No. 13-36078

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON NATURAL DESERT ASSOCIATION and AUDUBON SOCIETY OF PORTLAND,

Plaintiffs-Appellants,

-v.-

S.M.R. JEWELL, in her official capacity as Secretary of the Interior; and BUREAU OF LAND MANAGEMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (HON. MICHAEL W. MOSMAN)

FEDERAL DEFENDANTS-APPELLEES' ANSWERING BRIEF

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TABLEOF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Oregon Natural Desert Association and Audubon Society of Portland (collectively "ONDA") challenge the Bureau of Land Management's ("BLM") North Steens Transmission Line project ("the project"). ONDA alleges that the project approval violated the National Environmental Policy Act ("NEPA"). The district court had jurisdiction to hear this challenge pursuant to 28 U.S.C. § 1331. The district court entered final judgment on September 16, 2013. ER 1. ONDA filed a timely notice of appeal on November 13, 2013. ER 26; Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

NEPA requires that agencies take a "hard look" at the potential environmental impacts of their proposed actions and disclose these impacts to the public. Here, BLM examined and disclosed the project's potential impacts on, among other things, the Greater sage-grouse and its habitat.

The questions presented are:

1. Did BLM adequately assess the project's impacts on sage-grouse population connectivity?
2. Did BLM adequately assess the project's impacts on sage-grouse winter habitat?

STATEMENT OF THE CASE

This case is about a transmission line that will connect the proposed Echanis Wind Energy Project, which was developed by Columbia Energy Partners ("CEP") and involves the construction of 40 to 69 wind turbines, to the grid. FSER 17-18.[1] The turbines will be able to generate up to 463,000 megawatt hours of electricity for 30,000 homes and are designed to complement wind-energy production elsewhere in Oregon by generating power when other wind facilities are less productive. ER 326; FSER 43. The turbines will advance important national and State of Oregon goals of facilitating renewable-energy generation and avoiding 194,000 metric tons of carbon dioxide and harmful pollutants each year. *Id*. In a county suffering high unemployment, *see* FSER 218-218, the project is also estimated to increase countywide income by $34 million. *See* FSER 220.

The turbines will occupy private land on one of the ridges that make up Steens Mountain. The turbines will be located at elevations between 6,800 and 7,400 feet, FSER 305, and the adjacent ridges rise to similar elevations. *See* ER 384, 392. At elevations above 6,000 feet, the snowpack can last until mid-June and most precipitation in the region falls at these higher elevations. ER 1112. The

[1] Throughout this brief, the government uses the abbreviation ER to refer to the "Excerpts of Record," and the abbreviation FSER to refer to the "Federal Defendants Supplemental Excerpts of Record."

transmission line will run through cliffs, canyons, sagebrush, and Juniper woodlands that provide habitat for various species, including Greater sage-grouse. *See, e.g.*, FSER 151-82.

Because the transmission line runs through 12.1 miles of public land, *see* FSER 87, the Federal Land Policy and Management Act ("FLPMA") required CEP to submit to BLM an application for a right-of-way. As required by NEPA, BLM prepared an Environmental Impact Statement ("EIS") for the right-of-way to analyze and publicly disclose the potential environmental impacts of the transmission line and associated roads, as well as the impacts from the turbines on privately owned land. This 1,200-page document discusses a broad range of potential effects, including impacts to local wildlife such as the sage-grouse. Ultimately, the Secretary of the Interior approved a Record of Decision ("ROD") authorizing issuance of the right-of-way to CEP.

On April 5, 2012, ONDA filed this case. In its motion for summary judgment, ONDA argued that the EIS failed to comply with NEPA and accordingly, that the decision whether to grant the right-of-way should be remanded to the agency for further consideration. BLM cross-moved for summary judgment. On September 11, 2013, the district court granted summary judgment to BLM. ONDA appeals this decision.

A. Legal Framework

1. Federal Land Policy and Management Act

FLPMA establishes basic legal mandates that govern how the Secretary of the Interior administers and manages public lands. 43 U.S.C. §§ 1701-1787. FLPMA requires the Secretary (through BLM) to develop land-use plans (also called Resource Management Plans) that set forth the agency's public-land-management goals and objectives to allow for multiple uses, including protecting environmental quality and providing for human occupancy and use. *Id.* §§ 1701(a)(7), (8), 1712, 1732(a).

FLPMA gives BLM the discretion "to grant, issue, or renew rights-of-way, over, upon, under, or through [public] lands for . . . systems for generation, transmission, and distribution of electric energy." *Id.* § 1761(a). FLPMA requires that rights-of-way "carry out the purposes of this Act . . . ." *Id.* § 1765(a). FLPMA also requires rights-of-way to include terms and conditions that the Secretary deems necessary. *Id.* § 1765(b).[2]

[2] The right-of-way application process is governed by 43 C.F.R. subpart 2800. These regulations allow BLM to issue or deny a right-of-way. *Id.* § 2805.10. Follow-up notices to proceed are required before commencing ground-disturbing activities. *Id.* § 2807.10.

2. National Environmental Policy Act

Congress enacted NEPA for two principal purposes: (1) to ensure that federal agencies will have detailed information on significant environmental impacts when they make their decisions; and (2) to guarantee that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA directs federal agencies to consider the potential effects of proposed federal action before implementation. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). NEPA ensures a process, not a result, and its goals are satisfied once information is properly disclosed. *Robertson*, 490 U.S. at 350; *Marsh*, 490 U.S. at 371.

NEPA provides that federal agencies should prepare a "detailed statement" known as an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. An EIS generally discusses, among other items, the purpose and need for the proposed action, the alternatives to the action, the affected environment, and the environmental consequences of alternatives. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.10. Once an agency has finalized its EIS, NEPA regulations require an agency to choose an alternative to implement by issuing a record of decision ("ROD") that explains, in essence, why the agency selected a particular course. 40 C.F.R. § 1505.2.

If adverse environmental effects of the proposed action are "adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350. NEPA thus "prohibits uninformed—rather than unwise—agency action." *Id.* at 351. NEPA's procedural mandate is to "insure a fully informed and well-considered decision, not necessarily a decision that judges . . . would have reached." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). So long as an agency takes a "hard look" at environmental consequences, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976), its analysis should be upheld. *Laguna Greenbelt v. U.S. Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994).

3. Steens Mountain Cooperative Management and Protection Area Act of 2000

Steens Mountain is a 9,773-foot-high mountain located in Harney County in southeastern Oregon's high desert. In October 2000, Congress passed the Steens Mountain Cooperative Management and Protection Area Act ("Steens Act"), which created the Cooperative Management and Protection Area ("the Protection Area"), encompassing more than 400,000 acres of public, private, and state lands. 16 U.S.C. § 460nnn–11(a); FSER 142. The purpose of this area "is to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for

future and present generations." 16 U.S.C. § 460nnn–12(a). The Steens Act also provides that "[n]othing in this Act is intended to affect rights or interests in real property or supersede State law." *Id*. § 460nnn-42(d). The wind turbines at issue would be located on private lands, and none of the project would be constructed or operated on federal lands within the Protection Area. FSER 18, 46.

B. Facts

1. The Greater sage-grouse

The Greater sage-grouse is a ground dwelling bird, less than two-and-a-half feet tall, and weighing between two and seven pounds. ER 761, 963; *see also* ER 391 (photos of sage-grouse). In March 2010, FWS found that sufficient threats to the sage-grouse exist to warrant listing the species as threatened or endangered under the Endangered Species Act ("ESA") but that the listing is precluded by other priorities, pursuant to 16 U.S.C. § 1533(b)(3)(B). ER 346. As a result of this finding, BLM considers the sage-grouse a "special-status" species which it seeks to preserve notwithstanding the fact that it is not listed under the ESA. *See* FSER 176; *see also* FSER 449 (BLM's special-status species policy). Although sage-grouse are declining nationally, the Oregon population is "secure" and "doing relatively well." ER 345-346.

The sage-grouse is a sagebrush-obligate species, meaning that it relies on different sagebrush habitats throughout the year. ER 345. Sagebrush occurs in a

mosaic throughout the project area. *Id.*; *see also* FSER 163-73 Breeding habitat includes strutting grounds called "leks," which are open areas surrounded by sagebrush and are typically returned to annually. ER 345.

For sage-grouse, winter begins in November when their other sources of food dry-up and their diet changes to become entirely dependent on sagebrush. ER 967; *see also* FSER 305. In winter, sagebrush must be exposed more than 9.8 inches above the snow to provide forage and cover for the sage-grouse. ER 346. If sagebrush is covered with snow, sage-grouse will seek exposed sagebrush. ER 346-47. Typically, at the onset of winter, sage-grouse move to lower elevations with more exposed sagebrush. ER 731.

Sage-grouse movement patterns have not been well documented. ER 347. Sage-grouse can be either migratory or resident, they may stay confined to an area of less than 40 square miles or travel through an area of more than 500 square miles, and the different seasonal ranges of any given population or individuals in a population could overlap entirely, partially, or not at all. *Id.*

2. Early planning and permit applications

In April 2007, CEP received a Conditional Use Permit from Harney County to construct the turbines. FSER 426-48. In December 2008, Harney Electric Cooperative ("the Cooperative"), a nonprofit electric utility, filed a preliminary application with BLM for a right-of-way to construct, operate, and maintain a new

double-circuit 230-kV transmission line. FSER 137, 409-14. The line would transmit power generated at the turbines to the Cooperative's existing electrical transmission grid. FSER 137. Steel poles erected every 600 to 1,000 feet would hold the line at least 22 feet off the ground. FSER 144-49. In early 2009, a subsidiary of CEP assumed responsibility from the Cooperative for the right-of-way application. *See* FSER 425a.

CEP also initially sought Conditional Use Permits for the East Ridge Wind Energy Project and the West Ridge Wind Energy Project, which were proposed for the ridges adjacent to the project's proposed location. *See*, *e.g.*, FSER 415-25. CEP's consultant conducted winter avian surveys on these sites. FSER 366. CEP withdrew its permit application for these projects in January 2009. ER 358-59.

3. The draft EIS and public participation

On July 27, 2009, BLM began the NEPA process, requesting public comment on the issues the EIS should consider. FSER 407-08. From the outset, BLM notified the public that the EIS would assess the environmental effects associated with the wind turbines located on private lands as a connected action of the transmission line, along with cumulative impacts from other reasonably foreseeable actions. *See* FSER 370-71. Working through an interdisciplinary process that included specialists in each program potentially affected by the proposed action, *see* FSER 225-33, BLM completed the nearly 900-page draft EIS

on June 1, 2010. *See generally* FSER 368-405. Prior to BLM completing the draft EIS, the United States Fish and Wildlife Service ("FWS"), an agency also within the Department of the Interior, worked with BLM and provided a draft of its potential comments on the draft EIS to further these discussions. *See* FSER 406; ER 958-60.

BLM received comments on the draft EIS from 265 individuals and organizations. FSER 138-39. The comments were organized and summarized, along with BLM's responses, in Appendix G of the EIS. *See generally* FSER 237-304. ONDA submitted detailed comments that raised 224 points. *See* FSER 241-87. On September 17, 2010, FWS also sent a formal comment letter that raised 40 issues. FSER 288-297, 367. FWS recommended denying the permit until the Oregon Department of Fish and Wildlife ("ODFW") — the state's wildlife agency responsible for conservation and management of state wildlife — provided, and BLM used, an updated conservation strategy for the sage-grouse. FSER 292.

4. ODFW's updated guidance on sage-grouse conservation in Oregon

On March 1, 2011, ODFW updated its sage-grouse conservation strategy, "The Greater Sage-Grouse Conservation Assessment and Strategy for Oregon: A Plan to Maintain and Enhance Populations and Habitat" ("the Strategy"). ER 394, 399. This guidance document provided a management strategy and recommendations to promote the conservation of Greater sage-grouse and intact

sagebrush communities in Oregon, based on the best available science. ER 399. ODFW focused these recommendations on impacts from energy development and its associated infrastructure. ER 422.

ODFW used a modified core-area approach. ER 423-30. The existing core-area approach focuses on protecting the most important breeding areas as revealed by the best available data. ER 423. ODFW's approach includes mapping migration areas, or "connectivity corridors." *Id*. ODFW determines these corridors by drawing circles around breeding areas, using a radius that represents the greatest average distance that sage-grouse travel during seasonal migration. ER 424. ODFW then compares this map to an occupied habitat map and decreases the size of the corridors so that their boundaries fit the areas of occupied habitat. *See* ER 425. ODFW also uses radio-telemetry data it had on more than 1,500 birds to supplement its understanding of over-wintering areas. *Id*.

The goal of the modified core-area approach is to protect the most productive sage-grouse populations and the habitat. *Id*. ODFW defined its core areas as "habitats necessary to conserve 90% of Oregon's sage-grouse population with emphasis on highest density and important use areas." Low-density areas are "[a]reas that provide breeding, winter, and migratory habitats" for the sage-grouse. ER 425-26. Some connectivity corridor habitat is part of the core area and other portions are low density. *Id.* To support sustainable sage-grouse populations and

habitats, ODFW recommends avoiding impacts to core areas and mitigating, at a no-net-loss-with-net-benefit standard, impacts to sage-grouse habitat in low-density areas. ER 430.

On August 23, 2011, ODFW released a companion document to the Strategy called, "Mitigation Framework for Sage-Grouse Habitats: Implementing Habitat Mitigation for Greater Sage-Grouse Under the Core Area Approach" ("the Framework"). FSER 319-26. The Framework provided mitigation recommendations for energy-development projects affecting sage-grouse habitat in Oregon. FSER 319; *see generally* FSER 319-26. Its recommendations are implemented through the Strategy. FSER 320. The Framework recommended using a noise propagation model to identify the area impacted from noise, as well as a surrogate for other impacts from renewable energy. FSER 321. ODFW noted the lack of empirical data on renewable-energy development's impacts on sage-grouse populations, but theorized the impacts would be similar to those of traditional energy development in the West. *Id.* ODFW and FWS recommended use of the Framework "as the best scientifically defensible methodology for identifying project affected area and appropriate mitigation actions for sage-grouse and other wildlife." FSER 327.

5. BLM's consideration of the project's effects on the sage-grouse in its final EIS

In developing its final EIS for the project, BLM used the Strategy and the Framework to categorize the habitat in the project area and to explain the impacts to sage-grouse habitat and the potential mitigation for those impacts. ER 344, 348-51; FSER 182-190, 201-203, 215-216. The EIS describes the habitat categorization in these documents, the recommendations these documents make with respect to these categorizations, and the recommendations' purposes. *See* ER 348-49. The EIS notes that both project alternatives follow ODFW's recommendations because both alternatives run through low-density habitat and include mitigation to reduce the impacts to that habitat. *See* ER 350 (map showing that neither transmission line would cross core habitat); FSER 201-203, 215-216 (providing the mitigation needed for each transmission line alternative).

The EIS explains that habitat connectivity is essential for sage-grouse persistence. ER 346. Sagebrush habitats become degraded and fragmented from impacts from a number of factors including roads, power lines, and renewable-energy facilities. *Id.*; *see also* FSER 177, 180-181, 193, 200, 204, 207, 210, 212-213 (discussing the project's direct impacts to habitat).[3]

[3] Habitat fragmentation is the "splitting apart of previously contiguous functional habitat components of a species." ER 979.

The EIS discloses that sage-grouse likely would be displaced from their spring, summer, fall, and early winter habitats in the turbine area. ER 351. It also discloses that sage-grouse could be displaced by noise, visual effects, habitat fragmentation, or other aspects of constructing or operating the turbines, roads, and transmission line. *Id.* The EIS notes that sage-grouse may avoid areas with tall structures, such as wind turbines, that resemble predator perch sites. *Id.* No leks are within three miles of the turbine area, so BLM does not anticipate that the turbines will impact courtship or breeding. *Id.* And BLM does not anticipate that the project's low-use roads will impact leks. ER 351-52.

The EIS further explains that the effects of transmission lines on sage-grouse are not well understood. FSER 201. The EIS discloses the impacts to sage-grouse from each of the alternative transmission-line routes, including lost habitat, effects from fragmentation by power lines, and mortality from vehicle collisions, power-line collisions, and increased raptor predation. FSER 193, 196-97, 201, 213-16. BLM examined and disclosed a range of scientific studies regarding habitat fragmentation from, and sage-grouse avoidance of, power lines. FSER 196-97. Notably, some studies have found population decreases and avoidance behavior while others have found no effects on lek occurrence and nesting near power lines. *Id.*

There are seventeen leks within 6.2 miles of the transmission line alternatives and one as close as 1.05 miles from one of the alternatives. ER 347, FSER 215. To avoid impacts related to this lek, BLM will not allow construction activities during the breeding season. FSER 215, 238. Due to the absence of appropriate habitat along this route, sage-grouse do not use the area along the transmission line for nesting. FSER 215.

BLM used the Framework to model the area and the extent of the project's impact. *See* FSER 185-88, 201-03; 215-16. For the transmission line, the EIS used an 0.6 mile disturbance band on each side of the line to determine where the impacts would occur. FSER 201-03, 215-16. Within this band, impacts increase and the habitat's effectiveness decreases as the sage-grouse approaches the transmission line. FSER 201-03, 215-16. The EIS subdivided each disturbance band into four equal parts and explained that the habitat in the first part, farthest from the line, lost 20 percent effectiveness, 40 percent in the second part, 80 percent in the third part, and 100 percent in the last part, closest to the line. *Id.*

The EIS explained how the effects of each alternative would be mitigated, including the no-net-loss-with-a-net-benefit standard that the Strategy and the Framework recommend. *See, e.g.*, FSER 184-90, 201-04, 2215-17; *see also* FSER 177-78. This standard means that CEP would restore habitat in an area equal to the area impacted by the project and it would prioritize core areas for this restoration.

See FSER 187-90. In doing so, a benefit would accrue because the impacted habitat would be low-density but the restoration would focus on core areas. *See id.* The EIS discloses that after mitigation is complete, there may be residual effects on the sage-grouse because the displacement caused by the project may eventually cause habitat loss, or even lek abandonment. FSER 217.

In conducting its analysis of the sage-grouse, BLM worked closely with FWS and ODFW. *See, e.g.,* FSER 305-06. FWS reviewed two administrative drafts of the wildlife section of the EIS. *See* ER 380. And FWS provided formal comments on the second administrative draft, discussing ways to improve the wildlife mitigation. ER 380-84.

6. The Record of Decision

On October 21, 2011, BLM published the final EIS. *See generally* FSER 84-304. In its comments on the final EIS, FWS initially recommended the no-action alternative because the mitigation planning for the project was incomplete. ER 301. But in that same comment, FWS noted that an adequate framework of principles and standards for developing the sage-grouse habitat mitigation plan could be written prior to completion of the ROD. ER 302.

FWS and ODFW then worked with BLM to create a document explaining the standards and principles that would govern CEP's habitat mitigation plan. *See*

e.g., FSER 60, 62, 68. The product of this collaborative effort was included in the ROD as Attachment D. FSER 49-59.

In reviewing a draft of the ROD, ODFW congratulated BLM on "a job well done," FSER 60, and the local FWS office stated that "BLM has done an excellent job" and that "we think [the ROD] can serve as an excellent model for application elsewhere. We will recommend to our regional and national management that FWS should be prepared to support it." FSER 68.

BLM issued the ROD granting the right-of-way on December 28, 2011. FSER 48. In the ROD, BLM required that CEP finalize a Habitat Mitigation Plan using "mitigation principles and standards" provided in Attachment D. FSER 34-35. The ROD specified: "Based on preliminary modeling and analysis in accordance with [the Strategy] and [the Framework], BLM will require 2,412.6 acres of mitigation as a condition of the right-of-way due to effects to sagebrush and sage-grouse habitat . . . ." FSER 35. Further, "Harney County will impose an additional estimated 8,473 acres of mitigation" as required by the Conditional Use Permit. *Id*. Moreover, the ROD explains that the right-of-way "will include as a stipulation that [CEP's subsidiary will] implement a construction compliance and monitoring plan" to ensure that the requirements of the right-of-way, including the mitigation, are satisfied. FSER 40. On May 21, 2012, after completing the

habitat-mitigation plan, BLM issued a limited Notice to Proceed that allowed CEP's subsidiary to commence surveying but not to break ground. FSER 15-16.

C. District Court Proceedings

On April 5, 2012, ONDA filed its complaint against BLM. ER 1120-52. CEP and Harney County intervened. ER 1156. In its motion for summary judgment, ONDA submitted hundreds of pages of extra-record declarations. *See* ER 44–234, 1157.[4] BLM filed a cross-motion for summary judgment and also a motion to strike ONDA's extra-record declarations. ER 1158. On September 11, 2013, the district court granted BLM's motion for summary judgment, but denied its motion to strike, without explanation. Judgment issued on September 16, 2013. On November 13, 2013, ONDA filed a timely notice of appeal.

ONDA's summary-judgment motion raised two arguments relevant to this appeal. First, ONDA asserted that BLM failed to gather sufficient baseline information on the sage-grouse's use of the project area during the winter. Dkt. 37 at 28-30. The district court rejected this argument, finding that BLM gathered adequate information. ER 15. It also determined that BLM's decision to infer the sage-grouse's winter use of the turbine area from the East and West Ridge surveys

[4] ONDA dropped the substantive FLPMA and Steens Act claims that it had raised in its complaint. ER 3 n.1.

was "reasonable and adequately explained" and accordingly, the district court deferred to this inference as a scientific matter within BLM's expertise. ER 17 n.5.

Second, ONDA argued that the EIS did not assess impacts to habitat connectivity. Dkt. 37 at 33-37. The district court rejected this argument. ER 12. The district court explained that the concepts of habitat fragmentation and habitat connectivity are intertwined such that by explaining the project's potential to cause habitat fragmentation, the EIS assessed the project's impact on connectivity. *Id.*

Subsequent to the filing of this action, BLM revoked the limited Notice to Proceed that it had issued to CEP's subsidiary, because BLM found the bond paid in conjunction with the Notice to Proceed inadequate. ER 41. While a new Notice to Proceed is required before ground-breaking can begin, *see id.*, the right-of-way and the ROD have not been modified or withdrawn. ER 32-33. To date, CEP has not indicated that it is abandoning the right-of-way. Accordingly, BLM anticipates that, if this Court affirms the district court's judgment, the project will resume and a new bond will be paid by CEP. *See* ER 33.

SUMMARY OF ARGUMENT

BLM fully complied with NEPA. As NEPA requires, BLM took a "hard look" at the potential environmental impacts of its proposed action and disclosed them to the public. BLM thoroughly examined the project's potential impacts on

the Greater sage-grouse and its habitat, including impacts on sage-grouse connectivity and winter habitat.

BLM explained the project's proposed environmental impacts. To analyze the project's impacts on the sage-grouse, BLM set forth the relevant background about the sage-grouse including its range-wide decline, its increasing population separation, its need for sagebrush habitats throughout the year, and the need for connected habitats. BLM adopted the state wildlife agency's habitat categorization, to further explain the different types and relative importance of sage-grouse habitat in the project area. These categorizations are linked to recommendations regarding which habitats must be avoided and which habitats have the potential for impacts to be mitigated. The recommendations' purpose is to ensure sustainable sage-grouse populations and habitats going forward. With this background in place, BLM explained the potential impacts of the wind turbines, access roads, and transmission line on the sage-grouse, and how those impacts would be mitigated.

This Court should reject ONDA's argument that BLM failed to take a "hard look" at the project's potential impacts on genetic connectivity. The EIS looks at the issue and explains how, by disturbing habitat, the project could hinder sage-grouse movement, which could contribute to the potential for extensive population declines and regional extinctions. To the extent that ONDA believes there are

entirely unique impacts to gene flow that are not captured by the EIS's habitat-based approach, ONDA did not indicate that position in its comments or argue that issue before the district court, so the argument is waived.

ONDA's contention that the EIS lacks baseline data on the sage-grouse's use of the turbine area during the winter ignores the large amount of data on the sage-grouse contained in the EIS. The EIS informs the public that sage-grouse need sagebrush exposed above the snow for winter habitat; that nearby surveys determined that local sage-grouse stop using ridge tops for winter habitat after snow accumulates; and that snow accumulates earlier and stays longer on the turbine's proposed ridge than the ridges where the nearby winter surveys were performed because of its comparatively higher elevation. BLM reasoned from this information and their experience that sage-grouse will not use the ridge after snow accumulates. By providing this information to the public and the decision-maker, the EIS more than satisfied the purposes of NEPA. Accordingly, this Court should affirm the district court.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo. Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*).

Agency compliance with NEPA is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. *Marsh*, 490 U.S. at 375-76; *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013). An agency decision that an EIS complies with NEPA may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

When considering this decision, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Judicial review is generally limited to the record because, "[w]hen a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Asarco, Inc. v. EPA*, 616 F.3d 1153, 1160 (9th Cir. 1980)).

There are four narrow exceptions to this general rule: (1) where supplementation is necessary to determine if the agency considered all relevant factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms; or (4) plaintiffs have shown bad faith on the part of the agency. *Id.* at 603. These exceptions are approached with caution so as to not undermine the general rule limiting judicial

review to the administrative record. *Id.* Where a court "pits . . . experts against each other and resolves their contrary positions as a matter of scientific fact," the court will have "overstepped" the boundary of the rule. *Id.* at 604. Because this Court reviews the district "court's judgment *de novo*, however, [this Court] can confine [its] review to the administrative record" even when a district court did not do so in the first instance. *Id.*

Ultimately, review under the arbitrary-and-capricious standard is narrow, and a court may not substitute its judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Rather, a court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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." *Id.* (internal quotations omitted). "This deference is highest when reviewing an agency's technical analysis and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League of Wilderness Defenders Blue Mts. Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010).

ARGUMENT

I. BLM took a hard look at the project's impacts on the sage-grouse.

ONDA contends BLM's consideration of the project's impacts on the sage-grouse violated NEPA. Br. 47-56. NEPA requires agencies to take a "hard look" at the probable environmental consequences of their actions. This requirement is met if "the adverse environmental effects of the proposed action are adequately identified and evaluated." *Robertson*, 490 U.S. at 350. BLM takes the requisite "hard look" when it "provides a full and fair discussion of environmental impacts." *McNair*, 537 F.3d at 1001. In preparing the EIS, the agency "may not improperly minimize negative side effects." *Earth Island v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006) (internal citations omitted). But choosing the methods the agency uses to take a hard look at the impacts to wildlife is a decision within the agency's discretion, and the agency is entitled to substantial deference in that choice. *McNair*, 537 F.3d at 1003; *see also Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2011) (noting this "substantial deference").

In its EIS, BLM explained that population declines and increasing population separation are threatening the sage-grouse. *See* ER 345. BLM noted that the threats to the sage-grouse are sufficiently severe that FWS has found the species warrants protection under the ESA (although FWS's limited resources precludes the agency from listing the species at this time). ER 346. BLM

recognized that habitat connectivity is essential for the sage-grouse's persistence, and noted that sagebrush habitats are disturbed and fragmented by numerous threats including renewable-energy development, roads, and power lines. ER 346. BLM disclosed that the project-related impacts to the sage-grouse include lost habitat, effects from fragmentation by power lines, and mortality from vehicle collisions, power-line collisions, and increased raptor predation. FSER 193, 196-197, 201-03, 210, 212-16.

To reduce the project's potential impacts on sage-grouse habitat, BLM adopted the approach outlined in the Strategy, which ODFW developed to maintain sustainable sage-grouse populations in Oregon. As discussed above, the Strategy differentiates between "core" habitat and areas where the species is found in "low density." ER 348-49. The Strategy recommends that projects avoid core habitat entirely, but that projects may occur in low-density habitat with appropriate mitigation. ER 348. Consistent with these recommendations, BLM ensured that CEP sited the project only in low-density habitat and imposed adequate mitigation of the project's impacts in the ROD. ER 350; FSER, 182-90, 201-03, 215-16; *see also supra* pp. 16-17 (explaining how the ROD imposed mitigation).

Specifically, the EIS explains that CEP will use scientifically accepted methods of monitoring the sage-grouse population and habitat and will develop an adaptive-management mitigation strategy to respond to the results of this

monitoring. FSER 189. It also discloses that CEP will mitigate the effects to habitat based on a no-net-loss-with-a-net-benefit standard. *See* FSER 182, 185. To meet this standard, the EIS first determined the amount of area impacted by the project, using the Framework's model. *See* FSER 185-87, 201-03, 215-16. This model provides a basis for determining the area impacted and ratios that reflect the extent of that impact. FSER 184-87, 201-03, 215-16. Using this model, BLM calculated the total acres of required mitigation. *See* FSER 184-90 (mitigation acreage for the turbines and the roads), 201-03 (mitigation acreage for West Route), 215-16 (mitigation acreage for North Route). By requiring CEP to apply mitigation to this number of acres elsewhere, there will be no net loss of habitat.

Ultimately, the mitigation area selected will be based on the sage-grouse population in the project-impact area, the habitat quality in the mitigation area, and the potential to restore the mitigation area to high-quality habitat. FSER 187. To meet the "net benefit" objective of ODFW's recommendation, CEP will be required to prioritize mitigation in core areas. *Id.* This generates a net benefit for the species because the mitigation improves habitat in a more important area than where the impacts occurred. After the area has been selected, CEP will assess the factors limiting the productivity of sage-grouse habitat at the site. FSER 189. And CEP will carry out conservation actions such as Juniper removal, improvement of sagebrush, and invasive weed eradication. *Id.* The EIS also includes a draft

habitat-mitigation plan for public review. *See generally* Appendix F (habitat-mitigation plan).

Having ensured that the project was sited only in low-density habitat and that any impacts to that habitat were appropriately mitigated, BLM explained the project's residual impacts on the sage-grouse. FSER 217. After mitigation, BLM forthrightly noted that the displacement caused by the project might eventually lead to the loss of sage-grouse habitat, and possibly lek abandonment. *Id*. To be sure, the project in combination with other past, present, and reasonably foreseeable developments in the area could result in cumulative effects on the environment, including on the sage-grouse. FSER 222. In fact, BLM explained how historical changes to sage-grouse habitat led to an extirpation in the northern portion of Oregon. FSER 223. Hence, there is a worst-case scenario in which the relatively minimal impacts from this project combine with other land uses (*e.g.*, private land owners converting sagebrush into agricultural land) such that cumulatively "fragmentation from scattered disturbances could lead to disproportionate population declines or regional extinctions." *Id.* (citing Johnson et al. 2011).[5] In sum, the EIS explains that the impacts on sage-grouse from this

[5] While ONDA uses different terminology, its discussion of the project's potential impacts on genetic connectivity addresses the same concern. *See, e.g.*, Br. 17 (explaining that "extirpation from stochastic events" is the concern raised by a loss of genetic connectivity).

project are modest while recognizing that those impacts, if combined with future private actions outside the agency's control, could be grave. This candid assertion is the very definition of a "hard look."

A. Through its assessment of habitat disturbance, BLM analyzed the project's impacts on sage-grouse connectivity.

While conceding that BLM recognized "the spatial aspect of connectivity" and discussed "fragmentation in terms of 'reducing *size* of contiguous sagebrush' habitats," ONDA now asserts that BLM does not "mention the *independent* issue of potential loss of genetic connectivity" and that this constitutes "completely failing to consider an important aspect of the problem." Br. 52-53 (quoting the EIS at 3.5-80 (ER 353)) (first emphasis added by ONDA, second emphasis added by BLM). There are four flaws with this theory: (1) it was waived, (2) the EIS properly explains how the project will impact the sage-grouse, (3) both expert wildlife agencies (ODFW and FWS) support analyzing the impacts to all aspects of sage-grouse connectivity by analyzing impacts to sage-grouse habitat, and (4) ONDA does not identify any data that conflict with the EIS's characterization of the impacts.

1. *ONDA waived its argument that genetic connectivity is an independent issue.*

ONDA waived its argument (Br. 52-53) that BLM acted arbitrarily by failing to raise the independent issue of genetic connectivity (as opposed to habitat

connectivity). A party challenging agency action under the APA must "structure [its] participation so that it alerts the agency to the parties' positions and conditions, in order to allow the agency to give the issue meaningful consideration." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) (quoting *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004); *Vt. Yankee*, 435 U.S. at 553).

The draft EIS discussed the potential impacts to sage-grouse in terms of habitat. *See* FSER 388, 391, 394-95, 399, 402-05. ONDA provided 90 pages of comments on the draft EIS. *See generally* ER 465-555. These comments, however, never indicated that ONDA believed the project's likely impacts on any aspect of the sage-grouse's life history could not be accurately captured by evaluating the impacts to habitat. *See id.* It is true that ONDA notes that nearby leks are sufficiently close to one another that sage-grouse could move between them and that there will be impacts on the ability for sage-grouse to move across the landscape for breeding. ER 499-500; *see also* FSER 256 (BLM's response to ONDA's comment). But this observation is not the same as ONDA's position that there is an independent issue of genetic connectivity that somehow escaped BLM's

thoughtful habitat-based analysis.[6] Because nothing in ONDA's comments alerted BLM to this concern, ONDA waived this argument. *Barnes*, 655 F.3d at 1132-34.

ONDA also failed to raise this argument before the district court. Rather, it asserted that the EIS failed to assess how the turbines, roads, and transmission line "would fragment essential sage-grouse connectivity *habitat* on the Steens Mountain." FSER 5-6 (first emphasis in original, second emphasis added). *See generally* FESER 5-8 (not mentioning genetics); FSER 10-14 (arguing that BLM failed to consider the impacts on connectivity habitat, and mentioning genetics as only a ramification of that impact). For this reason, there is no force to ONDA's argument (Br. 54) that the district court erred by failing to appreciate the impacts to genetic connectivity. And this Court "will not consider an issue raised for the first time on appeal." *Bolker v. Comm'r of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985); *see also Weldon*, 697 F.3d at 1051.

2. The EIS evaluated the potential impacts on connectivity.

Putting waiver aside, ONDA's argument that the EIS does not address connectivity (Br. 52-53) is mistaken because BLM adequately considered genetic

[6] ONDA's other citations go no further in indicating their position. Br. 51 (citing ER 485 (providing the Steens Act's definition of ecological integrity); ER 489 (noting that ODFW included connectivity corridors in its habitat categorization)). None of ONDA's other record citations discuss the EIS. *See* Br. 51 (citing ER 598, 615-16, 629).

connectivity through its habitat-based analysis in the EIS. The EIS explains the link between population isolation and habitat fragmentation. The EIS observes that individual populations are becoming increasingly separated. ER 345. It explains that sage-grouse require large landscapes of suitable sagebrush habitats throughout the year, that sage-grouse can migrate great distances, and that the extent to which this habitat is connected is essential to the species' persistence. ER 345-46; FSER 223. The EIS notes that habitat fragmentation threatens the extent to which habitat is connected. Factors that can cause fragmentation include, among others, renewable-energy developments, roads, and power lines. ER 346.

The EIS then shows how these general concerns translate into local impacts. It explains that sagebrush-obligate species, like sage-grouse, avoid breaks in sagebrush habitat and that the project's impacts cannot be understood solely in terms of their physical "footprint," but must also include a larger "disturbance area." *E.g.*, FSER 177, 184-88, 193, 196-97, 201-03, 215-16. It also describes how the degree of disturbance to sagebrush increases as sage-grouse approach the transmission line and that habitat within 0.15 mile of the line is rendered useless. *E.g.*, FSER 201-03. Accordingly, the EIS addresses habitat disturbance and its potential impacts on sage-grouse movement.

Contrary to ONDA's claim that BLM "fail[ed] to appreciate the distinct issue of genetic connectivity through interbreeding among neighboring

populations" (Br. 54), the EIS observes that certain areas are essential for sage-grouse populations because they provide movement corridors between irreplaceable habitats. *See* ER 348-49. The categorization of habitat as either "core" or "low-density" included considering these movement corridors. *Id.*; *see also supra* p. 11 (explaining the habitat categorizations). The EIS maps the transmission line's route and notes the disturbance to the low-density habitat between the nearby core habitats. *See* ER 350; FSER 201-03, 215-16. But because this area is low-density, ODFW recommends mitigation — rather than avoiding impacts altogether — as a means of protecting sustainable sage-grouse populations and habitat in Oregon. *See supra* p. 11. By following these recommendations, BLM addressed the connectivity impacts within this corridor. In sum, BLM took a hard look at genetic connectivity and adequately explained the project's potential impacts.

BLM's analysis undermines ONDA's reliance on *Oregon Natural Resources Council v. Goodman*, 505 F.3d 884, 892 (9th Cir. 2007). ONDA cites *Goodman* for the proposition that an agency violates NEPA where the agency concludes a wildlife corridor will not be jeopardized without supporting that conclusion. Br. 53 (quoting 505 F.3d at 892). BLM here used the Strategy to support its understanding that the impacts to the connectivity corridor in this case will not

jeopardize sustainable sage-grouse populations in Oregon. *Goodman* requires nothing more.

ONDA also erroneously contends (Br. 55) that the district court impermissibly supplied a rationale for the agency's conclusion when it stated, "I find that BLM could have reasonably decided that fragmentation and connectivity are closely related, or even inextricably intertwined, and chosen to discuss them together." ER 12. ONDA's characterization of this sentence is inaccurate. The district court made this statement after explaining that the concepts of fragmentation and connectivity are intertwined. *Id.* The quotation above and the sentence that follows it indicate that fragmentation and connectivity are sufficiently intertwined that it is a matter of scientific judgment whether these topics need to be discussed separately. *Id.* In that scientific judgment, the district court correctly deferred to agency expertise because, as discussed below, *see infra* pp. 33-35, the record supports discussing these topics together. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) ("An agency will have acted arbitrarily and capriciously only when 'the record plainly demonstrates that [the agency] made a clear error in judgment in concluding that a project meets the requirements' of NEPA." (quoting *McNair*, 537 F.3d at 994)).

3. The record supports BLM's decision to focus on habitat.

ONDA's criticism of BLM's habitat focus (Br. 55) is wrong. Both ODFW and FWS have explained that habitat is the most important issue when considering sage-grouse connectivity. While recognizing that gene flow is a component of why connectivity matters for the sage-grouse, ODFW explained that "*suitable habitat* is needed to allow for connectivity between different resident populations." ER 412 (emphasis added). ODFW also notes that habitat loss and fragmentation are the primary cause for long-term changes in population abundance and distribution, ER 404; that maintenance of connectivity and reduction of fragmentation of sagebrush habitats are key to the long-term welfare of all sagebrush-obligate species, ER 407; that habitat loss and fragmentation have been linked to declines in population, ER 409; and that sagebrush cover is a key factor in providing for sage-grouse migration corridors, FSER 355.

More importantly, the Strategy's recommendations sought "to address greater sage-grouse management from a conservation biology perspective that protects the most productive populations and habitat that *meets all life history needs* . . . ." ER 422 (emphasis added). To that end, ODFW modeled several aspects of sage-grouse habitat, including connectivity corridors. ER 423-25. In modeling more than just breeding and nesting areas, ODFW accounted for some of the uncertainty in existing core-area approaches. *See* ER 424. It used the results of

all of its models to prioritize different locations in Oregon for the sage-grouse, and it recommended either avoidance or mitigation depending upon the results of this analysis. ER 425-26, 428-29. The underlying premise of this approach is that impacts to sage-grouse can be understood by evaluating impacts to their habitat.

Similarly, FWS's finding supports BLM's method of evaluating connectivity by focusing on the project's impacts to habitat. From its review of the scientific literature on sage-grouse connectivity, FWS concluded that "maintaining *habitat* connectivity and population numbers are essential for sage-grouse persistence." ER 976 (emphasis added). FWS explained that sagebrush distribution is the most important factor in maintaining sage-grouse connectivity. *Id.* And it confirmed that activities which remove or fragment sagebrush habitats contribute to the loss of connectivity and population isolation. *Id.*

Moreover, ONDA's basis for arguing that genetic connectivity warrants discussion separate from spatial connectivity (Br. 55) relies on mischaracterization of the scientific literature in the record. FWS, in its assessment of sage-grouse connectivity discussed above, relied on a scientific monograph which includes a discussion of "Population Trends and Habitat Relationships." ER 676. An article in the monograph (Knick & Hanser) focuses on sage-grouse population movements between leks. But none of these sources establish that the genetic component of connectivity warrants a separate discussion in the EIS or calls into

question the EIS's habitat-based analysis. Indeed, the Knick & Hanser article recognizes that "[p]opulation declines will track habitat loss" and that conservation strategies for the sage-grouse should focus on conserving habitats. ER 900. And FWS cited, among other things, this Knick & Hanser article to support its conclusion that habitat is the most important factor in assessing connectivity. *See* ER 976. Thus, the record supports BLM's decision to use a habitat-based approach in the EIS.

4. ONDA provides no data contradicting the EIS.

Relying on an extra-record declaration, ONDA contends that the impacts to genetic connectivity will likely have ramifications for the sage-grouse on a "far larger scale than indicated by the very limited discussion provided in the [EIS]." Br. 48. Specifically, ONDA suggests that (1) the transmission line could eliminate the sage-grouse's ability to travel between populations (Br. 50), (2) the project area was recognized as an important connection area for the grouse (Br. 50-51), and (3) impacts to genetic connectivity corridors are not addressed by the mitigation plan and cannot be mitigated (Br. 52). These unsubstantiated suggestions do not establish that the project will impact the sage-grouse in a different manner than BLM disclosed in the EIS.

First, power lines will not eliminate the sage-grouse's ability to travel across the landscape. Nothing in the record establishes that a two-and-a-half-foot-tall

sage-grouse cannot cross underneath power lines strung at least 22 feet above the ground. *See* FSER 148; ER 963. While one study suggests that other species of grouse cross power lines less frequently than roads, *see* ER 980, BLM discusses this study and properly identifies the sage-grouse's response to transmission lines as an issue of scientific uncertainty. FSER 197. The extent to which sage-grouse avoid transmission lines is uncertain because, as the EIS explains, other studies have shown no effects on lek occurrence and sage-grouse nesting near transmission lines. *Id.* For example, in the Burns District where the project is located, there are numerous leks near power lines. *Compare* FSER 361-62 (showing leks), *with* FSER 150 (showing existing major power lines and roads). Given this uncertainty, the EIS complied with NEPA by explaining the uncertainty and then supporting its analysis with the Framework and the Strategy which BLM not only deems to be reliable, but the best available science. ER 344; FSER 201-03, 215-16.

Second, the record does not support ONDA's contention that the two major sagebrush regions in Oregon are connected. ODFW said that areas *within* the two regions remain connected by small and tenuous corridors. ER 421. But the project lies between, not within, the two sagebrush regions in Oregon. *Compare* ER 421; FSER 357, *with* FSER 150 (showing the project area relative to other recognizable locations). ODFW explained that preexisting "human-caused and natural barriers in the Burns district separate these two contiguous areas." ER 420. The project

area is in the part of the Burns district where these contiguous areas are separated. *See* ER 421; FSER 357 (mapping the breaks in sagebrush in the Burns District between the two contiguous areas); FSER 150.

Third, ONDA's argument that the habitat-mitigation plan does not address connectivity corridors (Br. 53-54) lacks substance. The habitat-mitigation plan considered mitigation of impacts to movement corridors. The EIS informs the public that Category 2 habitats are migration or movement corridors. ER 349. The habitat-mitigation plan explains how impacts to different ODFW habitat categories would be assessed, including impacts to Category 2 habitat. *See* ER 370. To the extent ONDA's argument (Br. 54) is that the habitat-mitigation plan does not use the phrase "connectivity corridor," it is nothing more than a semantic distinction because the ODFW connectivity corridor, at issue in this case, is movement, migration, or Category 2 habitat. *See* ER 347-48, 370, 426. ONDA claims that impacts to genetic connectivity cannot be mitigated (Br. 54), but nothing in the record suggests that impacts to a connectivity corridors cannot be mitigated. In fact, the Strategy, which represents the best available science on sage-grouse habitat, states the contrary. *See* ER 346-50, 425-26, 430.

Moreover, this Court should disregard the post-decisional, extra-record declarations of Dr. Miller and Dr. Braun, which ONDA cites in support of its contention that impacts to connectivity habitat cannot be mitigated. ONDA's use

of these declarations illustrates the problem with post-decisional declarations. BLM received no comments during the public-comment period indicating that impacts to connectivity habitat could not be mitigated. *See generally* FSER 237-304. After litigation had begun, ONDA hired experts to critique the EIS. *See* ER 17 n.6. Dr. Miller states, without citation, that impacts to connectivity corridors cannot be mitigated; and Dr. Braun thinks highly of Dr. Miller's extra-record "analysis." ER 72-73 (¶ 53); ER 181. Because BLM supported its understanding of the potential for mitigation with the Strategy, ONDA's argument is a request that this Court do what it recently admonished a district court for doing: "pit[ting] the experts against each other and resolving their contrary positions as a matter of scientific fact." *San Luis*, 747 F.3d at 604. This Court, however, should refuse ONDA's request to substitute its judgment for the judgment of the agency. *See id.* at 602. Because BLM took a hard look at sage-grouse connectivity, including genetic connectivity, it complied with NEPA.

B. Nothing in the Steens Act undermines BLM's NEPA analysis.

As noted above, the Steens Act creates a Cooperative Management and Protection Area which covers over 400,000 acres of state, federal, and privately owned land. The project would only cross the Protection Area on privately owned land. FSER 18, 46. And the Steens Act provides that "[n]othing in this Act is intended to affect rights or interests in real property or supersede State law." 16

U.S.C. § 460nnn-42(d). The purpose of the Protection Area is to conserve, protect, and maintain the ecological integrity of the area. *Id.* § 460nnn-12(a).

ONDA is wrong that the Steens Act requires BLM to perform a separate analysis on genetic connectivity. Br. 49. ONDA mischaracterizes the Protection Area's statement of purpose by suggesting that it is a substantive provision that directs BLM to study genetic connectivity. *Id.* The provision does not direct the agency to *study* anything. Indeed, because the provision's text states that it is merely explaining the Protection Area's "purpose," it is not a substantive provision. *Id.*; *see Haw. v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) ("where the text of a clause itself indicates that it does not have operative effect . . . a court has no license to make it do what it was not designed to do."). Rather, this provision provides BLM with guidance on how to use the management and land-acquisition authority the Steens Act provides in subsequent provisions. *See, e.g.*, 16 U.S.C. §§ 460nnn-21 to -25.

While ONDA would have preferred that BLM discuss genetic connectivity in a separate section of the EIS, BLM had no obligation to do so. NEPA compliance "turns on the *substance* of the [EIS] rather than its form." *Mont. Wilderness Ass'n*, 725 F.3d at 1002 (emphasis in original). In *Montana Wilderness Association*, this Court held that the agency took a hard look at the relevant issues by discussing them generally throughout the EIS, and that breaking each issue out

in its own section was unnecessary. *Id.* Here, BLM explained the project's potential impacts on genetic interchange among the sage-grouse by explaining how its population was becoming separated, how the transmission line would disturb habitat, how the sage-grouse avoids breaks in habitat, and how the project's disturbance, when combined with other land uses that bring about much more extensive fragmentation, could have severe consequences for the sage-grouse. *See supra* pp. 23-27, 30-35.

ONDA's reliance on *Oregon Natural Desert Association v. Bureau of Land Management*, 625 F.3d 1092, 1112 (9th Cir. 2010), is also misplaced. In that case, the agency entered into a settlement with the State of Utah, agreeing to conduct a one-time review of wilderness characteristics. *Id.* at 1111. After doing so, the agency argued that further consideration of wilderness characteristics was outside the scope of its NEPA analysis. *Id.* at 1111-12. This Court rejected that understanding of the law. *Id.* at 1121-22. Here, BLM never took the position that genetic interchange was outside the EIS's scope, but rather chose a different methodology for addressing the project's impacts on genetic connectivity than the method that ONDA would prefer. Thus, although BLM presented the information in a manner different from what ONDA would prefer, BLM complied with NEPA. *See Weldon*, 697 F.3d at 1052-53 (upholding an agency's methodology where the record did not show that the chosen method was unreliable).

II. The EIS's baseline information enables informed decision-making and public participation.

A. BLM explained the project's potential impacts on winter habitat.

ONDA also argues that BLM violated NEPA's hard-look requirement because it "omitted winter habitat from its environmental review." Br. 36. This Court "employ[s] a rule of reason standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. This standard requires a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *League of Wilderness Defenders Blue Mts. Biodiversity Proj. v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012). ONDA's argument is contradicted by the record, which shows that BLM provided sufficient information about winter habitat to enable informed decision-making and public participation.

The EIS contained sufficient baseline data on sage-grouse and their habitat needs. *See generally* ER 345-48. The EIS explains that sage-grouse "are a sagebrush obligate species that use different sagebrush and riparian habitats throughout the year for courtship (lekking), nesting, brood rearing, and wintering"; that "[s]agebrush steppe is present in a mosaic throughout the Project Area"; that "[s]pecific habitat needs can be described in terms of breeding, brood rearing, and

winter habitat"; and that "[s]uitable year round sagebrush habitat is present at lower elevations, and high-quality summer brood rearing through winter range occurs along the access road to the [turbines] and on the [turbines'] site itself." ER 345.

The EIS informs the public that, during the winter, "[s]agebrush must be exposed at least 9.8 to 11.8 inches (25 to 30 cm) above snow level to provide adequate forage and cover, and if sagebrush is covered with snow, greater sage-grouse will move to areas where the sagebrush is exposed. The availability of sagebrush above snowpack is critical to the survival of greater sage-grouse through the winter." ER 346-47 (citing Hagen 2011a; ODFW 2011). And the EIS notes that "[t]here is a potential conflict between wind energy development and greater sage-grouse winter foraging habitats, because the windswept ridges that keep sagebrush exposed during winter months could also be ideal locations for wind energy development." ER 348 (citing Hagen 2011a).

BLM used winter surveys as part of its baseline understanding of the project's impacts. Winter surveys were not done on the turbines' proposed location. *Id.* But 23 winter avian surveys were conducted on ridges that are adjacent to, but generally lower in elevation than, the turbines' proposed location. *Id.*; *see also* ER 392 (topographical map). From November through March, these surveys found sage-grouse once in December and once in February on the East

Ridge site, and once in December on the West Ridge site. FSER 366. The paucity of these sightings, as well as existing research, *see* ER 346-47, 731, support BLM's conclusion that after snow accumulates on the nearby ridges, the sage-grouse move to lower elevation with exposed sagebrush. ER 348.

ONDA initially shared BLM's understanding of how sage-grouse use the turbine area. ONDA's complaint explains that from May to October sage-grouse inhabit areas "all along the elevational gradient with most sage-grouse found at higher elevations of sagebrush, above 6,500 feet, until late fall to early winter as snow moves them into lower country." ER 1135. Here, the turbines will be located above 6,500 feet. *See* FSER 305.

The EIS explains that the turbines' location is generally covered with snow earlier and later in the winter than the East and West Ridge sites because of that ridge's higher elevation. ER 348. The snowpack can remain until mid-June at the turbines' elevations above 6,000 feet. ER 1112. Higher elevations get more precipitation. *Id.* And in the experience of BLM's wildlife biologist, the relatively higher elevation and similar aspect of the turbines' location means that snow accumulates earlier in the season and would crust over preventing sage-grouse use. FSER 305-06; *see also Hells Canyon Alliance v. U. S. Forest Serv.*, 227 F.3d 1170, 1184 (9th Cir. 2000) (holding that "[t]he agency is entitled to rely on its own expertise."). Based on this information, the EIS concludes that sage-grouse do not

use the area around the turbines' proposed location "for winter habitat from the time the vegetation is covered with snow until snow melt, roughly December through April." ER 348.

Because the EIS supports its scientific conclusion with a study and observations that BLM deemed reliable, BLM had an adequate basis to satisfy NEPA's procedural requirements. *See League of Wilderness Defenders Blue Mts. Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014) (rejecting a challenge to an EIS that relied on old data indicating a species' absence, even though the EIS did not engage with contrary scientific opinions about the potential presence of that species because the EIS included all relevant data and provided sufficient information to let the public make an informed decision); *Weldon*, 697 F.3d at 1051 (holding that an agency need only support its analysis with studies it deems reliable). In other words, BLM's decision was not arbitrary or capricious simply because the agency could have gathered even more data to support its conclusion. BLM had adequate data, and it drew a rational connection between the data gathered and its conclusions. NEPA and the APA require nothing more.

B. The record supports BLM's inference about when sage-grouse use the turbines' location.

ONDA contends that BLM acted arbitrarily when it drew an inference from the East and West Ridge surveys because the record shows that (1) the proposed

turbine site is at a higher elevation and closer than either of the other sites to the Steens Mountain escarpment (Br. 45); (2) ODFW recommended performing winter surveys (*id.*); and (3) a track-changes comment bubble written by an FWS employee states that the project area provides winter habitat for the sage-grouse (Br. 45-46). But ONDA cites no data that contradicts the EIS's explanation of when sage-grouse use the habitat near the turbines. Accordingly, ONDA's argument does not establish a NEPA violation. *E.g.*, *Weldon*, 697 F.3d at 1055 (holding that where an agency's conclusion "is supported, rather than contradicted by the evidence in the record," the agency "does not violate NEPA" (citing *McNair*, 537 F.3d at 987)).

First, ONDA provides no data that explain how the turbines' proximity to the Steens Mountain escarpment or its elevation contradicts BLM's conclusion about sage-grouse use of the turbine area. ONDA's citations are to maps, pictures of the area, and studies that recognize a generalized potential for wind to sweep the snow off of sagebrush on ridge tops. *See* Br. 45 & n.5 (quoting ER 730; citing ER 100, 109, 112, 122 180, 412, 416, 418-19, 438). But the potential for wind to sweep snow off sagebrush generally says nothing about the project area specifically. The article ONDA quotes discusses studies from North Park, Colorado, not the project area. ER 730. Even ONDA's post-decisional declaration does not identify conflicting data; rather, it relies on an interpretation of preexisting

studies to suggest that, at the project's altitude, snow *could* be swept off of sagebrush by wind. ER 180. But ONDA's speculation regarding the potential sage-grouse occupancy of the project area aside, the record supports BLM's understanding that the increased elevation of the turbines' location means it gets more snow, which lasts longer, and prevents sage-grouse from using the sagebrush in the area during the winter. *See supra* pp. 42-44 (citing ER 348, 1112; FSER 305-06); *see also* ER 731 (typical sage-grouse response to winter is to move to lower elevations).

Second, ODFW's recommendation is not contrary to BLM's inference about sage-grouse use of the project area. In a letter that predates the application for the right-of-way, ODFW recommended that CEP — not BLM — monitor the *East and West Ridge sites* for sage-grouse use in the winter due to the *potential* conflict between the wind-energy project locations and sage-grouse winter habitat. ER 441; *see also* ER 439-440. BLM concluded that the results of the recommended monitoring were that sage-grouse stopped using habitat on top of these ridges around mid-December, after snow accumulation. *See* ER 348. These results formed part of the basis for BLM's understanding of the project area and the record does not show that ODFW, which BLM consulted throughout the process, recommended more winter surveys. ODFW's biologist thought that BLM's

characterization was "probably reasonable," given the data BLM gathered. FSER 305.[7]

Finally, FWS supported BLM's conclusions about the project area. An FWS employee, one of four who reviewed an administrative draft of the wildlife section of the FEIS, said in a track-changes comment bubble that "[b]ased on survey information for East and West Ridge, [BLM] should *assume* that [the turbine's area] provides winter habitat." ER 385 (emphasis added); *see also* FSER 307. This comment bubble, however, does not call into question BLM's inference about when sage-grouse's use of the area will change due to snow accumulation. Unlike ONDA's argument focusing on the EIS's affected-environment section, in particular page ER 348, this comment bubble addresses a sentence in a subsequent section, discussing the potential for the turbines to displace sage-grouse from their habitat. ER 385. The portion of the sentence that FWS highlighted is a change from the draft EIS that removes the word "winter" from the list of seasons when the turbines would displace sage-grouse. *Id.* The comment bubble indicates that

[7] In discussing winter habitat, ODFW's biologist indicated he was uncertain about whether sage-grouse left the ridges because snow started to fall, but he deferred to the understanding of BLM's biologist regarding this issue. In reply, BLM's biologist explained that the surveys showed that sage-grouse stopped using the sagebrush due to snow accumulating and hardening at a particular depth. *See* FSER 305.

the FWS employee thought BLM should fix this deletion to comport with the East and West Ridge surveys. *See id.*

BLM responded to this comment bubble by consulting ODFW about when, as a scientific matter, winter begins for sage-grouse. *See* FSER 305-06. As a result of ODFW's advice, BLM changed the EIS to reflect what the winter avian surveys indicate, that sage-grouse use the area through early winter but stop after snow accumulates. *See* ER 348, 351. BLM thus adequately addressed FWS's comment. None of the cases ONDA cites (Br. 43, 46) establishes that a further response was necessary. *See, e.g.*, *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011) (where the agency offered *no* meaningful response to considered comments); *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1182 (9th Cir. 2011) (explaining that every comment does not need to be published in the EIS); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1174-75 (9th Cir. 2004) (explaining that it would be inappropriate to fault an agency for not taking actions that were not formally proposed to it).

Moreover, FWS's comment bubble does not discuss how long the winter habitat it believes to be in the project area is available. ER 385. Earlier in the administrative draft, BLM explained the inference it drew from the East and West Ridge surveys, namely, that sage-grouse use of the habitat in the project area continues until snow accumulation gets too deep. FSER 315. None of FWS's

numerous other comments or track-changes comment bubbles indicates disagreement with BLM's understanding of the project area. *See, e.g.*, FSER 307-16. Therefore, nothing cited by ONDA undermines BLM's conclusions about winter use in the project area. *See Weldon*, 697 F.3d at 1055. Because the EIS provided adequate baseline information from which the public and the decision-maker could get an accurate picture of the project's potential impacts, this Court should affirm the decision below.

C. BLM was under no obligation to gather additional baseline information.

ONDA contends that to comply with NEPA's procedural requirements BLM must perform winter habitat mapping of, or conduct winter avian studies on, the turbines' location on private land. *E.g.*, Br. 40. *See generally* Br. 36-43. In asking this Court to require BLM to conduct additional studies or gather more information, ONDA ignores the lessons set forth by this Court in *Lands Council v. McNair*.

As *McNair* explains, reviewing courts generally may not impose specific methods of complying with NEPA's procedural requirements. *See* 537 F.3d at 992 (rejecting the contention that a site visit requirement can be derived from the procedural parameters of NEPA); *see also Vt. Yankee*, 435 U.S. at 548 ("the only procedural requirements imposed by NEPA are those stated in the plain language

of the Act"). In *McNair*, the plaintiffs moved for a preliminary injunction to halt the Mission Brush Project, which called for logging in the Idaho Panhandle National Forest. 537 F.3d at 984. The plaintiffs claimed that the Forest Service failed to comply with the APA, NEPA, and the National Forest Management Act. *Id*. Specifically, the plaintiffs argued that the Forest Service erred by not verifying its predictions about logging impacts on old-growth species' habitat with "observation or on-the-ground analysis." *Id.* at 990. The Court held that, where there is another reasonable basis to uphold an agency's understanding of the project's impacts, a categorical on-site analysis requirement "cannot be derived from the procedural parameters of NEPA." *Id.* at 992 (quoting *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1073 (9th Cir. 2005) (McKeown, J., dissenting), *cert. denied*, 549 U.S. 1111 (2007)). Here too, BLM had a reasonable basis to conclude that sage-grouse do not use the turbine area during the winter months, so BLM had no obligation to conduct the additional studies ONDA demands.

ONDA's reliance (Br. 37, 42) on *Northern Plains Resources Council v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011) ("*NPRC*"), is misplaced. In *NPRC*, the plaintiffs argued that the Surface Transportation Board violated NEPA by failing to provide a basis for its environmental analysis. *Id*. at 1083. The Board acknowledged that it lacked information about the project's impacts on wildlife but planned, as part of the mitigation measures, to gather the

information and mitigate potential impacts after the project was approved. *See id*. at 1083-84. Because the Board deferred gathering baseline information about numerous species until after the project's approval, this Court found the Board's EIS violated NEPA's requirement to provide decision-makers and the public with information before the decision was made. *Id.* at 1082, 1085. This Court noted, however, that had the Board attempted to obtain this information through a methodology that its experts deemed reliable, it would be a different case. *Id.* at 1085.

Similarly, ONDA's citation to *Half Moon Bay Fisherman's Marketing Association v. Carulucci*, 857 F.2d 505, 510-12 (9th Cir. 1988), in support of its contention that winter site visits were required (Br. 38) is also unavailing. *Half Moon Bay*, like *NPRC*, involved a very different situation. In *Half Moon Bay*, this court noted that "the final supplemental [EIS] fails to set forth *any* baseline conditions or monitoring program for ocean disposal." 857 F.2d at 510 (emphasis added).

Unlike *NPRC,* and *Half Moon Bay*, here the EIS presented baseline data and provided it to the public and the decision-maker to inform their understanding of the project's potential impacts on sage-grouse habitat. *See supra* pp. 42-45. None of the cases cited by ONDA suggests that when an agency provides a reasoned basis for its understanding of the baseline conditions of the project area, it must

also verify its understanding through some additional method. Such verification is what *McNair* rejects. 537 F.3d at 992. Accordingly, ONDA's discussion of other ways to determine sage-grouse winter use (Br. 40-41) is irrelevant. This Court should defer to BLM's method for assessing the baseline conditions of the project area.

This Court should further reject ONDA's argument that 40 C.F.R. § 1502.22(a)'s requirement that the agency have the information that is "essential to a reasoned choice among alternatives" means that BLM had to conduct more surveys. Br. 42. This regulation is inapplicable because the information ONDA desires is not "essential to a reasoned choice" among the right-of-way alternatives. ONDA concedes that that the importance of winter habitat is accurately described. Br. 39. And, as explained above, *see supra* pp. 42-45, the EIS informs the public of BLM's basis for understanding that sage-grouse use of the turbine area stops after the snow accumulates. The EIS then explains that sage-grouse would be displaced by the turbines during spring, summer, fall, and early winter. *See* ER 351. The EIS maps where sagebrush is located and where the project occurs, which enables a reader to know where the impacted sagebrush is located. FSER 163-64, 188. The EIS also discloses that the turbines will impact 5,915.2 acres of sagebrush. FSER 186. This information enabled a reasoned choice among the alternatives. That is all that NEPA requires.

ONDA's reliance on a post-decisional declaration from Dr. Clait Braun is improper. Dr. Braun contends that a winter survey of the turbine's proposed location should have been executed. *See* ER 180. But Dr. Braun's opinion has no bearing on the EIS's legal adequacy because, at most, it shows one expert's conflicting opinion about how seasonal use should be determined. BLM reasonably supported its conclusion based on winter surveys of adjacent ridges. Dr. Braun's assertion is insufficient to establish a NEPA violation because "experts in every scientific field routinely disagree," and "'an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" *McNair*, 537 F.3d at 1000, 1001 (quoting *Marsh*, 490 U.S. at 378). Accordingly, this Court should reject ONDA's contention that NEPA required BLM to perform additional surveys to verify its understanding of how sage-grouse use the turbine's proposed location during the winter.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Federal Defendants-Appellees is unaware of any case that is related to this appeal within the meaning of Ninth Circuit Rule 28-2.6.

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