.6 people per vehicle as the basis of its estimate. AR 13429-31, 13437. However, for other sno-parks, the draft EIS and the Winter Recreation Sustainability Analysis used 3.0 people per vehicle to estimate snowmobile use. AR 13418, 12095. In addition, the Forest Service stated that the Wanoga Sno-park (3 acres, 130,680 sq. ft.), which was about half the size of the proposed Kapka lot (7.5 acres, 254,997 sq. ft.), holds 76 vehicles, and in fact 134 large vehicles have been documented in that lot. AR 13418, 16413, 16446, 01831. Based on the Forest Service’s estimates, the alternative actions in the draft EIS would increase snowmobile use by 130-182 snowmobiles. AR 13377, 13430.

The Forest Service received 242 total comments on the draft EIS. AR 14670-15267. Many commenters, including non-motorized backcountry recreationists, skiers with dogs, and snowmobilers, were opposed to the Kapka Sno-park. *See e.g.* AR 13809, 13825, 13851, 13863, 13921, 13924-25, 14350, 14481, 14483, 14490, 14494, 14646. They raised a wide range of

concerns, including increasing conflicts between motorized and non-motorized recreationists due to increasing snowmobile use, increasing trespass and incursions into wilderness and other motorized closure areas around Dutchman Flat and Tumalo Mountain, and the need to segregate uses to reduce conflicts and prevent further displacement of backcountry users. AR 15270-92.

After analyzing public comments, the Forest Service decided to issue a supplemental draft EIS that included a new alternative action, which would be alternative 5. AR 15400. The new alternative would address dog owners' concerns about off-leash areas for winter recreation being near heavy motorized use areas by proposing construction of two sno-parks—one on the east side of road 45 for snowmobilers and a separate one on the west side of road 45 that would be adjacent to the Nordic trails open to dogs. AR 15332, 15396, 15400, 15475. The Forest Service did not mention considering a new alternative to address all the public comments expressing concern about the increased motorized use and resulting conflicts with non-motorized users in the Dutchman Flat/Tumalo Mountain area. *Id.*

Also after the draft EIS was issued, the Forest Service began discussions with the Federal Highway Administration (FHWA) about FHWA becoming a cooperating or joint-lead agency on the EIS and signing the Record of Decision (ROD). AR 13923, 15464, 15466. The Forest Service and FHWA decided to be co-lead agencies and both sign the ROD. AR 15469, 15476. The parties planned a meeting for June 28, 2012 to discuss comments on the EIS by FHWA's legal counsel. AR 16003. Immediately following that meeting, the Forest Service suddenly stated that it would withdraw the draft EIS and issue a final EA rather than a final EIS, which would not include the new alternative 5. AR 16058-65 (discussing meeting); 16066-68 (final EA and withdrawal notice), 16075, 16084 (dropping alternative 5).

The Forest Service determined to issue an EA and a "Finding of No Significant Impact"

(FONSI) before even assessing whether it could support a decision that there would be no significant impacts. *See* AR 16069. The decision to issue an EA rather than an EIS meant that FHWA would be a cooperating agency, rather than co-lead agency, and thus did not have to sign the decision document. AR 16066, 16077.

D. Kapka Sno-park Final EA and FONSI.

On September 14, 2012, the Forest Service issued its final EA for the Kapka Sno-park along with its Decision Notice (DN) and Finding of No Significant Impact (FONSI), and a letter to interested publics notifying them of the EA, DN and FONSI. AR 13362-16745. The EA contained the same purpose and need statement and four alternative actions as the draft EIS. AR 16394-95, 16409-28. It also contained the same single “key issue” that the proposed action did not adequately address user conflicts in the Dutchman Flat area. AR 16401. And it continued to rely on the Winter Recreation Sustainability Analysis for conclusions about the extent of on-snow conflicts, and the same prediction of an increase of 130-182 snowmobiles based on 70 vehicles in the Kapka Sno-park and 2.6 people per vehicle. AR 16368, 16435, 16450-51, 16455-56, 16462-65. Even after receiving 237 timely public comments, the Forest Service made only minor changes to the effects analysis between the draft EIS and the final EA. AR 16440.

In the Decision Notice, the Forest Service decided to implement a modified alternative 2 that removed the Nordic trails open to dogs and the snowshoe trail connected to the Kapka Sno-park and consisted of just a parking lot for 70 vehicles with trailers, a snowmobile connector trail, and a cross-country ski connector trail. AR 16721. In light of public comments received about safety concerns over skiing with dogs in the same vicinity as snowmobilers, the agency would initiate a separate EA to do a different sno-park with a cross-country ski trail system open to dogs. *Id.*; AR 16084, 16736. The decision stated that modified alterative 2 was selected

because of how well it met the purpose and need, even though it did not address the need to provide Nordic trails open to dogs. AR 16721, 16725.

The Decision Notice also stated that modified alternative 2 responded to the key issue of user conflict in the Dutchman Flat area by reducing competition over parking at the Dutchman Sno-park. *Id.* However, that alternative did nothing to address on-snow user conflicts between snowmobilers and skiers and snowshoers on Dutchman Flat and Tumalo Mountain, despite many public comments that such conflicts were occurring and the Kapka Sno-park would only increase them. *Id.* AR 13809, 13851, 13863, 14350, 14481, 14494, 14646. The Decision Notice did acknowledge that moving the snowmobile play area and snowmobile corridor on Dutchman Flat would not substantially benefit the winter recreation experience in the area and thus that provision was not included in the selected alternative. AR 16738. It also acknowledged that the project would result in an increase of 182 snowmobiles on peak days, again relying on 70 vehicles and 2.6 people per vehicle. AR 16721, 16726-27. It concluded that a FONSI was appropriate because there will be no significant effects from the project. AR 16740-42.

Shortly after issuing the EA and DN/FONSI, on September 20 and 21, 2012, notices were published in the Federal Register regarding the withdrawal of the Forest Service's intent to prepare an EIS and withdrawal of the draft EIS. AR 16824, 16842, 16846.

After release of the EA and DN/FONSI, six parties submitted administrative appeals of the decision, with appeals coming from both non-motorized and motorized parties. AR 16966, 16975, 16993, 17019, 17023, 17025. One of the appeals was resolved informally and the remaining appeals were denied on December 18, 2012. AR 17379, 17497-551. Plaintiffs then filed their Complaint in this case on March 27, 2013 (ECF # 1).

ARGUMENT

I. LEGAL STANDARDS

Summary Judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Review of agency decision-making is governed by the Administrative Procedure Act (APA), which requires a Court to hold unlawful and set aside an agency decision that was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, or was adopted without observance of procedure required by law. 5 U.S.C. § 706(2); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005).

A decision is arbitrary and capricious if the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court’s inquiry must be “searching and careful,” and an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

Plaintiffs are submitting three declarations to establish their standing in this case. These declarations show that members of Wild Wilderness and Bend Backcountry Alliance regularly use the area around Kapka Butte, Dutchman Flat, and Tumalo Mountain for backcountry skiing. Silver Decl. ¶¶ 5-8; Neubauer Decl. ¶¶ 2-3; Johnson Decl. ¶ 3. These members are injured by snowmobile use in those areas, which impairs their recreation experience and displaces them from areas that no longer contain the recreation attributes they seek; and the Kapka Sno-park will

create additional injury by increasing snowmobile use in the Kapka Butte, Dutchman Flat, and Tumalo Mountain areas. Silver Decl. ¶¶ 6-7, 9-19, 22-24; Neubauer Decl. ¶¶ 14-25; Johnson Decl. ¶¶ 4-5, 7-13. Plaintiffs claims will be redressed if the Forest Service is ordered to conduct a proper environmental analysis that addresses the user conflict issue and considers motorized closures and other measures to mitigate for the increased snowmobile use caused by a new snowpark. *See Ctr for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (noting that under NEPA, causation and redressability requirements are relaxed, and it is enough that a revised NEPA analysis may redress Plaintiffs' injuries); Silver Decl. ¶¶ 20-21; Neubauer Decl. ¶¶ 7-11; Johnson Decl. ¶¶ 6, 14-15. Thus, Plaintiffs have standing to bring this case.

II. VIOLATIONS OF NFMA AND THE TRAVEL MANAGEMENT REGULATION.

Off-road vehicle use on public land has been an issue for more than forty years. In 1972, President Nixon issued Executive Order (E.O.) 11644 requiring federal agencies to “establish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.” E.O. 11644, Sec. 1 (AR 00001). The definition of “off-road vehicle” in the E.O. included motorized vehicles capable of traveling over snow or ice. E.O. 11644, Sec.2(3) (AR 00001).

The E.O. called for the Forest Service and other agencies to issue regulations that provide for designation of areas and trails on public lands that are open to off-road vehicle use, and areas that are closed to off-road vehicles, for all public lands. E.O. 11644, Sec. 3 (AR 00002). The designations must be based on protecting resources, promoting safety of all users of public lands, and minimizing conflicts with other recreational uses of those lands. *Id.* Criteria for designating lands as open or closed to off-road vehicles included minimizing damage to soil, watershed,

vegetation, or other resources; minimizing harassment of wildlife or significant disruption of wildlife habitats; and *minimizing conflicts between off-road vehicle use and other recreational uses of the same or neighboring public lands. Id.*

The Forest Service issued travel management regulations to implement E.O. 11644. 36 C.F.R. Part 212. The regulations require that, when designating trails and areas for off-road motorized vehicle use, the agency's objective is to minimize damage to resources, harassment of wildlife, and "conflicts between motor vehicle use and existing or proposed recreational uses of National Forest System lands or neighboring Federal lands," and it must consider "compatibility of motor vehicle use with existing conditions in population areas, taking into account sound, emissions, and other factors." 36 C.F.R. §§ 212.55(a)-(b), 212.81(c).¹ The Forest Service Manual states that regulations for off-road vehicle use must protect natural resources, promote public safety, and minimize conflicts among uses, and where trails are scarce and conflicts are likely, the Forest Service must consider "physical or temporal separation of uses." FSM 2353.01c, 2353.28.

Furthermore, the Forest Service is required under NFMA to ensure that all agency actions are consistent with the governing Land and Resource Management Plan, here the Deschutes Forest Plan. 16 U.S.C. § 1604(i); *Native Ecosystems Council*, 418 F.3d at 961. The Deschutes Forest Plan has objectives and requirements related to motorized recreation to satisfy the requirements of E.O. 11644 and the travel management regulations. Specifically, the Deschutes Forest Plan contains a Forest-wide Standard and Guideline for winter recreation that states:

¹ The Forest Service is currently under Court Order to revise its regulations again by September 2014, which will mandate designation of all National Forest land as open or closed to snowmobiles, using the minimization criteria. *See Winter Wildlands Alliance v. U.S. Forest Serv.*, 2013 WL 1319598, Case No. 1:11-cv-586-REB (D. Idaho, March 29, 2013) & Case No. 1:11-cv-586-REB Docket No. 70 (June 3, 2013).

Where conflicts arise between motorized and non-motorized user groups the following sequence of steps will generally be taken:

1. Trails will be designated to encourage the intended user and discourage others. Inviting trail systems will be provided for both user groups.
2. Intensify educational and indirect management efforts to resolve conflict.
3. Restrict motorized use of Nordic trails.
4. Close the area where conflict is occurring to motorized use.

AR 01421. The Forest Plan also sets forth “Recreation Opportunity Spectrum” (ROS) categories that guide winter recreation management in semi-primitive non-motorized, semi-primitive motorized, roaded-natural settings. AR 01531.

The Cascade Lakes Highway is a high-use winter recreation area due to the numerous existing sno-parks, snowmobile trails, and cross-country ski trails as well as prime winter backcountry destination areas. *See* AR 16831 (winter use map). The Forest Service has failed to comply with its legal requirements under the travel management regulation and its own Forest Plan by designating a new sno-park and trail open to motorized use without considering how to promote public safety and minimize conflicts between motorized and non-motorized user groups on National Forest lands, or closing areas to motorized use where conflicts are already occurring.

As discussed above and admitted in the Kapka EA, conflicts between snowmobilers and backcountry skiers and snowshoers have occurred in the Dutchman Flat/Tumalo Mountain area for more than twenty years, with conflicts escalating as advances in technology have enabled snowmobiles to travel up steeper terrain and through deeper snow. *See supra* pp. 2-8; AR 13423. Areas that were previously accessible only by ski or snowshoe are now accessible to snowmobiles, creating conflicts with and displacement of backcountry users who desire a safe, quiet, clean winter recreation experience. *Supra* p. 2; AR 12075, 13423, 14495-96, 14518.

As far back as 1996, the Forest Service stated that the Dutchman Flat area was exceeding the ROS objective for semi-primitive settings and thus was beyond the theoretical carrying

capacity for the area. AR 04320. Since that time, use of that area by both motorized and non-motorized recreationists has grown. Wild Wilderness and other backcountry users have repeatedly complained to the Forest Service over the years about on-snow safety issues and conflicts with snowmobiles in the Dutchman Flat/Tumalo Mountain area, and the need to better manage snowmobile use to minimize those conflicts and protect non-motorized recreationists. AR 4093-95, 4097-99, 4369-79, 4391-92, 5676-77, 5683-84, 6590, 6593-6607, 6619-25, 6708, 6710, 6734-38, 6773-74, 6793, 6797, 6800, 6803-15, 6834-67, 6870-86, 6888-7146 (1993-2004), 9034-62, 9072-75, 9090-96, 9098-101, 9105-13, 9207-08, 9217-21, 9487-98, 9499, 9745, 9747, 11620-47, 11655, 11658-95, 11701, 11722-53, 12060-61, 12174-76, 12229, 12532-33 (2004-2010). Indeed, the only key issue the Forest Service identified in its draft EIS and final EA was that the proposed action did not go far enough to address conflicts between motorized and non-motorized users in the Dutchman Flat and Dutchman Sno-park areas. AR 13375, 16401.

Rather than promoting safety, minimizing conflicts, and closing areas to motorized use where conflicts already exist, as the travel management regulation, Forest Service Manual, and Forest Plan require, the Kapka Sno-park will exacerbate these on-snow safety issues and user conflicts by increasing the number of snowmobiles that use the Dutchman Flat/Tumalo Mountain area. The Forest Service estimates that on peak days the new sno-park will increase use by an additional 182 snowmobiles, an increase of 61% over current levels. AR 16726, 16435. Because of the close proximity of the Kapka Sno-park to Dutchman Flat and Tumalo Mountain, many of these snowmobilers will use that area, which is also the prime destination of many backcountry skiers and showshoers. *See* AR 13639 (noting Dutchman Flat is only five minute snowmobile ride from Kapka Sno-park), 16454 (noting Tumalo Mountain is a primary area that draws snowmobile use and is also a prime destination of backcountry skiers and telemark skiers);

AR 16415-16 (noting need to improve snowmobile trail #5, which accesses Tumalo Mountain and Dutchman Flat from Kapka Sno-park, to “accommodate increased use”); AR 6785, 10574-97 (public comments noting importance of Tumalo Mountain to backcountry skiers); AR 14600-01 (draft EIS comments noting Kapka Sno-park will draw snowmobilers away from Edison and Wanoga Sno-parks to use Tumalo Mountain area).

Conflicts between user groups and trespass by snowmobiles into the non-motorized areas on Dutchman Flat and Tumalo Mountain will only increase with the growing number of snowmobiles using the area. *See* AR 6778-82 (common infractions in Dutchman/Tumalo area); 13744-88 (photo documentation of trespass 1999-2011); AR 6784-86, 9034-35, 9038-41, 9047-48, 9050-53, 9057, 9059-60, 9072-74, 9090, 9094, 9096, 9108, 9217-20, 9499, 11620-47, 11661-66, 11668, 11671-85, 11687-90, 11692-95, 11701-53, 12060-61, 12174-78, 12229, 12532-33 (public comments discussing need to close Dutchman Flat/Tumalo Mountain due to increasing motorized use and trespass). The Forest Service even admitted in the final EA that: (1) a number of public respondents commented that conflict exists between motorized and non-motorized users in the Dutchman Flat area, (2) the Kapka Sno-park would increase parking capacity to accommodate continued growth of snowmobile use, (3) moving the snowplay area on Dutchman Flat would not reduce conflicts between user groups in that area, (4) non-motorized users would continue to encounter the sight and sounds of snowmobiles, and (5) continued infractions of snowmobiles into restricted areas would occur. AR 16368. However, the Forest Service’s chosen alternative does nothing to minimize this acknowledged conflict or otherwise address on-snow user safety concerns, while admittedly increasing snowmobile use, which will only add to the conflicts. AR 16721, 16726-27.

The Forest Service’s decision to designate a new sno-park and trail open to motorized use

without including any measures to minimize user conflicts, promote public safety, or close areas to motorized use where conflicts are occurring violates the travel management regulation and the Deschutes Forest Plan, and thus the Kapka Sno-park decision must be set aside.

III. NEPA VIOLATIONS

A. The Decision Notice and FONSI Violated NEPA.

The Forest Service's issuance of the FONSI and DN for the Kapka Sno-park was unlawful and not supported by the record. After first determining that the new sno-park may significantly impact the quality of the human environment and issuing a draft EIS, the Forest Service abruptly reversed course after a meeting with FHWS and decided to issue an EA and FONSI/DN. The Forest Service failed to adequately explain its conclusion that an EIS was no longer necessary and did not provide the required convincing statement of reasons why the project's impacts are, in fact, insignificant. Rather, the record indicates that the Forest Service's decision to issue a FONSI and DN had little or nothing to do with environmental considerations, and the agency did not undertake the necessary analysis to determine if a FONSI could be supported until *after* deciding to switch course and withdraw the draft EIS. This arbitrary departure from normal NEPA procedures allowed the Forest Service to avoid the more stringent requirements for a final EIS and ROD. Because the Forest Service did not provide a reasonable explanation for its FONSI, the Kapka EA and DN must be set aside.

Under NEPA, an EIS is required if a proposed action *may* have a significant effect on the environment, which is a low standard. *Ocean Advocates v. U.S. Army Corps*, 402 F.3d 846, 864-65 (9th Cir. 2005); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" explaining why the action will not have a significant effect on the environment. *Blue Mountains*

Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998). A court should defer to an agency's decision not to prepare an EIS only when it is "fully informed and well considered." *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986).

NEPA regulations define "significantly" to require an analysis of both the "context" and "intensity" of effects. 40 C.F.R. § 1508.27. The context of the action includes "the affected region, the affected interests, and the locality," as well as short and long term effects. *Id.* § 1508.27(a). Ten non-exclusive intensity factors are also considered in the significance determination. *Id.* § 1508.27(b). These factors include the degree to which the action affects public safety, the degree to which the effects are likely to be highly controversial, the degree to which the action may establish a precedent, whether there may be cumulatively significant impacts with other related actions, and whether the action threatens a violation of law. *Id.* § 1508.27(b)(2), (4), (6), (7), (10). The potential presence of even one of these factors can be sufficient to require an EIS. *Ocean Advocates*, 402 F.3d at 865.

Here, the Forest Service admitted up front that the Kapka Sno-park may have significant effects by issuing a notice of intent to prepare an EIS and a draft EIS. AR 10757, 13339. Based on public comments on the draft and internal discussions, the Forest Service decided to issue a supplemental draft EIS that included a new alternative action. AR 15332, 15396, 15400, 15475. The Forest Service also began talking to FHWA, which was funding the project, about joining the decision; and they decided FHWA would be a co-lead agency and therefore both agencies would sign the ROD. AR 15469, 15476; 40 C.F.R. § 1501.5 (responsibilities of lead agencies).

Then suddenly, right after the Forest Service met with FHWA in person, the Forest Service stated it would issue a notice to withdraw the EIS and instead issue an EA (without the new alternative). AR 16058-65, 16066-68, 16075. As a result, FHWA became a cooperating

agency and did not need to sign the ROD. AR 16066, 16077; 40 C.F.R. § 1501.6 (responsibilities of cooperating agencies). In a telling email, a Forest Service employee stated in response to a “to do” list that included withdrawing the EIS and preparing a FONSI: “looks good, but I’d take a stab at seeing if a FONSI is supportable, i.e. do we need to change any conclusions in effects analysis.” AR 16069. The record here clearly indicates that the Forest Service’s abrupt decision to change course and issue a final EA and FONSI was not due to scrutiny of public comments or environmental considerations but, rather, a closed-door agreement with FHWA. In fact, after reviewing the public comments on the draft EIS, the Forest Service determined it needed to issue a supplemental draft EIS with a new alternative action. AR 15332, 15396, 15400, 15475. It was only after the in-person meeting with FHWA that the Forest Service changed course and decided to withdraw the draft EIS and issue an EA. AR 16066-68. Because this decision was not supported by an adequate explanation, it was arbitrary and capricious. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 494 (9th Cir. 2011).

Moreover, the Forest Service’s conclusory statements in the FONSI about lack of significance do not supply the “convincing” and “fully informed and well considered” explanation required to support a FONSI given contrary evidence in the record that five of the intensity factors for significance apply here. AR 16740-42; *Blackwood*, 161 F.3d at 1212; *Jones*, 792 F.2d at 828. First, as discussed above, the Kapka Sno-park threatens a violation of Federal law, specifically NFMA and the travel management regulations. *See supra* pp. 15-19; 40 C.F.R. § 1508.27(b)(10). At a minimum, the Forest Service should have discussed in its FONSI the requirements of the travel management regulation and Deschutes Forest Plan to address and minimize conflicts between motorized and non-motorized winter recreationists rather than simply asserting that the sno-park does not threaten a legal violation and is consistent with the

Forest Plan. AR 16742. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (Forest Service EA failed to consider state water protection requirements); *Cascadia Wildlands v. U.S. Forest Serv.*, 2013 WL 1296084, at *11 (D. Or. March 21, 2013) (Forest Service EA failed to analyze whether project would violate objectives in Northwest Forest Plan).

Second, the sno-park's effects on the human environment are highly controversial. 40 C.F.R. § 1508.27(b)(4). In the context of the intensity factors, controversy refers to the size, nature, and effects of the project. *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004). A proposal may be highly controversial where "substantial questions" are raised as to whether it "may cause significant degradation of some human environmental factor." *Id.* While the sheer number of comments on the scoping notice and draft EIS does not itself prove controversy, their content does. Many of these comments discussed the significant impact the sno-park would have on non-motorized backcountry skiers in the Dutchman Flat and Tumalo Mountain area as well as the Kapka Butte area, disputed the Forest Service's estimate of increased snowmobile use and level of conflicts, and argued that the agency must consider actions to mitigate and minimize user conflicts in those areas before approving the Kapka Sno-park because of the substantial impacts the increased snowmobile use would have. *See* AR 9038-41, 9049, 9090-101, 9105-13, 11604-19, 11833-34, 12016-20, 12060-61, 12229, 13809, 13851, 13863-72, 14350-74, 14494-96, 14609-17, 14646. The EA even identified the "key issue" that arose from public comments as the failure to adequately address user conflicts in the Dutchman Flat area. AR 16401. The Forest Service tries to escape its responsibility to prepare an EIS by asserting that motorized closures are outside the scope of the project and thus there are no highly controversial effects. AR 16741. But simply because the Forest Service is not willing to address this issue at this time does not mean the effects of the project are not highly controversial.

Third, the Kapka Sno-park also implicates the public safety intensity factor. 40 C.F.R. § 1508.27(b)(2); *see e.g. Ctr. for Biol. Diversity v. BLM*, 2013 WL 1405938, at *12 (N.D. Cal. Mar. 31, 2013) (granting summary judgment to plaintiff because BLM's EA failed to adequately address risks to human health and safety from fracking). As noted in many comments to the Forest Service over the years, public safety is already a concern in the Dutchman Flat area, where snowmobiles race past pedestrian skiers and snowshoers. AR 5683-84, 6593-604, 6708, 6800, 6834-7146, 9094, 9113, 9487-98, 14352. A person on skis or snowshoes is no match for a 400 pound machine. The increased snowmobile use caused by the Kapka Sno-park will create even more safety concerns for people on skis or snowshoes not just in the Dutchman Flat area but also in the Kapka Butte area, which will see an exponential increase in snowmobile use. The Forest Service did not even address this public safety issue in its FONSI conclusion. AR 16741.

Fourth, this project will have cumulatively significant effects when considered with other related actions. 40 C.F.R. § 1508.27(b)(7); *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 605 (9th Cir. 2010) (plaintiff need not show that cumulative impacts will in fact occur, only that the potential for them to occur exists). Here, the Forest Service plans to build another sno-park and a trail system that would be open to cross country skiers with dogs across Road 45 from the Kapka Sno-park, and also expand the Meissner Sno-park to add parking for another 60 vehicles. AR 16442, 16729. These projects together with the Kapka Sno-park will significantly increase the capacity for winter recreation use along the Cascade Lakes Highway, resulting in fewer opportunities to find solitude and untouched snow that backcountry skiers and snowshoers seek. The Forest Service's conclusion that there will be no significant cumulative effects does not take this point into consideration. AR 16741.

Finally, by separating the sno-park decision from any actions to address user conflicts,

the Forest Service is setting a precedent for future decisions, which is another factor that contributes to the need for an EIS. 40 C.F.R. § 1508.27(b)(6); *Evans*, 371 F.3d at 493. As soon as demand rises, the Forest Service will couch the problem as a parking issue and simply add more parking capacity without addressing the underlying issue of user conflicts and overall recreation capacity in the area, as it has done here. Thus, this decision paves the way for more sno-parks using an EA that avoids addressing the key issue of user conflicts. Given the record in this case, the Forest Service's conclusion that none of these intensity factors applies here is not convincing or well considered.

The result of this backwards approach of issuing a draft EIS and then an EA and FONSI is that the Forest Service can escape the requirements that apply to a ROD. For instance, a ROD must include a monitoring and enforcement program for any mitigation measures proposed. 40 C.F.R. § 1505.2(c). In contrast, mitigation proposed in an EA is not binding and enforceable, and many of the measures proposed in the Kapka EA are discretionary. AR 16733-34. In addition, the Forest Service is arguing here that certain NEPA regulations do not apply to an EA, but would certainly have applied if the Forest Service had issued an EIS. *See* Def. Answer at p. 20 (ECF # 6) (stating that regulations requiring response to public comments and scientific integrity do not apply). Thus, the change from an EIS to an EA does make a difference.

Finally, the Forest Service improperly issued the DN without providing for public comment on the EA and FONSI. The Council on Environmental Quality (CEQ) guidelines, which the Ninth Circuit often cites as guidance to interpret NEPA regulations, notes that an EA and FONSI should undergo public comment when it is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS, or when the EA relied on mitigation measures to find no significant impact. CEQ Forty Most Asked Questions Concerning CEQ's NEPA

Regulations, Questions 37b & 40, <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf> (last accessed Sept. 27, 2013); *San Luis Obispo Mothers For Peace v. Nuclear Regulatory Com'n*, 449 F.3d 1016, 1033 (9th Cir. 2006) (referring to CEQ 40 questions as guidance). This is certainly a “borderline case” given that the Forest Service initiated an EIS process, and the agency should have offered the public an opportunity to comment on the Kapka EA and FONSI to provide input on its mitigation measures and conclusions about insignificance. The failure to do so prevented interested parties from contributing input necessary for any fully informed and well-considered decision.

The Forest Service’s choice to issue an EA, FONSI, and DN was not based on a rational explanation supported by the record, and did not follow proper procedures. Accordingly, the Kapka Sno-park decision violates NEPA and is arbitrary and capricious.

B. The Kapka EA Violated NEPA.

1. The Kapka EA’s purpose and need and range of alternatives were arbitrary and capricious.

NEPA requires that agencies specify the purpose and need for a proposed action and analyze the environmental consequences of the proposed action as well as a reasonable range of alternative actions. 40 C.F.R. §§ 1502.13, 1502.14; *Env’tl Prot. Info. Ctr (EPIC) v. U.S. Forest Serv.*, 234 Fed.Appx. 440, 2007 WL 1417163 (9th Cir. 2007) (applying purpose and need and range of alternative requirements to an EA). Because project alternatives derive from the stated purpose and need, the goal of a project necessarily dictates the range of reasonable alternatives. *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (scope of alternatives analysis depends on underlying purpose and need specified by the agency). The Ninth Circuit has made clear that, while agencies have discretion

when defining the purpose and need of a project, their discretion is not unlimited and an agency cannot define its objectives in unreasonably narrow terms such that the outcome is preordained. *Id.*; *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013).

Courts evaluate an agency's statement of purpose and need under a reasonableness standard and will overturn a statement that is arbitrary and capricious. *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1070; *Westlands Water Dist.*, 376 F.3d at 865, 867. In assessing the reasonableness of a purpose and need statement, courts must consider the statutory context of the federal action. *League of Wilderness Defenders*, 689 F.3d at 1070 (looking to Forest Service Organic Act and Research Act when assessing purpose and need of fire project); *EPIC*, 234 Fed.Appx. at 443-44 (looking to NFMA and Northwest Forest Plan when assessing purpose and need of tree-thinning project); *Alaska Survival*, 705 F.3d at 1085 (looking to authorizing statutes when assessing purpose and need of new rail line); *Westlands Water Dist.*, 376 F.3d at 866 (looking to authorizing laws when assessing purpose and need of fish restoration project).

Here, NFMA and the Deschutes Forest Plan govern the Forest Service's actions. 16 U.S.C. § 1604(i). Furthermore, E.O. 11644 and the travel management regulations direct Forest Service management of motorized vehicle use and designation of new areas and trails open to such use. E.O. 11644, Sec. 3; 36 C.F.R. §§ 212.55, 212.81. These laws provide the underlying statutory context for the Kapka Sno-park decision. As discussed above, with respect to winter recreation, both the Deschutes Forest Plan and the travel management regulations require the agency to address conflicts between motorized and non-motorized users, including by closing areas to motorized use where conflicts are occurring and minimizing conflicts when designating new areas or trails. AR 01421; 36 C.F.R. §§ 212.55, 212.81.

NEPA is also part of the statutory context governing the Forest Service's action in this case. NEPA's implementing regulations direct an agency to consider cumulative or similar actions together in one EIS to best address the combined impacts, and prohibit splitting an action into separate parts to avoid finding "significance." 40 C.F.R. §§ 1508.25, 1508.27(b)(7). And because the purpose of NEPA is to assess and disclose environmental impacts *before* taking any action, the agency must prepare its analysis before making any irreversible and irretrievable commitment of resources. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000).

In light of this legal context, the Forest Service's purpose and need statement in the Kapka EA was unreasonable. The Forest Service has recognized for years that conflicts occur between motorized and non-motorized winter recreationists in the Dutchman Flat/Tumalo Mountain area. In the 1996 EA for the expansion of the Dutchman Flat and Wanoga Sno-parks, the purpose and need for the project included both alleviating parking congestion at the Dutchman Sno-park, and addressing the increase in number of on-snow conflicts between user groups. AR 4278-79. The agency rejected the option of only expanding the parking area because it would not resolve on-snow conflicts between users resulting from current and increased use of the area. AR 4349. In the end, the agency did not take action to enlarge the parking lot or address conflicts. AR 4367.

After holding the 2004 "snow summit" to try and find a solution to the conflicts in the Dutchman Flat/Tumalo Mountain area, the Forest Service issued the 2006 Kapka scoping notice. AR 8993. The purpose and need identified there was to "decrease the congestion and user conflicts in the Dutchman Flat area." *Id.* The project would accomplish that goal by building a new sno-park that catered to snowmobiles, prohibiting vehicles with trailers in the Dutchman Sno-park, and closing the surrounding Dutchman Flat area to motorized use. AR 8994. Based on public comments to the scoping notice, the Forest Service acknowledged that it needed to

better address impacts from increased snowmobile use in the Dutchman Flat/Tumalo Mountain area and considered including alternatives that would address how much additional snowmobile use could occur within the guidelines of the Forest Plan and close Tumalo Mountain to motorized use. AR 9210, 9751-55, 9770, 9773, 9774, 10074-76, 10554-55.

Then, instead of pursuing that action, the Forest Service reversed course and bifurcated the action, issuing a new scoping notice and EA that narrowly focused just on reducing parking congestion by adding parking capacity with the Kapka Sno-park. AR 10756, 16394. The Forest Service's only explanation for eliminating actions to address increasing snowmobile use and on-snow user conflicts in the Dutchman Flat/Tumalo Mountain area from the Kapka EA was that it would "really simplify the analysis" to address the larger user-conflict problem later. AR 10652.

The Forest Service's narrow purpose and need statement in the Kapka EA was unreasonable in the context of its duties under NFMA, the Deschutes Forest Plan, the travel management regulations and NEPA. Given the requirements in the Deschutes Forest Plan and the travel management regulations to address conflicts between motorized and non-motorized winter recreationists, it was unreasonable for the Forest Service to exclude the need to address increased snowmobile use and user conflicts from its purpose and need in the Kapka EA and postpone any such actions until some unknown future date. *See* AR 16792 (noting no timeline for completing large scale winter recreation assessment). It was also unreasonable to segregate actions that would address such increased use and conflicts from the Kapka Sno-park project given NEPA direction to consider cumulative and similar actions in one analysis, prevent separating projects into smaller parts to avoid "significance," and ensure that a proper analysis is completed before making any irreversible or irretrievable commitment of resources. Building a new sno-park is an action that cannot be reversed, and the Forest Service must include in its

analysis actions that would attempt to address and mitigate the resulting increased snowmobile use and user conflicts before constructing the sno-park.

The Kapka EA's purpose and need was also arbitrary and capricious because the agency failed to adequately explain and justify its change of course. Without a reasoned explanation, the Forest Service changed the purpose and need in the 2009 scoping notice and Kapka EA from what it had included in the 1996 Dutchman EA and 2006 Kapka scoping notice. The need to address increased snowmobile use and user conflicts remained, and would increase with construction of the Kapka Sno-park. The Forest Service simply decided to deal with that need at a later time to simplify the Kapka EA analysis. But making things easier is not a valid reason for the agency to shirk its legal responsibilities under its Forest Plan, travel management regulations and NEPA. Such a change of course without a reasoned explanation is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 ("an agency changing its course must supply a reasoned analysis"); *Kraayenbrink*, 632 F.3d at 494. For all of these reasons, the Forest Service's purpose and need statement in the Kapka EA was unreasonably narrow, rendering it and the Kapka EA arbitrary and capricious.

Finally, because the Kapka EA included an unreasonably narrow purpose and need, the range of alternatives considered was also too narrow. In *National Parks & Conservation Association*, the Ninth Circuit found that BLM's purpose and need statement was unreasonably narrow. 606 F.3d at 1072. Accordingly, "[a]s a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives." *Id.* Thus, the Court held that both the purpose and need and range of alternatives were arbitrary and capricious. *Id.*; see also *EPIC*, 234 Fed.Appx. at 443 (Forest Service did not adequately consider alternatives because purpose and need was too narrow).

The same is true here, where the Forest Service relied on the unreasonably narrow purpose and need statement in the Kapka EA to exclude from consideration alternative actions that would mitigate the increased snowmobile use resulting from the Kapka Sno-park, such as motorized closure areas. AR 16394-95, 16409-28. Indeed, the Forest Service rejected an alternative provided by the non-motorized backcountry user group to close the Tumalo “Backcountry Recreation Zone” to motorized use to mitigate the rise in user conflicts in that area because that proposal was “outside the scope of this particular project.” AR 16406. The Forest Service stated that such a closure would “need to be assessed in a large scale assessment that could assess issues, alternatives, trade-offs and effects.” *Id.*; AR 16792.

Yet, as discussed above, the Forest Service has approved the Kapka Sno-park, which will admittedly increase snowmobile use in the area, prior to this large-scale assessment. That is like closing the stable door after the horse has left—there is no way for the horse to get back inside. Once this sno-park is built, it becomes a permanent fixture on the landscape that will increase the capacity for snowmobile use even if the Forest Service later determines that the area cannot sustain that much use and still comply with the agency’s directives. Thus, the issues of greater parking capacity, increased motorized use, and growing user conflicts are intertwined and cannot be segregated into separate actions as the Forest Service is attempting to do here. The Forest Service’s failure to consider motorized closures to mitigate for increased snowmobile use in any of its alternatives was arbitrary and capricious.

2. The analysis of direct, indirect, and cumulative impacts was flawed.

In addition to including a reasonable purpose and need and range of alternatives, an agency must take a hard look at all of the direct, indirect, and cumulative effects of a proposed action and its alternatives in an EA. *Barnes v. U.S. Dep’t of Transportation*, 655 F.3d 1124,

1131, 1136, 1141 (9th Cir. 2011). An agency's conclusions about the impacts of a project must be supported by correct assumptions and accurate information. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (citing *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964-65 (9th Cir. 2005)); *see also* 40 C.F.R. § 1500.1(b) (NEPA documents must contain high quality information and be based on accurate scientific analysis) & § 1502.24 (agencies must ensure scientific integrity of discussions and analyses). Here, the Forest Service relied on inaccurate and misleading information in its effects analysis and failed to consider important direct and indirect impacts caused by the Kapka Sno-park. Thus, the Kapka EA and Decision Notice are arbitrary and capricious.

In its analysis of effects, the Forest Service relied on flawed assumptions. First, it estimated the increased snowmobile use that would occur as a result of the Kapka Sno-park based on the number of parking spaces for vehicles with trailers, and the number of people per vehicle. AR 16462-65, 16473. The Forest Service estimated the sno-park could hold 70 vehicles with trailers and 40 vehicles without trailers based on the number of spaces available. AR 16464-66, 13685. Yet parking spaces are not visible in winter, when snow covers the pavement. More vehicles often park in sno-parks than what the parking spaces indicate. For instance, the Wanoga Sno-park has spaces for 55 vehicles with trailers and 21 vehicles without trailers, but close to 135 large vehicles have been documented in that parking lot at one time. AR 16450, 01832. The size of the Kapka Sno-park proposed in the EA would be almost double the Wanoga Sno-park, at 260,000 square feet compared to 130,680 square feet. AR 13685, 16450. Indeed, an aerial photo overlay of the Kapka Sno-park dimensions on top of the Los Angeles airport parking lot shows the vast size of the Kapka Sno-park. AR 17357-58. The Forest Service's assumption for the EA's effects analysis that the Kapka Sno-park will only hold 70 vehicles with

trailers is not a reasonable assumption.

Furthermore, the Forest Service's use of 2.6 people per vehicle to estimate snowmobile riders is also unreasonable. The agency derived that number from the 2008 National Visitor Use Monitoring study. AR 16462, 16281. That study, however, assessed both summer and winter recreation use on the forest. AR 15926-78. In contrast, the 2009 Winter Recreation Sustainability Analysis for the forest used a figure of 3.0 people per vehicle that pertained specifically to winter recreationists. AR 12095. The Forest Service failed to explain why it did not use the person per vehicle figure from the more recent analysis that was specific to winter recreation. Thus, it failed to support its conclusion with a reasoned and reliable assumption.

Finally, the Forest Service's assumption about the extent of user conflicts was biased because it did not take into account opinions of backcountry skiers and snowshoers. The Kapka EA repeatedly relies on the statement that information collected for the Winter Recreation Sustainability Analysis "indicated that the existing trail system can accommodate increased use and still allow visitors to achieve their desired experiences" in order to downplay the impacts of increased snowmobile use. *See e.g.* AR 16368, 16474. But backcountry skiers and snowshoers do not use a trail system—in fact many purposely avoid developed trails—and many snowmobilers prefer off-trail use as well. *See* Silver Decl. ¶ 12; Neubauer Decl. ¶ 10. Moreover, the Forest Service did not interview anyone from the two key non-motorized backcountry user organizations—Wild Wilderness and Bend Backcountry Alliance—for its winter recreation analysis even though both groups had communicated their concerns about backcountry conflicts to the Forest Service many times. AR 10731-53 (analysis interviews).

The Kapka EA did distinguish between various non-motorized user groups, noting some users prefer the Nordic trail system while others use backcountry areas—primarily Tumalo

Mountain. AR 16454. However, the EA did not disclose or assess whether increased snowmobile use in backcountry areas would still allow backcountry skiers and snowshoers to achieve their desired experience. Given the history of conflicts between snowmobiles and backcountry skiers in the Dutchman Flat and Tumalo Mountain area, there is no question that these users are not achieving their desired experience, and increased snowmobile use in that area will only degrade their experience further. By relying on this incomplete and misleading information, the Kapka EA did not take a hard look at the impacts of the Kapka Sno-park.

The Forest Service also failed to consider all direct and indirect impacts of the new sno-park in its EA. First, the Kapka EA did not consider the direct effect the sno-park would have on the Kapka Butte area. Currently, the only sno-park in the vicinity of Kapka Butte is the Vista Butte Sno-park, which is very small and has little capacity for snowmobile trailer parking. AR 16466, 16720. The new Kapka Sno-park would hold at least 70 vehicles with trailers, creating a starting point for at least 182 snowmobiles (which, as discussed above, is almost certainly an underestimate) at the base of Kapka Butte. AR 16727, 15394. Whereas most snowmobiles now travel through the Kapka Butte area on trails that lead to other destinations, the new Kapka Sno-park would create a hub of snowmobile use, with machines leaving and returning to this area and likely using Kapka Butte as a play area. *See* AR 14598 (comments on draft EIS), 15394 (map of trails); Silver Decl. ¶¶ 8-9, 16. Backcountry skiers seeking undeveloped areas with little snowmobile use are often displaced from Dutchman Flat and Tumalo Mountain to Kapka Butte, and will now also be displaced from Kapka Butte once the Kapka Sno-park is built. AR 14598; Silver Decl. ¶¶ 7-9, 16; Neubauer Decl. ¶ 20.

Yet the Kapka EA barely mentioned the direct impacts to non-motorized backcountry skiers and snowshoers using the Kapka Butte area. The Forest Service simply estimated the total

number of additional snowmobiles that the new sno-park would contribute to the area, stated that the existing trail system could accommodate more recreation use, and noted that non-motorized users would encounter snowmobiles in the Kapka Sno-park and be able to hear snowmobiles when they are near the sno-park or motorized trails. AR 16473-77. It ignored the fact that backcountry users on Kapka Butte are not using the trail system but, rather, are enjoying the undeveloped terrain on the butte; and if these users are subjected to continuous noise from snowmobiles in the near-by sno-park, they will likely be displaced from this area just like they have been displaced from Dutchman Flat and Tumalo Mountain. The Forest Service's cursory analysis of the impacts to the Kapka Butte area does not rise to the level of a hard look.

Similarly, the Forest Service did not consider the indirect effect of redistribution of snowmobile use resulting from the Kapka Sno-park. Some snowmobilers who currently use the lower elevation Wanoga and Edison Sno-parks and trail systems will use the higher elevation Kapka Sno-park instead in order to access better snow in the high country of Dutchman Flat and Tumalo Mountain. AR 14600-01; Silver Decl. ¶ 15; Johnson Decl. ¶ 12. The tunnel under Road 46 is just east of the Kapka Sno-park site and that trail leads directly to Tumalo Mountain. AR 15394, 16397; Silver Decl. ¶ 15. This change in snowmobile dispersal will result in even greater snowmobile use of Tumalo Mountain, increased user conflicts with backcountry skiers and snowshoers, and more incursions into motorized closure areas. The Kapka EA never discussed this indirect impact. AR 16473-77. Because the Forest Service did not consider two key impacts caused by the Kapka Sno-park, its EA was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant summary judgment in their favor, and reverse and remand the Kapka Sno-park EA, FONSI and DN.

Respectfully submitted this 27th day of September, 2013.

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