No. 14-35505

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD WILDERNESS, et al.,
Plaintiffs-Appellants,

v.

JOHN ALLEN, et al.,
Defendants-Appellees,

and

OREGON STATE SNOWMOBILE ASSOCIATION, et al.,
Intervenors-Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon
Case No. 6:13-cv-00523-TC
Hon. Thomas M. Coffin, U.S. Magistrate Judge

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellant Wild Wilderness *et al.*'s opening brief described how Appellee U.S. Forest Service ("USFS") violated the National Forest Management Act ("NFMA") and National Environmental Policy Act ("NEPA") when deciding to build the new Kapka sno-park in central Oregon that would increase recreational use conflicts already occurring in the area between snowmobiles and backcountry skiers and snowshoers. The USFS attempts to refute Wild Wilderness's claims by obscuring the real issues, relying on Wild Wilderness's "concessions," and offering *post hoc* explanations for its decision rather than even attempting to defend the actual explanations found in the USFS's challenged decision. Although agencies have broad discretion, "an agency must cogently explain why it has exercised its discretion in a given manner….[and] an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co,* 463 U.S. 27, 48-50 (1983). Here, both the explanations offered by the USFS in its decision documents and the improper *post hoc* explanations offered by agency counsel find no support in the administrative record.

No one disputes that this part of central Oregon is a prime destination for winter recreation users. The USFS tries to pretend in its brief that a lack of parking for winter recreationists is the only relevant problem at issue, and the new Kapka

sno-park will solve that problem. The record shows, however, that user conflicts occurring between snowmobilers and non-motorized recreationists seeking a clean, quiet, backcountry experience have been escalating in severity and extent over the years—and these on-snow conflicts are the real issue here.

By constructing a new sno-park that will increase snowmobile use in this area without addressing the on-snow conflicts between motorized and non-motorized recreationists, the USFS acted inconsistently with direction in its Forest Plan to resolve such conflicts. The USFS's attempt to refute this claim ignores the facts in the record as well as the agency's long-standing interpretation of its own Forest Plan. The record demonstrates that the USFS did *not* meet its burden of showing that this project was consistent with the Deschutes Forest Plan, in violation of NFMA.

In addition, the USFS's key assertions used to refute Wild Wilderness's NEPA claims are inconsistent with the explanations offered at the time the agency made its decision and are contradicted by the facts in the record. The record clearly shows that the USFS's decision to switch from an environmental impact statement ("EIS") to an environmental assessment ("EA") was not based on a reasoned analysis but, rather, was an abrupt decision that had no rational basis and thus was arbitrary and capricious. Furthermore, the USFS's attempts to show that its Kapka sno-park EA and Finding of No significant Impact ("FONSI") complied

with NEPA were not supported by facts in the record. The administrative record establishes that this project will funnel more snowmobiles to the very area that is already experiencing the most user conflicts, and the USFS is taking no action to address that problem. Rather than supporting the USFS's assertions, the record supports Wild Wilderness's NEPA claims.

In light of the evidence in the administrative record showing that the USFS violated NFMA and NEPA when issuing the Kapka decision, this Court must reverse the District Court and vacate and remand the decision back to the agency for preparation of an EIS.

ARGUMENT

I. The Kapka Project Will Increase Snowmobile Use And On-Snow User Conflicts In The Dutchman Flat And Tumalo Mountain Areas.

The USFS and Intervenors try to divert the arguments in this case away from the issue of on-snow recreation conflicts between snowmobiles and non-motorized recreationists by asserting that Kapka will solve the congestion at sno-parks along the Cascade Lakes Highway by adding parking capacity. What this added capacity will lead to, however, is more snowmobile use that will add to conflicts already occurring on the snow with non-motorized users.

The record shows that, on peak days, there will be up to 182 more snowmobiles on the snow due to the additional parking at Kapka. ER66. This is a *61% increase* above the current level of snowmobile use. ER68. Dutchman Flat

and Tumalo Mountain are two of the primary areas used by both snowmobilers and backcountry skiers because of the good snow, good topography, and scenic views. ER137-38, 1689, 2193, 2197-98, 2232-33. The Dutchman area is so important to snowmobilers that many opposed the Kapka project because they wanted an expansion of the Dutchman sno-park instead. ER1027-1190.

Despite USFS claims that snowmobiles from Kapka will disperse in many directions, the record shows otherwise. USFS Resp. at 31. Dutchman Flat accesses most of the high country used by snowmobilers. In fact, Intervenors told the USFS that without a new trail allowing snowmobiles to get from Kapka to the Elk Lake area, "almost all snowmobile traffic headed to the most popular higher elevation snowmobiling destinations are forced through Dutchman Flat." ER1735. The USFS did not build the trail to Elk Lake, and thus most snowmobilers will funnel from Kapka to Dutchman Flat. ER578.

The continuing on-snow recreation conflicts occurring in the Dutchman Flat and Tumalo Mountain areas are evident in the record. ER1231-1575, 1612-87, 1797-1966. As the Ninth Circuit recently recognized, "snowmobiles can interfere with non-motorized winter recreation activities because of the noise and pollution they generate." *WildEarth Guardians v. Montana Snowmobile Ass'n,* 790 F.3d 920, 923 (9th Cir. 2015). The court noted that a reduction in the area open to snowmobiles would not necessarily result in a reduction of snowmobile impacts

because "[t]here has been a sharp increase in snowmobile use since the 1980's, and advances in technology allow snowmobiles to reach altitudes and terrain not previously accessible." *Id.* That precise dynamic has caused escalating conflicts on Tumalo Mountain. *See* ER178, 2176, 2186.

Backcountry skiers and snowshoers who have expressed concerns to the USFS about conflicts in the Dutchman and Tumalo areas are not a "small subset" of users (Int. Resp. at 11) but, rather, consist of a large number of local and non-local recreationists. ER1231-1575, 1612-87, 1797-1966, 2174. Despite past efforts by the USFS to reduce on-snow conflicts, "steadily increasing" winter recreation use (Int. Resp. at 9) has prevented resolution of conflicts in these areas. The study cited by the USFS in its response acknowledged these conflicts, and one of its three recommendations was to "consider separating uses in some areas (zoning)." SER1235.[1] Rather than do that, the USFS authorized a new parking lot that would add significant snowmobile use to areas already experiencing extensive on-snow conflicts.

[1] The USFS asserts that the materials in its more than 2200 pages of supplemental excerpts of record ("SER") are "relevant." *See* USFS Br. at 11, n.1. But more than 1500 pages of the USFS SER are cited only once, to support a single sentence in the "overview" portion of the USFS's answering brief, calling into question the need for these documents in the SER. *See* USFS Resp. at 14; Ninth Circuit Rule 30-1.7 (allowing for SER materials "if argument in the answering brief requires [their review]").

II. The USFS Violated NFMA Because It Did Not Show The Kapka Project Was Consistent With The Forest Plan.

When making management decisions, the USFS must ensure that any activity it authorizes is consistent with direction in the relevant Forest Plan. 16 U.S.C. § 1604(i). Thus, the USFS must have demonstrated in the administrative record that the Kapka project is consistent with the Deschutes Forest Plan to comply with NFMA. *Native Ecosystems Council v. U.S. Forest Serv.,* 418 F.3d 953, 962-65 (9th Cir. 2005). The USFS has not met that burden here.

A. The USFS's Current Interpretation of the Forest Plan is Arbitrary and Capricious.

The USFS asks this Court to defer to its current interpretation of the Deschutes Forest Plan, which allows the agency simply to continue to monitor known winter recreation conflicts between motorized and non-motorized users while also authorizing projects that will add to those conflicts. USFS Resp. at 26, 28. Under this interpretation, the USFS could continually put off actions needed to resolve conflicts and simultaneously issue decisions that lead to more conflicts. Such an interpretation is inconsistent with the plain language of the Forest Plan, as well as the USFS's prior interpretation, and thus deserves no deference. *Native Ecosystems Council,* 418 F.3d at 962-63; *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987).

The controlling Deschutes Forest Plan includes standards to address

conflicts between recreation users. As the USFS noted several times in its response brief, when conflicts arise between users, the "intent is to use the minimum regulation necessary to *resolve* conflicts." UFSF Resp. at 5, 25, 29 (citing ER1199—Forest Plan Standard TR-10) (emphasis added). Standard TR-10 also states that when conflicts arise, all avenues of *resolution* will be explored. ER1199.

With regard to conflicts between non-motorized and motorized winter users, the Deschutes Forest Plan includes a series of steps for resolving those conflicts, with the final step being to "[c]lose the area where the conflict is occurring to motorized use." ER1200 (Standard TR-18). Contrary to the USFS's argument, these are not merely "suggested" steps. USFS Resp. at 25. Rather, under the plain language of the Forest Plan, when use of the trail system by motorized users leads to conflicts with non-motorized users, the USFS must take actions to *resolve* those conflicts. The USFS itself described Standard TR-18 as "Forest Plan direction for resolving conflicts between non-motorized and motorized winter recreationists." ER2210. Thus, before approving a project that will increase use of the snowmobile trail system, the USFS must demonstrate that the project is consistent with the Forest Plan requirement to *resolve* conflicts with other winter users.

It is true, as the USFS states, that Standards TR-10 and TR-18 themselves do not mandate particular timing for resolving conflicts or implementing snowmobile

closures. USFS Resp. at 26; ER1199, 1200. But a Forest Plan is generally not self-executing. It is implemented through site-specific actions. If one of those actions would exacerbate conflicts that are already occurring between winter recreation users, the USFS's prior decisions show that it does not have discretion to address those conflicts at some indefinite future time because the Plan requires resolving conflicts.

The USFS's position here is in fact contrary to the previous position it held and actions it has taken for many years. Such a flip-flop in position without any reasoned explanation is arbitrary and capricious, as the Ninth Circuit just reaffirmed. *Organized Village of Kake v. U.S. Dept. of Agric.,* --F.3d--, 2015 WL 4547088, at *9-10 (9th Cir. July 29, 2015) (*en banc*). In this new case, the Ninth Circuit *en banc* held that an agency decision was arbitrary and capricious because it rested on factual findings that contradicted the findings relied upon in a prior decision without adequate explanation for the change. *Id.*

Specifically, the Court stated that the agency "was required to provide a reasoned explanation . . . for disregarding the facts and circumstances that underlay its previous decision." *Id.* at *10 (internal quotation omitted). The Court concluded that:

> The 2003 [Record of Decision] does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a "minor" one. The absence of a reasoned explanation for disregarding previous factual findings

> violates the APA. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." (*Fox*, 556 U.S. at 537 … (Kennedy, J., concurring).

Id. The same principle applies here.

As explained in Wild Wilderness's opening brief, and completely ignored by the USFS in its response brief, the record shows the USFS previously recognized that if other measures have not been successful at resolving on-snow conflicts between winter recreation users, the Forest Plan requires restricting snowmobile use. *See* WW Opening Br. at 21-23 (citing ER2210, 1222, 1698). The USFS acknowledged Forest Plan Standard TR-18 when considering a prior proposal to expand the Dutchman and Wanoga sno-parks. ER2210, 1222. The agency rejected an alternative that addressed recreation use conflicts by creating an exclusive motorized use area because that did not comply with "Forest Plan direction for resolving conflicts," which required *restricting* motorized use when other measures have been exhausted. ER2210.

Likewise, the USFS rejected an alternative that would have expanded those parking lots without addressing the recreation use conflicts in the Dutchman Flat area. ER1207. The USFS rejected that alternative because "it would have entailed a major expansion of [the] Sno-parks *without adequately attempting to resolve conflicts between users as a result of current and increased use of the area*." *Id*. (emphasis added). In the end, the USFS did not expand the parking lot at

Dutchman or Wanoga because it did not want to address the user conflict problem at that time. ER1225. Ten years later, the USFS again issued a proposed action aimed at resolving parking congestion *and* recreation user conflicts in the Dutchman Flat area. ER1589.

Then, the USFS changed its position, and decided that it *could* expand the parking capacity in the area without "attempting to resolve conflicts between users as a result of current and increased use of the area," in direct contrast to its prior decisions. *See* ER1207, 1225, 1728. The USFS recognized that existing motorized closures have not resolved conflicts in the Dutchman Flat and Tumalo Mountain areas, and the Kapka sno-park will cause further conflicts and displacement of non-motorized users. *See* ER90, 123, 178, 1612-87, 1797-1966, 1998, 2009 (discussing conflicts, displacement and ineffectiveness of prior closures). Yet the agency now claims it can authorize a project that will add motorized use to the area and simply continue to monitor on-snow conflicts between recreation users, in contrast to its prior finding that addressing conflicts by restricting snowmobile use would be required in that situation. ER220, 1207, 2210. The USFS's change in position occurred without any changes to the Forest Plan. ER1200.

As in *Organized Village of Kake,* the USFS's decision did not provide a reasoned explanation for disregarding the facts and circumstances that underlay its previous decisions and making contradictory findings for the Kapka project. 2015

WL 4547088, at *9-10. "Unexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change." *Id.* at *7 (internal quotation omitted). Because the USFS's current interpretation of the Forest Plan is inconsistent with the agency's prior interpretation as well as the plain language of the Plan, the USFS's conclusion that Kapka complies with the Plan is arbitrary and capricious. *Id.* at *10; *see also Humane Soc'y of the United States v. Locke,* 626 F.3d 1040, 1049 (9th Cir. 2010); *Native Ecosystems Council,* 418 F.3d at 962-65. [2]

B. The USFS's Conclusion that it Complied with the Forest Plan is Not Supported by a Substantial Basis in Fact.

In addition to the unexplained change in position, the USFS's conclusion about compliance with the Forest Plan was arbitrary and capricious because the record failed to support the agency's assumptions and thus its conclusion was without "substantial basis in fact." *Native Ecosystems Council,* 418 F.3d at 960.

The USFS relies on a series of assumptions to refute Wild Wilderness's

[2] Intervenors argue that the USFS did not determine that all four steps of TR-18 were triggered and thus did not need to close areas to motorized use. Int. Resp. at 25. The USFS brief shows the opposite is true. The USFS admits that it has taken steps to address conflicts by closing Nordic trails and part of Tumalo Mountain to snowmobiles and through public education. USFS Resp. at 13, 14. Yet these measures have not resolved conflicts in the Dutchman Flat and Tumalo Mountain areas, as the record shows. ER1612-87, 1797-1966, 1998. The USFS decision here did not explain why simply continuing to monitor those conflicts complies with TR-18 when it acknowledged previously that closing areas to motorized use must occur when other measures to resolve conflicts have failed. ER220, 2210, 1698.

NFMA claim but none of those assumptions is supported by the record. The USFS claims that: (1) the Kapka sno-park will address user conflicts because it will ease parking congestion; (2) the USFS has taken actions in the past to address user conflicts, and considered motorized closures as part of the Kapka project; (3) a forest survey shows that the winter trail system can accommodate more use and most winter recreation users are satisfied with their experience; and (4) the added snowmobiles from Kapka will disperse in numerous directions from the new sno-park, spread out over all available snowmobiles trails, and bypass the Dutchman area. USFS Resp. at 27, 30-32. The USFS, however, ignores many of the record documents cited by Wild Wilderness that undercut the agency's assertions. *See* WW Opening Brief at 25-30.

First, simply easing parking congestion at Dutchman sno-park does not at all address the conflicts occurring *on the snow* between motorized and non-motorized winter recreationists in the Dutchman Flat and Tumalo Mountain areas. Despite past actions by the USFS to attempt to reduce these on-snow conflicts, such conflicts were still prevalent in these two particular areas and were predicted to increase with the construction of Kapka, leading to displacement of non-motorized users. ER1998, 2009 (partial motorized closures on Tumalo Mountain have not resolved conflicts), 1612-87, 1797-1966 (letters discussing continuing conflicts in Dutchman and Tumalo areas), 90, 123, 177-78, 1998 (USFS admissions that

adding parking at Kapka will add to conflicts with non-motorized recreationists and displace them from the area). The claim by the USFS that it "considered" motorized closures as part of the Kapka project is disingenuous, as the USFS simply dismissed that alternative without analyzing it, stating that it was outside the scope of the project. ER128.

Second, this record of continuing recreation conflicts specifically in the Dutchman and Tumalo areas undercuts the USFS reliance on its generalized survey that shows more trail use is acceptable and most winter users are satisfied with their experience. The record contains ample evidence of continuing on-snow conflicts between snowmobiles and non-motorized recreationists in the Dutchman and Tumalo areas, that many non-motorized users in these areas are not satisfied with their recreation experience, and that more snowmobile use is not acceptable to them. ER1231-1575, 1612-87, 1702-24, 1797-1966. In fact, the survey cited by the USFS acknowledged that user conflicts were still occurring in the Dutchman Flat and Tumalo Mountain areas. ER1974-76, 1998, 2009. Rather than follow Forest Plan direction to "close the area where the conflict is occurring to motorized use," the USFS sweeps the conflicts in those two areas under the rug by asserting that "most" winter recreationists on the forest are happy and non-motorized users who are displaced from Dutchman and Tumalo can go elsewhere**.** ER90. This position does not "place the burden of reducing user conflicts on the motorized

user," as the USFS previously found is required by the Forest Plan. ER1222.

Third, the USFS's "predictions" that snowmobiles will disperse from Kapka sno-park in many directions, spread out evenly over many miles of trails, and completely bypass Dutchman Flat are not supported by the record. They ignore the plethora of documents in the record showing the popularity of the Dutchman area and that most snowmobilers will head from Kapka straight to Dutchman Flat to access it and the surrounding high country. *See* WW Opening Br. at 27-28; ER2232-33, 1689, 1027-1190, 1733-47. The USFS's assumptions about snowmobile dispersal are not entitled to deference when they are unsupported by the facts in the record. *Native Ecosystems Council,* 418 F.3d at 963-65.

Finally, the record does not demonstrate that the Kapka project is consistent with Forest Plan direction regarding the applicable "Recreation Opportunity Spectrum" ("ROS") category.[3] "Management Area 13 Winter Recreation" is to be managed for ROS categories of "Semiprimitive Nonmotorized, Semiprimitive Motorized, and Roaded Natural." ER1202. The USFS acknowledged in the 1996

[3] Wild Wilderness did not waive this argument. *See* USFS Resp. at 33-34. First, plaintiffs can raise new arguments in appeal briefs, they just cannot raise new claims. *Yee v. Escondido,* 503 U.S. 519, 534-35 (1992). The claim that the USFS did not demonstrate compliance with its Forest Plan was certainly raised in the District Court. Furthermore, Wild Wilderness *did* raise the ROS issue in its opening brief, and the District Court noted the ROS provision. WW Summary Judgment Br. at 17-18 (D.Ct. ECF# 30-1); ER9. Thus, the ROS argument was not waived. *Baccei v. United States,* 632 F.3d 1140, 1149 (9th Cir. 2011) (if plaintiffs had raised issue in cross motion for summary judgment, it would not have been waived).

EA that the Dutchman and Tumalo areas are managed for the semi-primitive motorized category, and the Dutchman area was already exceeding the carrying capacity for that ROS category while Tumalo Mountain was "mostly within" the carrying capacity. ER2208, 2244-45. Since 1996, use of Dutchman Flat and Tumalo Mountain by both motorized and non-motorized users has increased exponentially, yet the USFS did not consider to what extent these areas were exceeding the ROS carrying capacity when analyzing the Kapka project, as it did in 1996. *See* ER167, 220, 2244-46. Thus, the record does not demonstrate that the increased winter recreation use caused by Kapka is consistent with the Forest Plan ROS direction.

The USFS's only argument in response is that the area at issue in this case is not all managed as "MA-13 Winter Recreation." USFS Resp. at 34-35. The map cited by the USFS does show that much of the area around Dutchman Flat and Tumalo Mountain falls under the designation of "Dispersed Recreation." ER808. However, that designation does not alter the argument. "Dispersed Recreation" areas are to be managed the same as "Winter Recreation" areas: "to provide the recreation activity, setting, and experience of the [ROS] category of Semi-primitive Non-motorized, Semi-primitive Motorized, and Roaded Natural." ER167. Therefore, the Dutchman and Tumalo areas could fall within the semi-primitive ROS category under either the Dispersed Recreation or Winter

Recreation management designation.

Because the Kapka Decision Notice and EA never stated which ROS category applied to those areas, whether current conditions were within the carrying capacity for that category, or to what extent increased recreation use caused by Kapka would exceed the carrying capacity, the USFS did not demonstrate that the Kapka project is consistent with Forest Plan ROS direction. ER220. Thus, it violated NFMA.

III. The District Court Erred By Upholding The USFS's FONSI.

A. The USFS's Switch From a DEIS to an EA Was Arbitrary and Capricious.

As it did in the District Court, the USFS creates a new *post hoc* explanation in its appellate response brief to try and account for its change from an EIS to an EA, which again ignores the facts in the record discussed by Wild Wilderness in its opening brief. The record shows that the switch to an EA was not based on rational decision-making, as required under the APA, but instead was an abrupt change without any explanation. Because the record does not contain a reasoned explanation for the USFS's sudden departure from its position that it needed to complete an EIS, the issuance of the Kapka EA was arbitrary and capricious.

Wild Wilderness is not arguing here that the USFS is prohibited from ever issuing a final EA after issuing a draft EIS. However, if the USFS chooses to make that switch, it must provide a reasoned explanation for determining that "an

EIS is no longer necessary" after previously determining that it was. USFS Resp. at 37; *Organized Village of Kake,* 2015 WL 4547088, at *9-10. If the record shows the USFS's decision to switch to an EA was not rational, that decision was arbitrary and capricious under the APA. *Native Ecosystem Council,* 418 F.3d at 965 (decision was arbitrary and capricious where agency failed to provide a satisfactory explanation supported by the record showing the necessary rational basis for its conclusion); *see also Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). Absent such an explanation, the agency also has not provided the required "convincing statement of reasons" to support its FONSI. *See Ocean Advocates v. U.S. Army Corps of Engrs.*, 402 F.3d 846, 864 (9th Cir. 2005).

The necessary rational explanation is missing from the record here. As discussed in Wild Wilderness's opening brief, the record shows that the USFS initially determined the Kapka project needed an EIS and proceeded on that path for three years, including deciding to issue a supplemental draft EIS based on public comments. WW Opening Br. at 33; ER1728-29, 1731, 539, 2063, 2064, 2067, 2069. Then, almost a year after the close of the public comment period, the USFS suddenly changed course after meeting with the Federal Highway Administration ("FHWA") and decided overnight that it would switch to an EA—without any explanation in the record as to why. WW Opening Br. at 33-34; ER2070, 2079, 2084, 2086-89, 2093, 2097, 2098-2100. The record clearly shows

this was not a well-reasoned decision because the agency admitted that it was changing course before it even assessed whether "a FONSI is supportable." WW Opening Br. at 34; ER2101. The USFS completely ignores this evidence in the record showing the agency's decision to change to an EA was not well-reasoned or supported by an adequate explanation. USFS Resp. at 36-44.

Instead of addressing the facts in the record, the agency has offered a variety of unsupported justifications, most of them *post hoc*, for the switch to an EA. The agency's original justification in its Decision Notice and district court briefing—that the switch was based on public comment—was unsupported because the record shows public comments resulted in the agency deciding to issue a supplemental draft EIS—not an EA. WW Opening Br. at 32-33; USFS D.Ct. Br. at 25-26 (D.Ct. ECF# 38-1); ER58, 2067, 2069. The USFS's next explanation, a *post hoc* justification in its reply brief before the district court, was that the agency removed from the project all tree-cutting within inventoried roadless areas, and thus it could now use an EA. *See* WW Opening Br. at 36; USFS D.Ct. Reply at 16-17 (D.Ct. ECF# 41). This justification was not offered by the agency in its Decision Notice or EA because the underlying record clearly shows that aspect of the project was removed *before* the USFS issued its draft EIS. ER547-48, 2052-53. The District Court erred by relying on these arguments even though the record did not support them. ER18, 20.

The USFS, in its brief before this Court, now produces another *post hoc* explanation. Yet this explanation also is not included within the challenged agency decision or supported by the record. The USFS currently claims that it switched to an EA because it removed several components from the project after issuing the draft EIS. USFS Resp. at 38-39. Besides the fact that this explanation was not offered at the time the agency abruptly decided to change to an EA, *see* ER2097-2101, or in the Decision Notice itself, ER58, there are two additional problems with this *post hoc* argument: these components were still included in the final EA, and their removal in the final decision did not alleviate the significant effects of increased snowmobile use.

The USFS argues that because the final project was smaller than what was proposed in the draft EIS, it was reasonable to switch to an EA. USFS Resp. at 38-39. Yet the final EA contains the *exact same* alternative actions as the draft EIS. *Compare* ER154-56 *with* ER603-04. In other words, the projects contemplated in the final EA were exactly the same as those assessed in the draft EIS. Thus, the alternatives in the EA resulted in the same changes to the level of recreation use analyzed in the draft EIS. *Compare* ER157-58 *with* ER605-06. Neither the EA nor the Decision Notice explain why the USFS decided to use an EA to assess the same four alternative actions—which would result in the same impacts—when it

previously determined those alternatives and their impacts needed to be analyzed using an EIS.

The fact that the USFS later decided to remove a few components from the project in its final decision does not excuse the agency from doing a proper assessment of the alternatives it was considering in its NEPA analysis. ER61 (discussing modified alternative selected in final decision). Such a result would undercut NEPA's decision-making process, allowing the agency to justify a final decision even when its analysis was flawed. The change from an EIS to an EA has meaningful ramifications, as an EIS requires a more comprehensive and thorough analysis as well as inclusion of measures to mitigate adverse environmental impacts. *See* WW Opening Br. at 38; *Compare* 36 C.F.R. § 220.7(b)(1)-(3) and 40 C.F.R. § 1508.9 (EA requirements) *with* 40 C.F.R. §§ 1502.9(b), 1502.14(f), 1502.16(h), 1502.24, 1508.9(b)(EIS requirements). Indeed, this Court has recognized that "an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment" because "an EIS serves different purposes from an EA." *Anderson v. Evans,* 371 F.3d 475, 494 (9th Cir. 2004).

Furthermore, the changes to the project in the final decision did not reduce the key impact that would occur, and which necessitated the draft EIS: increased snowmobile use leading to increased user conflicts. The draft EIS and final EA

both acknowledged that the one "key issue" that arose from this project was user conflicts in the Dutchman Flat area. ER123-24, 575-76. The final decision shows that the project would still increase snowmobile use by up to 182 machines on peak days, an increase of 61% over the current level of use. ER66, 68. The USFS did not provide a rational explanation for changing to an EA when the most significant effect from the project remained the same from draft EIS all the way through the final decision.

The USFS also makes the startling assertion in its response brief that, under the APA, an agency can offer the reviewing court new explanations or justifications for its challenged decision that do not appear in the agency's contemporaneous decision documents. The USFS insists, citing *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013), that such arguments in their legal briefs are not improper *post hoc* justifications so long as they "reference" any part of the underlying administrative record. USFS Resp. at 43. *Muniz* however was not an APA case and merely repeats the well-established rule that, when an appellate court is reviewing a district court ruling under an abuse of discretion standard, it can affirm the district court's ruling "on any basis supported by the record." 738 F.3d at 219. The USFS completely ignores the controlling APA case law from the Supreme Court and this Court holding that an agency's decision can only be upheld "on the basis articulated by the agency itself," *State Farm,* 463 U.S.

at 50, and not based on the explanations offered by agency counsel in their legal briefs. *Id.; Humane Soc'y*, 626 F.3d at 1050. Indeed such "post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself." *Id.*

The USFS and District Court both rely on *Public Citizen v. National Highway Traffic Safety Administration* to support the USFS's unexplained shift from a draft EIS to an EA/FONSI. 848 F.2d 256, 265 n.39, 267 (D.C. Cir. 1988); USFS Resp. at 40; ER21. But that case supports Wild Wilderness's position because there the record provided the necessary rational explanation for the change from EIS to EA. *Id*. at 267-268. In fact, the change from EIS to EA in that case was based on public comments in the record by a third party expert agency, the Environmental Protection Agency. *Id*. at 267. In contrast, the change here occurred immediately after a private meeting with a third party agency, where those discussions were never made public and are not memorialized in the record. Thus the record here, unlike that in *Public Citizen,* does not provide the necessary rational explanation for the change.

Because the Decision Notice, EA and underlying record here show that the agency's sudden switch from an EIS to EA was not well-reasoned or supported by a satisfactory explanation, it was arbitrary and capricious and must be reversed.

B. The USFS did not Provide a Convincing Statement of Reasons for its FONSI.

The USFS's failure to provide a reasoned explanation for changing its position that it needed to complete an EIS is enough to overturn the agency's decision. *Organized Village of Kake,* 2015 WL 4547088, at *10-11. In addition, this Court must overturn the Kapka FONSI because the USFS did not provide a "convincing statement of reasons" to explain why the impacts of the project are insignificant. *Ocean Advocates*, 402 F.3d at 864. The USFS cannot "avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment." *Id*. That is especially true here where the USFS issued a draft EIS initially, showing it believed Kapka's impacts could be significant.

As explained in Wild Wilderness's opening brief, three of the NEPA significance factors apply here, demonstrating that the agency needed to complete an EIS. WW Opening Br. at 40-52. The USFS's attempts to minimize the effects of Kapka are contradicted by the record, and its FONSI did not convincingly explain why none of the NEPA significance factors applied.

1. *The Kapka Project is Highly Controversial.*

The first applicable significance factor is that the project may be highly controversial. 40 C.F.R. §1508.27(b)(4). Under this factor, controversy refers to the size, nature, and effects of the project. *Anderson*, 371 F.3d at 489. 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*. The record here shows that substantial questions have been raised concerning the effects of the Kapka project on the experiences of non-motorized recreation users.

The USFS continues to argue that the agency did not need to consider recreational preferences in its NEPA analysis. USFS Resp. at 52-54 (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983); *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466–67 (9th Cir. 1996)). Yet the USFS undercuts its own argument by admitting that snowmobiles cause physical impacts, such as noise and emissions, that affect non-motorized users. *Id.* at 53. This Court also recently recognized that "snowmobiles can interfere with non-motorized winter recreation activities because of the noise and pollution they generate." *WildEarth Guardians,* 790 F.3d at 923. In addition, snowmobiles cause tracks in the snow, which affect the experience of backcountry skiers. ER2176, 2186-87, 2193-95, 2198. Because the recreational experiences of non-motorized users are tied to the physical impacts of snowmobiles, these experiences must be included in the NEPA analysis. WW Opening Br. at 41-46.

The USFS cites no cases to respond to the argument that subjective experiences that are interrelated to physical environmental effects must be considered under NEPA, and ignores the regulations and cases cited by Wild

Wilderness showing such analysis is required. USFS Resp. at 53-54; WW Opening Br. at 44-46 & n.6.[4] In fact, the Kapka EA and FONSI attempted to discuss the impacts of Kapka on other recreation users after determining that user conflict was the "key issue." ER66-71, 123-24, 166-220.

The District Court erred by relying on the USFS's *post hoc* litigation position, raised for the first time in a reply brief. ER23, 25-26; *Humane Soc'y*, 626 F.3d at 1050; *United States v. Cox*, 7 F.3d 1458, 1463 (9th Cir. 1993) (party may not make new arguments in reply brief). The District Court's reasoning also failed to acknowledge that there is a "reasonably close causal relationship" between the physical environmental impacts of increased snowmobile use—noise, fumes, and tracked snow—and the effects to "subjective experiences" of non-motorized recreationists, unlike in *Metropolitan Edison* and *Bicycle Trails*. For these reasons alone, the District Court must be reversed on this claim.

Moreover, the record shows that there were substantial questions raised about the extent of the effects of the project, making it highly controversial. The USFS attempts to minimize the effects of increased snowmobile use caused by Kapka by asserting that most recreation users are satisfied with their experience,

[4] Because the USFS improperly raised this argument in its reply brief to the district court, Wild Wilderness could not refute the argument in its district court briefing. *See* WW Opening Br. at 41. Now that the issue has been fully briefed here, the USFS offers no legal authority to refute Wild Wilderness's showing that this argument must fail.

snowmobiles originating from Kapka will disperse in numerous directions, and backcountry skiers have opportunities to recreate elsewhere. USFS Resp. at 48-51.

However, documents in the record contradict these assertions. Numerous letters from both backcountry skiers and snowmobilers show that: (1) serious conflicts between users continue to occur on Dutchman Flat and Tumalo Mountain, and many non-motorized recreationists are not satisfied with their experience (ER1231-1575, 1612-87, 1797-1966); (2) most snowmobilers leaving Kapka will head to the high country through Dutchman Flat because the Elk Lake trail was not built (ER1733-96, 1027-1190); and (3) there are not other equivalent opportunities for backcountry non-motorized users because most non-motorized areas are too far away for those on foot (ER1231-1575, 1702-1724, 1936-1966). Even the survey upon which the USFS relies recognized that such conflicts occur, and recommended separating uses in some areas. USFS Resp. at 49, 51; SER1235. Thus, the record shows a substantial dispute exists about the extent of effects to non-motorized users from Kapka. At bottom, the USFS did not provide a convincing explanation to show the project's effects are not highly controversial.

2. *The Kapka Project Threatens a Violation of Federal Law.*

The second intensity factor implicated here is whether the action threatens a violation of law. 40 C.F.R. § 1508.27(b)(10). The USFS notes in its response that the FONSI referenced the EA's discussion of various laws at issue, including

NFMA and travel management regulations. USFS Resp. at 55; ER82. The EA, however, did not provide the necessary "convincing statement of reasons" to show that Kapka was consistent with the requirements of the Forest Plan, and therefore complied with NFMA. *Ocean Advocates,* 402 F.3d at 864; *see also League of Wilderness Defenders v. U.S. Forest Service,* 585 Fed. Appx. 613, 614 (9th Cir. 2014)(failure to include explicit analysis of compliance with relevant forest plan standards violated NEPA).

As described above, the EA discussed Forest Plan Standard TR-18 as well as Plan requirements to manage for the appropriate ROS category, but failed to sufficiently explain how Kapka is consistent with that direction. *Supra* pp. 6-16. In fact, the EA did not even discuss which ROS category applied to Dutchman Flat and Tumalo Mountain or whether those areas were within the recreation carrying capacity for that category and would stay within the capacity after Kapka was built. *Compare* ER2208, 2244-46 (ROS discussion in 1996 EA) *with* ER167, 218-220 (Kapka EA). Accordingly, the USFS's conclusory assertion that Kapka was consistent with the Forest Plan was not "fully informed and well-considered." ER82; *Jones v. Gordon,* 792 F.2d 821, 828 (9th Cir. 1986).

3. *The Kapka Project Will Have Cumulatively Significant Effects.*

Finally, there may be cumulatively significant effects when Kapka is considered with other related actions, implicating a third significance factor. 40

C.F.R. § 1508.27(b)(7); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 605 (9th Cir. 2010) (plaintiff need only show that there is a potential for cumulative impacts to occur). The FONSI stated that there would be no cumulative effects to soil, water, vegetation, air, or fish and wildlife, but ignored cumulative effects to recreation users. ER81.

The EA described other past, present, and foreseeable future actions related to winter recreation that might have cumulative effects when combined with Kapka. ER215-18. Even assuming the project to create dog-friendly ski trails is not a "reasonably foreseeable future action," as the USFS argues (USFS Resp. at 58), other projects such as the expansion of Meissner sno-park and expansion of ski trails at Mt. Bachelor were recognized by the USFS as reasonably foreseeable future actions. ER216.

The USFS claims that the expansion of Meissner sno-park would not cause any significant effects because it is already designated as non-motorized and the area is not important to Plaintiffs. USFS Resp. at 57. What the EA failed to assess, however, is whether there may be cumulatively significant effects to backcountry users from the construction of Kapka, added to the existing sno-parks, the expansion of Meissner sno-park, and the expansion of downhill and cross-country trails at Mt. Bachelor by reducing the ability of backcountry users to find untracked snow.

Additionally, the USFS did not assess whether cumulative effects from the overall increase of recreational use along Cascade Lakes Highway may be significant by considering the appropriate ROS categories and recreation carrying capacity. Before completing the Kapka EA, the USFS acknowledged that carrying capacity was a significant issue for the area, but then never addressed this in the EA. ER1688, 216-220. Given that the Dutchman Flat area was exceeding the ROS carrying capacity in 1996 and Tumalo Mountain was close to capacity, it is likely that these areas are well above carrying capacity now. ER2207-08, 2244-46. Adding even more recreation use from Kapka and the other future expansions at Meissner and Mt. Bachelor certainly creates potentially significant cumulative effects to the overall level of recreation use along the Cascade Lakes Highway, which the USFS failed to consider.

In sum, the three significance factors implicated here necessitate completion of an EIS. The USFS's FONSI must therefore be reversed.

IV. The Kapka EA's Purpose And Need And Range Of Alternatives Were Unreasonably Narrow.

The USFS claims that Kapka's purpose and need was reasonable under NEPA, but fails to acknowledge that reasonableness is assessed by considering the "statutory context of the federal action." USFS Resp. at 59; *League of Wilderness Defenders v. U.S. Forest Serv.,* 689 F.3d 1060, 1069-70 (9th Cir. 2012). Here, the

agency defined its objectives in unreasonably narrow terms by ignoring key standards in the Forest Plan in order to create a foreordained outcome. *Nat'l Parks & Conservation Ass'n v. BLM,* 606 F.3d 1058, 1070-72 (9th Cir. 2010).

The Kapka EA focused on the need to provide additional parking in order to accommodate all existing users and meet future demand. USFS Resp. at 59-60. Although the EA purpose and need statement cited to general goals in the Forest Plan related to recreation, it ignored Standards in the Plan that require the USFS to: (1) resolve conflicts between winter recreation users, and (2) manage for the appropriate ROS category. ER116. The USFS recognized these standards were relevant because it noted them elsewhere in the EA. ER120-21, 166-67, 220. By ignoring them in the purpose and need, the USFS created a foreordained outcome of adding parking without addressing user conflicts or ROS carrying capacity.

In contrast, the USFS previously found—in the 1996 EA and the 2006 scoping notice—that there was a need to address parking congestion and user conflicts in the Dutchman area at the same time. ER2203-04, 1589-90. The USFS tries to downplay these documents by stating that the 1996 EA was not "a decision or a policy announcement," and the 2006 scoping notice did not state that constructing Kapka and closing Dutchman to motorized use had to proceed together. USFS Resp. at 61-62. The documents themselves are to the contrary.

The 1996 EA discussed both parking congestion and user conflicts in the

purpose and need statement, noted the Forest Plan Standard for resolving winter recreation use conflicts, and specifically rejected an alternative that increased parking capacity without addressing on-snow user conflicts. *See* ER2203-04, 2210, 1207. In the end, the USFS decided to *not* increase parking because the agency did not want to address user conflicts at the same time. ER1225.

Similarly, the 2006 scoping notice was for a single "Proposed Action" that included creating a new parking lot at Kapka as well as alleviating on-snow user conflicts by closing the Dutchman area to motorized use and creating a trail to divert some snowmobiles away from Dutchman. ER1589-90. The "Proposed Action" included three proposed projects, and the purpose behind the projects was "to decrease the congestion *and* user conflicts in the Dutchman Flat area." *Id.* (emphasis added).

The USFS did not provide a reasoned explanation for then finding in the Kapka EA that it did not need to address parking congestion and user conflicts in the same proposed action when the facts and circumstances were the same. The Kapka EA recognized that user conflicts in the Dutchman area was the sole "key issue" raised in public comments. ER123. However, the USFS summarily dismissed the one alternative that included motorized closures as outside the scope of the project, and admitted that moving the snowmobile play area was "not expected to reduce conflict between motorized and non-motorized users." ER128,

90. Thus, all of its action alternatives resulted in increased snowmobile use without any effective mitigation to reduce user conflicts. ER186 (all action alternatives increased motorized use on peak days by 44-61%).

The USFS's unexplained change in position in the Kapka EA compared to the 1996 EA and 2006 scoping notice created a purpose and need that was arbitrary and capricious and unreasonably narrow considering the standards in the Forest Plan. *Organized Village of Kake,* 2015 WL 4547088, at *9-10; *Nat'l Parks,* 606 F.3d at 1070-72.

Finally, because of the unreasonably narrow purpose and need, the USFS "necessarily considered an unreasonably narrow range of alternatives." *Nat'l Parks,* 606 F.3d at 1072. Although the Kapka EA included alternatives that varied the size of the parking lot and moved the snowmobile play area within Dutchman Flat, none of the alternatives included measures that would reduce or restrict motorized use to alleviate user conflicts. ER154-56. The one alternative that did include motorized closures was dismissed without analysis. ER128. The USFS's "rational" explanation that this alternative was outside the scope of the project, USFS Resp. at 65, 66, was based on the unreasonably narrow scope of the project, in violation of NEPA.

V. Intervenors' Additional Arguments Are Unavailing.

A. This Case is not Moot.

Intervenors argue that the case is moot because the Kapka sno-park is built. Int. Resp. at 16-21. This premise is false because there is effective relief available to remedy the USFS's legal violations. Wild Wilderness's Complaint seeks relief that includes vacating the Decision Notice and FONSI, enjoining the USFS from implementing the decision or allowing any use of a constructed or partially constructed Kapka sno-park until the agency has complied with NEPA and NFMA, any further injunctive relief requested by Plaintiffs, and any other relief the Court deems necessary or appropriate. ER2149-50. These broad requests encompass several forms of relief that are still available to address continuing harm from the challenged project. *Neighbors of Cuddy Mountain v. Alexander,* 303 F.3d 1059, 1066 (9th Cir. 2002) (noting that broad requests in a complaint for "such other relief as the Court deems appropriate" can avoid mootness).

The party asserting mootness bears a "heavy" burden because a case is not moot if there is *any* effective relief available. *Forest Guardians v. Johanns,* 450 F.3d 455, 461 (9th Cir. 2006). In NEPA cases, this burden is particularly heavy because "if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the

mootness doctrine. Such a result is not acceptable." *Or. Natural Res. Council v. BLM*, 470 F.3d 818, 820 (9th Cir. 2006) (internal quotation omitted).

Either a new NEPA analysis or injunctive relief that alleviates harm from the project can provide effective relief even after a project is completed. *See Or. Natural Res. Council*, 470 F.3d at 821; *Neighbors of Cuddy Mountain,* 303 F.3d at 1065-66. *Ocean Advocates* specifically held that requiring the agency to prepare an EIS, even after it had constructed the challenged project, would redress the plaintiffs' injuries. 402 F.3d at 860-861.

Consistent with the requests for relief in the complaint, this Court could order a new NEPA analysis that must include the need to address on-snow user conflicts in the purpose and need, and measures to reduce those conflicts within the action alternatives. Until that analysis is completed, Plaintiffs would seek injunctive relief from this Court or the district court to require the agency to close the Kapka sno-park, use it only in summer, or impose motorized use restrictions or closures to reduce the number of snowmobiles or prevent their use in the Dutchman Flat or Tumalo Mountain areas. Thus, there are multiple types of relief still available to relieve the harm caused by the Kapka project, which prevents this case from being moot.

B. Other User Conflicts Cases are Irrelevant Here.

Intervenors also argue that two other user conflict cases are somehow relevant here simply because they show that the USFS balanced recreation uses when designating rivers as open or closed to motorized boats. Int. Resp. at 22-24 (citing *Hells Canyon Alliance v. U.S. Forest Serv.,* 227 F.3d 1170 (9th Cir. 2000); *Riverhawks v. Zepeda,* 228 F. Supp. 2d 1173 (D. Or. 2002)). These two cases are inapposite because they do not discuss the Forest Plan standards at issue here nor do they review the NEPA analysis challenged here. The fact that the agency properly balanced recreation uses in other contexts does not mean it has complied with its duties under NFMA and NEPA here.

The Ninth Circuit also recently held that, when designating areas as open or closed to snowmobile use, the USFS must minimize impacts to resources and minimize conflicts with other recreation users under its travel management regulations, rather than simply balance uses, further undercutting Intervenors' reliance on *Hells Canyon* and *Riverhawks*. *WildEarth Guardians*, 790 F.3d at 930-932.

CONCLUSION

Neither the USFS nor Intervenors have refuted Wild Wilderness's claims because they rely on arguments that are not supported by the law or by the administrative record, as did the District Court. Accordingly, this Court should

reverse the District Court and remand the Kapka decision to the agency so that it can prepare an EIS and final decision that comply with NEPA and NFMA.

Respectfully submitted this 19th day of August, 2015.

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FED. R. APP. P. 32 AND NINTH CIRCUIT RULE 28-4 CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), Ninth Circuit Rule 28-4, and appellants' Rule 28-4 Notice (ECF # 31) I certify that this reply brief is proportionally spaced, has a typeface of 14 points or more using Times New Roman, and contains 8388 words.

s/ Tom Buchele
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2015, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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