

**UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT**

Docket No. 13-36078

**OREGON NATURAL DESERT ASSOCIATION and
AUDUBON SOCIETY OF PORTLAND,**

Plaintiffs-Appellants

v.

**SALLY JEWELL, Secretary, U.S. Department of the Interior, and
BUREAU OF LAND MANAGEMENT,**

Defendants-Appellees

On Appeal From the
United States District Court for the
District of Oregon No. 12-cv-596-MO

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellants Oregon Natural Desert Association and Audubon Society of Portland both are Oregon non-profit, public interest corporations, do not have shareholders, and do not have parent or subsidiary corporations.

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Council on Environmental Quality, *Considering Cumulative Effects under
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[http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-
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GLOSSARY OF ACRONYMS AND TERMS

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
CMPA	Steens Mountain Cooperative Management and Protection Area
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ER	Excerpts of Record
Monograph	<i>Greater Sage-Grouse: Ecology and Conservation of a Landscape Species and its Habitats</i> , Studies in Avian Biology, No. 38 (Steven T. Knick & John W. Connelly eds.) (2011)
NEPA	National Environmental Policy Act of 1969
ODFW	Oregon Department of Fish and Wildlife
USDOI	U.S. Department of the Interior
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey

STATEMENT OF JURISDICTION

Subject matter jurisdiction exists in the district court under 28 U.S.C. § 1331 because this action is brought against the Secretary of the Interior and the Bureau of Land Management (“BLM”) for violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370h. The federal government waived sovereign immunity pursuant to 5 U.S.C. § 702.

The Oregon Natural Desert Association and the Audubon Society of Portland (collectively, “ONDA”) are conservation organizations whose members use and enjoy the public lands on Steens Mountain in southeastern Oregon. These lands are affected by the Department of the Interior’s decision to grant a right-of-way for a transmission line on BLM-administered lands that would connect an industrial-scale wind energy generation site to the interstate electrical grid, and the associated environmental review of the entire project. ONDA has engaged extensively in the public process for the project.¹

This appeal seeks review of the district court’s September 12, 2013 Opinion and Order (ER 2–25), and subsequently adopted Judgment (ER 1) dated September 16, 2013. This Court has jurisdiction under 28 U.S.C. § 1291 to review appeals

¹ The record demonstrates that appellants have standing, which the Secretary has not challenged. ER 44–47, 219–234 (member declarations); ER 1120–52 (Complaint).

from all final decisions of the district courts of the United States. ONDA timely filed its Notice of Appeal (ER 26) on November 14, 2013. *See* Fed. R. App. P. 4(a)(1)(B), 4(a)(2).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Whether Interior violated NEPA’s requirement to use accurate baseline information by granting the right-of-way for the Steens wind project without surveying **winter use** of the project area by Greater sage-grouse, despite the best available science showing that such information is essential to make an informed decision whether to grant a right-of-way for this project. Issued raised and ruled on at ER 3–4, 15–17.

- II. Whether Interior violated NEPA’s “hard look” requirement by granting the right-of-way without studying the Steens wind project’s effects on **genetic connectivity** between neighboring populations of Greater sage-grouse, despite evidence showing the project would slice across a connectivity corridor critical to sustaining sage-grouse populations throughout Oregon, in an area in which Congress specifically directed BLM to protect “genetic interchange.” Issued raised and ruled on at ER 3–4, 11–17.

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STATEMENT OF THE CASE

This case involves the Secretary of the Interior’s review of the environmental impacts from an industrial-scale wind energy project on Steens Mountain. Steens Mountain is a protected landscape essential to the survival of the imperiled Greater sage-grouse, and lies within one of the bird’s only two remaining habitat strongholds. The sage-grouse—an icon of the American West, endemic to the arid sagebrush sea bounded by the Rocky Mountains, Cascade Range, and the Sierra Nevada—is in danger of extinction from loss and fragmentation of its habitat and increasing isolation of populations due to human activities, including energy development.

The Secretary’s decision grants a federal right-of-way for the North Steens Transmission Line, which would connect the Echanis power generation site to the electrical grid. The 104-megawatt Echanis site would be built on private land near the top of Steens Mountain and contain up to 69 wind turbines, each with rotors approximately 415 feet tall. ER 307–08. The proposed generation site is surrounded almost entirely by the federally-protected Steens Mountain Cooperative Management and Protection Area (“CMPA”). ER 307; *see also* 16 U.S.C. §§ 460nnn *et seq.* (Steens Mountain Cooperative Management and Protection Act of 2000, or “Steens Act”). To connect the generation site to the electrical grid, Interior approved a right-of-way across 46 miles of federal and

private lands. ER 331.

As required by NEPA, BLM prepared an environmental impact statement (“EIS”) to study the environmental effects associated with the combined transmission line and generating site. *See* ER 307. In its EIS, BLM disclosed and evaluated a series of issues, including some of the project’s likely effects on sage-grouse. Unfortunately, the agency’s analysis of impacts to sage-grouse was deficient in key respects. At issue in this appeal are the two most critical of those errors.

First, BLM failed to collect and evaluate fundamental baseline information on sage-grouse winter concentration areas that would be affected by the project. The sage-grouse is a “landscape-scale” species that often requires a home range of several hundred square miles of unfragmented habitat to breed, feed, and shelter in the broiling summers and frigid winters of the dry Intermountain West. The bird uses different parts of the sagebrush ecosystem during different stages of its annual life cycle. The areas the sage-grouse needs to survive over the winter are distinct from its breeding, nesting, and brood-rearing habitats. In fact, sage-grouse experts have concluded that analytical approaches used to identify breeding and nesting habitats are not appropriate for identifying winter habitat. However, in the EIS, BLM claimed that winter habitat was too difficult to survey, and simply assumed—without basis—that sage-grouse do not have any winter habitat in or

around the project area. The record points in the opposite direction, with federal and state wildlife agencies, and one of the Nation’s leading sage-grouse scientists, unanimously disagreeing with BLM’s implausible assumption.

Second, BLM failed to evaluate the impact of the project on genetic connectivity. The project cuts across a corridor of land through which neighboring sage-grouse populations intermingle and that is vital to maintaining genetic diversity among those populations—and therefore persistence of the bird in eastern Oregon and beyond. This error was particularly egregious in light of the Steens Act’s directive that BLM shall conserve, protect, and manage “genetic interchange” on Steens Mountain in order to protect the mountain’s “long-term ecological integrity.” 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a). BLM compounded that error by not considering—as NEPA requires in an EIS—any mitigation measures for the loss of the Steens genetic connectivity corridor. If the agency had considered the issue, it would have had to concede that sage-grouse scientists currently are aware of no *effective* measures that can mitigate for loss of genetic connectivity—which ought to have fundamentally changed not just the environmental analysis but potentially the final decision itself.

ONDA challenged the Secretary’s decision, alleging that the Department of the Interior violated NEPA and other laws in approving the right-of-way for the Steens wind project. While recognizing this Nation’s need to eliminate dependence

on fossil fuels, ONDA pointed out that the Echanis site and 46-mile transmission line are the antithesis of responsible renewable energy development. The project puts imperiled wildlife populations at risk and would open one of America's great wild landscapes to industrial development.

In the district court, the project developer and local county intervened as defendants. The court granted the Secretary's and intervenors' cross-motions for summary judgment, deferring to the Secretary even on these key issues where BLM undertook *no* analysis whatsoever. ONDA appealed.

STATEMENT OF RELEVANT FACTS

I. STEENS MOUNTAIN

Steens Mountain is an extraordinary place deep in southeastern Oregon's high desert. Nearly 10,000 feet high and 60 miles long, this massive fault block mountain is a unique part of an expansive landscape punctuated by the high mountains, broad valleys, and desert playas that characterize the Great Basin. Steens Mountain's precipitous eastern escarpment towers more than a mile above the prehistoric lake bed of the Alvord Desert. Less than a million years ago, alpine glaciers on top of the Steens carved dramatic gorges thousands of feet deep. *See* ER 340–41, 1111–17 (general descriptions in land use plan for Steens Mountain area and in Steens wind project EIS); ER 330, 1107–09 (general vicinity maps); ER 122 (¶ 16) (photograph of project area); ER 117, 119, 121–25, 132 (other

photographs of project area landscape and wildlife). The mountain lies at the heart of one of only three areas where Americans still will be able to see the Milky Way clearly in ten years.²

Steens Mountain covers an ecologically distinctive, half-million acre area replete with specially-protected public land designations and habitats essential to hundreds of species of fish and wildlife. In 2000, Congress recognized these exceptional characteristics in enacting the Steens Act, 16 U.S.C. § 460nnn *et seq.* The Act established the CMPA, a 496,000-acre area managed by BLM and covering most of Steens Mountain. *Id.* § 460nnn-11(a). The purpose of the CMPA is “to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” *Id.* § 460nnn-12(a). The Act defines “ecological integrity” to include maintaining “biological diversity” and “genetic interchange.” *Id.* § 460nnn(5).

The Department of the Interior includes Steens Mountain in its National Landscape Conservation System, established by Congress in 2009 to protect nationally significant landscapes recognized for their outstanding cultural, ecological, and scientific values. *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (codified in scattered sections of 16

² *See* Megan Finnerty, *Disappearing Darkness*, The Republic, <http://www.azcentral.com/longform/news/local/arizona/2014/09/07/arizona-dark-skies-disappearing/15158485/> (last visited Nov. 23, 2014).

U.S.C.); *see also* Statement of Robert T. Anderson, Counselor to the Secretary, Department of the Interior, Senate Energy and Natural Resources Committee, Subcommittee on Forests and Public Lands Management, S. 3052 Steens Mountain Wilderness Act (Sept. 26, 2000) (statement to Congress when it was considering the Steens Act, recognizing “the very special nature of this area” including its “dramatic diversity of flora and fauna”).³

Award-winning author Ursula K. Le Guin described the Steens as “that strange ridge standing across the sagebrush range” in a volume of poetry and original sketches dedicated to the Steens Mountain country. URSULA K. LE GUIN, *Wright’s Point*, in *OUT HERE* 16, 16 (Raven Studios, 2010). For those fortunate enough to have visited this remarkable place, Steens Mountain is one of the true natural wonders of the American West. *See, e.g.*, ER 45 (¶ 5), 222–23 (¶¶ 11–13), 227 (¶ 7) (member declarations).

II. THE GREATER SAGE-GROUSE

Greater sage-grouse are a symbol of the Intermountain West. ER 678. But sage-grouse are in trouble. As many as 16 million of these iconic birds once ranged

³ Statement *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/2000_congressional.Par.29694.File.dat/092600%20Steens%20Mountain%20Wilderness%20&%20Las%20Cienegas%20NCA.pdf (last visited Nov. 23, 2014); *see also* http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS.html (last visited Nov. 23, 2014) (BLM’s National Conservation Lands website).

across 297 million acres of sagebrush grasslands, an area of western North America so vast it is called the “sagebrush sea.” ER 969. But over the past 200 years, agriculture and development have reduced sage-grouse range by nearly half, and sage-grouse populations have steadily declined. ER 969–75. In 2010, Interior’s expert wildlife agency, the U.S. Fish and Wildlife Service (“USFWS” or “the Service”), determined that the Greater sage-grouse is “warranted” for protection under the Endangered Species Act, 16 U.S.C. §§ 1531–43. 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910 (Mar. 23, 2010) (ER 961).⁴ Scientists believe that the fate of the Greater sage-grouse may be a harbinger for that of literally hundreds of other species dependent upon the West’s sagebrush habitats. *See, e.g.*, ER 922–24 (discussing sage-grouse as an “umbrella species” for purposes of developing conservation measures that can benefit many other species).

A. Sage-Grouse Ecology

The sage-grouse is a sagebrush “obligate,” meaning it cannot survive without a healthy sagebrush ecosystem to provide its food, cover, and varying

⁴ Under a court-ordered settlement, the Service must make a final listing decision by September 30, 2015. *In Re Endangered Species Act Section 4 Deadline Litigation – MDL No. 2165*, No. 1:10-mc-00377-E65 (D.D.C. July 12, 2011) (Dkt # 42-1).

seasonal habitats year-round. ER 570–72, 708–39, 966; *see also* *W. Watersheds Proj. v. Salazar*, 843 F. Supp. 2d 1105, 1111–12 (D. Idaho 2012) (description of sage-grouse life history and habitat characteristics).⁵ The bird also is described as a “landscape-scale species” because it requires “large, contiguous areas of sagebrush for long-term persistence.” ER 1009. Because of the region’s harsh and arid conditions and the bird’s reliance on different aspects of the land at different times of the year, home or migratory ranges for sage-grouse can span up to hundreds of square miles. ER 967.

The sage-grouse’s life cycle revolves around the seasons. In the early spring, sage-grouse breed at relatively open sites of low grasses called “leks.” Sage-grouse hens then disperse to nest, with some traveling more than 12 miles from the lek. They nest under taller stands of sagebrush, which are vital both as food sources and for concealment from predators. After chicks hatch in May, they eat flowering plants and insects throughout the early brood-rearing period. As the summer

⁵ Much of the recent science describing the imperiled status of the sage-grouse and its habitat is collected in a scientific monograph first released by the U.S. Geological Survey in November 2009, and subsequently published by the University of California Press’s Studies in Avian Biology Series. Titled *Ecology and Conservation of Greater Sage-grouse: A Landscape Species and its Habitats*, it often is simply referred to as “the Monograph.” ONDA provided BLM with a complete copy of the Monograph as part of ONDA’s extensive comments on the agency’s draft EIS in September 2010. *See* ER 503; *see also* ER 672–945 (key excerpts of the Monograph).

progresses and conditions become hotter and drier, sage-grouse move from sagebrush uplands to wetter sites like natural springs and wet meadows. By the late-summer and fall, as other plants and grasses wither, sage-grouse shift their diet entirely to sagebrush. *See* ER 570–72, 712–33, 966–67 (life cycle and seasonal habitat overviews).

They continue to depend on sagebrush throughout the winter for both food and cover. The birds select winter sagebrush stands based on topography and the availability of sagebrush protruding from the snow. ER 572, 730–33. At high-elevation sites—where deep snow might otherwise bury sagebrush and preclude over-wintering—sage-grouse seek out windswept ridges where high winds prevent heavy snow accumulation, leaving sagebrush exposed and available for the sage-grouse’s needs. These places are critical to the bird’s winter survival. ER 412, 416, 418–19, 438, 730–31. Sage-grouse typically live between three and six years, but researchers have recorded individuals up to nine years of age. ER 967.

Steens Mountain sits near the center of one of just two remaining “strongholds” of contiguous sagebrush habitat left in North America. ER 969–71, 1009–10. According to the Service, conservation of these stronghold areas is “essential for the long-term persistence of greater sage-grouse.” ER 1009.

Oregon’s expert wildlife agency, the Oregon Department of Fish and Wildlife (“ODFW”), estimates that, in the three million acres of sagebrush habitat that BLM

manages in its entire Burns District (which includes Steens Mountain), there may be fewer than 4,000 of the birds left. ER 414 (Table 8); *see also* ER 1107–09 (maps showing BLM Burns District and CMPA location within it).

Fifteen years ago, as the Department of the Interior urged Congress to protect Steens Mountain, it recognized that “[a] small but important sage grouse population calls this area home, and with its historic habitat in rapid decline, this population is regionally significant.” Statement of Robert T. Anderson, *supra* n.3. Likewise, while developing its land use plan for Steens Mountain in 2005, BLM acknowledged that “[i]ncreased fragmentation and loss of connectivity within and between blocks of habitat, especially in shrub steppe and riparian areas, have isolated some habitats and populations and reduced the ability of populations to move across the landscape, resulting in long-term loss of genetic interchange.” ER 1119.

Recent studies have confirmed this. Sage-grouse on Steens Mountain are part of the biologically-defined Western Great Basin population. This is one of four populations scientists have identified within the Northern Great Basin Management Zone.⁶ ER 845–46 (population description); *see also* ER 704 (map

⁶ The Western Association of Fish and Wildlife Agencies—an organization of U.S. state and Canadian provincial wildlife agencies, and of which ODFW is a member—has defined seven sage-grouse Management Zones “for assessing population and habitat trends independent of administrative and jurisdictional

showing Management Zones). The Western Great Basin population is the largest of the four in this Management Zone, and thus the critical population of this core zone. ER 843–47. In 2010, sage-grouse experts undertook an unprecedented population viability analysis. It showed a *100% probability* that the Western Great Basin population will decline below 500 birds (the minimum size to maintain population viability) in just 100 years if the lands’ carrying capacity continues to decline. ER 846.

Sage-grouse live year-round on Steens Mountain, but, as described, move among different types of sagebrush habitats over the course of the seasons. ER 344–47. Importantly, the birds not only move among seasonal habitats centered around leks, but also migrate across so-called “connectivity corridors” to reach neighboring areas of habitat they need to survive. ER 412, 975–76. Migration across these corridors allows local sage-grouse populations to intermix—which is key to promoting genetic diversity and protecting against inbreeding that is detrimental to the species’s survival. *See* ER 869–918 (Monograph chapter dedicated to genetic connectivity); ER 772 (genetic research has confirmed “unique genetic clusters” in neighboring “populations geographically adjacent to

boundaries.” ER 682. According to the USFWS, the Northern Great Basin Management Zone, where Steens Mountain is located, is significant because it is among the zones holding “core populations” and that “have the highest reported densities” of the birds. ER 969–71 (including map at Fig. 2).

one another”); ER 182–84 (¶¶ 27–30, 36) (overview of importance of genetic connectivity by Dr. Clait Braun, a Monograph author and one of the Nation’s leading sage-grouse experts). According to the Service, “maintaining habitat connectivity and sage-grouse population numbers are essential for sage-grouse persistence.” ER 976.

B. Threats to the Sage-Grouse

The ecosystem on which sage-grouse depend is among the most vulnerable in North America, with loss and fragmentation of sagebrush threatening the bird’s prospects for survival. ER 967, 975, 1009. Fragmentation takes many forms, from habitat conversion (*e.g.*, elimination of food and cover as weeds spread and replace sagebrush), to construction of roads, fences, power lines, energy facilities, and other human developments, to wildfires and livestock grazing. *See* ER 976–1014 (USFWS comprehensive review of threats to sage-grouse). Any land use that subdivides blocks of intact sagebrush causes fragmentation. *See* ER 979 (defining fragmentation as “the separation or splitting apart of previously contiguous, functional habitat components of a species”).

The transmission lines and strings of gigantic spinning turbines that make up wind energy facilities can cause serious harm to sage-grouse. According to the Service, power lines directly affect sage-grouse “by posing a collision and electrocution hazard, and can have indirect effects by decreasing lek recruitment,

increasing predation, fragmenting habitat, and facilitating the invasion of exotic annual plants.” ER 980 (internal scientific references omitted). Power poles afford perches for raptors and ravens that “increase a raptor’s range of vision, allow for greater speed during attacks on prey, and serve as territorial markers.” ER 980. In places like the Steens wind project area—where natural perches are limited in areas of relatively low, desert vegetation—raptors are quick to populate new stretches of power lines. ER 433, 980. The “increased abundance of raptors and corvids within occupied sage-grouse habitats can result in increased predation.” ER 980.

Importantly, whether or not predators actually move into a developed area, and even where sagebrush remains intact around project infrastructure, these types of human activities will result in a “functional” fragmentation and loss of habitat. This is because sage-grouse exhibit strong avoidance behavior toward vertical structures such as power lines and wind turbines. ER 980 (“The presence of a powerline may fragment sage-grouse habitats even if raptors are not present.”). Scientists believe sage-grouse avoid these structures instinctively because the birds know they may provide perches and hunting corridors for predators. ER 980, 1003. The Service has concluded that power lines are “a particularly strong barrier to movement.” ER 980.

Wind turbines—ten times as tall as any tree in sage-grouse habitat and

usually strung out over several miles with connecting roads and buried power collector lines—pose similar problems. *See* 1002–05. Although low-flying sage-grouse are not as likely as other birds to be killed by blade strikes, they avoid turbines as they do power lines because they instinctively perceive the tall vertical structures to be predator perches. ER 1003. Scientists also suspect the birds avoid turbines because of the noise and air disturbance as well as the “shadow flicker” effect⁷ generated by the giant blades. ER 1003. For these reasons, the Service has recommended that BLM configure turbine locations “to avoid areas or features of the landscape known to attract raptors (hawks, falcons, eagles, owls)[,]” avoid fragmenting large, contiguous tracts of habitat by instead placing turbines in already altered or cultivated areas, and avoid “locating turbines in known local bird migration pathways.” ER 1084–85.

The leading study reviewing the effects of energy development on Greater sage-grouse concluded that *all* the scientific literature on the topic “reported negative impacts of energy development on sage-grouse” and “*none* reported *any* positive effects of development on either populations or habitat.” ER 1088 (emphasis added) (U.S. Geological Survey wind energy report, citing the Monograph’s Naugle *et al.* (2010), also reviewed by USFWS *at* ER 994–1000).

⁷ Spinning turbine blades cast flickering shadows that mimic predator shadows and elicit an avoidance response in ground-dwelling birds. ER 1003.

C. Sage-Grouse Conservation

One of the great challenges of sage-grouse conservation is to understand and protect not only the seasonal habitat areas the bird needs to survive and reproduce each year—lek sites and nesting, brood-rearing, and over-wintering habitats—but also the bird’s migratory and population-level movements. *See* ER 678–81. Loss of connectivity between neighboring populations increases population isolation and, therefore, “the probability of loss of genetic diversity and extirpation from stochastic events” such as wildfire or drought. ER 975; *see also* 412, 420, 435, 873. Maintenance of connectivity and reduction of fragmentation of sagebrush habitats is key to the long-term welfare of the sage-grouse. ER 403; *see also* ER 401, 708–09, 730, 934–35 (similar statements from leading sage-grouse scientists); ER 976 (USFWS stating that “maintaining habitat connectivity and sage-grouse population numbers” is “essential” for survival of the species).

The Service (ER 975), as well as the Department of the Interior’s sage-grouse National Technical Team⁸ (ER 278) and Oregon’s Department of Fish and

⁸ In 2011, the Department of the Interior established its National Technical Team consisting of the department’s leading expert sage-grouse scientists. The Team was charged with identifying “science-based . . . conservation measures” that are “necessary to promote sustainable sage-grouse populations, and which focus on the threats in each of the management zones.” ER 264. The Team developed these conservation recommendations on a consensus basis, ER 268, 280–97, and, in December 2011, released its “Report on National Greater Sage-grouse Conservation Measures.” ER 270.

Wildlife (ER 407), all agree on the utmost importance of maintaining and restoring habitat connectivity to promote population movement and genetic diversity. In fact, so important is the issue of connectivity that both the Service in its “warranted” decision and the Nation’s top sage-grouse experts in the Monograph dedicate entire sections to it. ER 975–76, 869–918. These scientists understand that protecting core regions and maintaining genetic connectivity with more isolated sage-grouse populations “may help reverse or stabilize the processes of range contraction and isolation that have resulted in long-term population declines.” ER 871; *see also* ER 965 (USFWS explaining that sage-grouse “populations follow an isolation-by-distance model of restricted gene flow”—meaning “gene flow resulting from *movement between neighboring populations* rather than being the result of long distance movements of individuals”) (emphasis added).

Based on the average distance between population centers (leks)—about 11 miles—leading sage-grouse experts Drs. Steven Knick and Steven Hanser of the U.S. Geological Survey evaluated connectivity between populations throughout the West. ER 869–918; *see also* ER 975–76 (USFWS summarizing Knick and Hanser’s work). They drew lines connecting leks within 11 miles of each other to identify habitat areas and local populations that are biologically connected. They discovered that even small disruptions in lek connectivity resulted in “large increases” in probability of lek abandonment. ER 975. Ultimately, Knick and

Hanser concluded that maintaining connectivity—and therefore sage-grouse population numbers—is “essential for sage-grouse persistence.” *See* ER 975.

Building on that research, Oregon’s Department of Fish and Wildlife in 2011 developed a *Conservation Assessment and Strategy* for sage-grouse based on a “Core Areas” framework. ER 401–02, 422–31. Similar to Knick and Hanser’s work, the ODFW drew circles around lek sites in order to identify statistically significant areas of sage-grouse habitat in Oregon. These are the “areas of greatest biological importance to the persistence [of] sage-grouse populations.” ER 401–02. As described by the ODFW, the strength of the approach is “that it uses biological information to identify Core Areas with the objective of protecting the most important breeding areas.” ER 423. It allows land managers “to map and analyze the risks and necessary conservation measures” for each Core Area. ER 423.

But the state wildlife agency recognized that the Core Areas approach tells only part of the story. The ODFW’s research showed that this approach, focused solely on local populations’ breeding areas, does not capture the sage-grouse’s distinct winter habitat areas, or the corridors used by neighboring populations to intermix. ER 424. Thus, the agency also developed a complimentary approach focusing on “connectivity corridors” that link local and regional sage-grouse populations. ER 423–24. The agency identified just eight corridors in all of eastern Oregon. ER 432 (Fig. 27); *see also* ER 71–72 (¶¶ 51–54) & 95–97 (highlighting

those corridors with red circles on ODFW’s map, as well as ONDA maps).

These corridors are the places in southeastern Oregon in particular that the Service had described just a year earlier as “large areas of relatively unfragmented sage-dominated landscapes which are important for maintaining long-term connectivity” between sage-grouse populations. ER 1002–03. According to the National Technical Team, connectivity corridors (along with winter concentration areas) are among the “priority habitats” that “have the highest conservation value to maintaining or increasing sage-grouse populations.” ER 276 (National Technical Team Report).

One of the eight corridors identified by the ODFW is the Steens corridor. *See* ER 97.⁹ The Steens corridor is the only corridor connecting the western and eastern halves of Oregon’s sage-grouse populations within a protected landscape—the Steens Mountain CMPA. ER 72 (¶ 55) & ER 97 (map); *see also* ER 181 (¶ 23) (Dr. Braun noting “the importance of this Steens Mountain location to connectivity between sage-grouse populations” and that a disruption of connectivity will likely cause “population declines”); ER 184–85 (¶ 36) (Dr. Braun explaining that proposed turbine strings and transmission line would “bisect an existing sage-

⁹ The ODFW did not name the connectivity corridors it identified, but for ease of reference ONDA has referred to the corridor at issue here as the “Steens corridor.” *See* ER 72 (¶ 55 n.1).

grouse connectivity corridor that links not only leks and lek complexes in the area, but also for connectivity between regional sage-grouse populations”). The unique genetic corridor on Steens Mountain is the keystone to one of the last substantially connected sage-grouse population groups in the bird’s remaining range—in a place whose “long-term ecological integrity” Congress explicitly directed BLM to protect by maintaining “biological diversity” and “genetic interchange.” 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a); *see* ER 1002–03, 1010.

III. FEDERAL LAND MANAGEMENT

NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It “declares a broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); *see* 42 U.S.C. § 4331. NEPA’s “action-forcing” procedure serves two purposes: (1) “it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” and (2) it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson*, 490 U.S. at 349) (internal citations and alteration omitted).

Agencies must prepare an EIS for “major Federal actions significantly

affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The EIS is NEPA’s “chief tool, designed as an ‘action-forcing device to [e]nsure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.’” *Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) (“*ONDA*”) (quoting 40 C.F.R. § 1502.1). The obligation to obtain and disclose information about environmental impacts is central to NEPA’s basic principle of “democratic decisionmaking.” *Id.* at 1121 n.24.

“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). Statements in a NEPA document “shall be supported by evidence that the agency has made the necessary environmental analyses.” *Id.* § 1502.1. Agencies “shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [NEPA documents].” *Id.* § 1502.24. By focusing attention on the environmental consequences of a proposed action, NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast.” *Robertson*, 490 U.S. at 349.

Establishing the environmental baseline is a critical part of an EIS. NEPA requires BLM to “describe the environment of the area(s) to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15. It is against this

baseline information that an agency measures and evaluates impacts. *See Am. Rivers v. FERC*, 201 F.3d 1186, 1195 & n.15 (9th Cir. 2000). The Council for Environmental Quality has explained that the “concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.”¹⁰ Likewise, this Court has observed that “[w]ithout establishing the baseline conditions which exist [in the action area], there is simply no way to determine what effect [the action] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans’ Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1998).

Finally, “a NEPA analysis should be informed by the laws driving the federal action being reviewed.” *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013).

IV. THE STEENS WIND PROJECT

In 2007, a corporation called Columbia Energy Partners (“the developer”) began to pursue development of a large-scale wind project on Steens Mountain. The developer divided the project into four turbine sites—called Echanis, East Ridge, West Ridge, and Riddle Mountain, all linked by a single transmission

¹⁰ Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* (Jan. 1997), at 41, available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (last visited Nov. 23, 2014).

line—for which it sought county use permits. Each site could generate up to 104 megawatts—just below the 105-megawatt threshold above which state regulations would have required review and approval by Oregon’s Energy Facility Siting Commission. *See* ER 307–08, 357–60 (descriptions and map of the four sites and their locations); ER 230 (¶ 17) (characterizing multi-site project). The developer abandoned the East Ridge and West Ridge sites in November 2011 and the Riddle Mountain site sometime thereafter. *See* ER 7, 260.

In 2008, Harney County granted a Conditional Use Permit for the developer to build up to 69 turbines on the Echanis site, a parcel of private land surrounded by public land within the Steens Mountain CMPA. *See* ER 307, 326. Because the only access to the turbine site is a rough, two-track jeep trail, the construction of the turbines alone would require widening and upgrading 19 miles of access roads, building at least 17 miles of new service roads through sagebrush, and constructing other facilities on public lands in essential sage-grouse habitat within the CMPA. ER 333–38 (project description); ER 91, 98–99, 102, 104–05, 108–09, 111 (maps showing project as it relates to sage-grouse seasonal and connectivity habitats).

To connect the generation site to the existing electrical grid, the developer applied to BLM for a right-of-way to build a transmission line that would stretch northward from Steens Mountain for 46 miles, crossing public lands within the CMPA. ER 330 (map). Because the generation site could not deliver power to the

grid without the transmission line across public lands, NEPA obligates BLM to study the environmental impacts of the entire project before deciding whether to grant the transmission line right-of-way. 40 C.F.R. §§ 1508.7, 1508.25(a); ER 307. In 2009, the agency contracted with an outside consultant, selected by the developer, to prepare the required EIS. ER 1090.

During the NEPA process, ONDA met with BLM officials and submitted extensive written comments and accompanying studies emphasizing Steens Mountain's special values and advising that the project would harm sage-grouse, golden eagles, rare bats, wilderness values, and other natural resources. *See, e.g.*, ER 465–945 (ONDA comments and exhibits on Draft EIS); ER 946–48 (comment letter); ER 457–64 (requests for information needed in order to evaluate BLM's environmental analysis); ER 452–56 (summary of issues raised by ONDA, USFWS, and EPA); ER 447–51 (comment letter); ER 445 (comment letter); ER 386–93, 303–05 (letters to Secretary of the Interior); *see also* ER 228 (¶ 12), ER 74 (¶ 58) (summarizing ONDA's participation in NEPA process). ONDA cited extensively from scientific literature and from state and federal agency reports, as well as documenting its own field observations and data. ONDA urged BLM to collect industry-standard baseline data to inform the process, and specifically identified the Steens corridor that is critical for seasonal and genetic connectivity among local sage-grouse populations.

In a 2009 report that identified 467,000 acres of lands in eastern Oregon with high wind resources and relatively few resource conflicts, ONDA explained that Steens Mountain, on the other hand, falls within a small number of “certain special landscapes which, due to their iconic qualities, pristine nature, and biological or recreational values are not compatible with industrial use.” ER 596–97, 609–10 (ONDA’s report, *Oregon’s High Desert and Wind Energy: Opportunities and Strategies for Responsible Development*). “By overlaying wind resource potential with these other natural values, a picture emerges showing where wind power development will have the least social conflict and environmental impact.” ER 595. Steens Mountain, by contrast, falls within the very highest category of potential conflict.

In March 2010, the Service determined that the Greater sage-grouse is “warranted” for listing under the Endangered Species Act. ER 961. Finding the sage-grouse in danger of extinction, the Service reversed its prior “not warranted” decision on the bird’s status from just five years earlier. *See* ER 961. The Service explained that its “understanding of the status of the species and the threats affecting it has changed substantially” since January 2005. ER 1040. The Service relied heavily on the Monograph in making its findings. *See* ER 961. Among other threats to the sage-grouse and its shrinking habitat, the Service identified wind energy development and associated transmission lines as factors contributing to the

bird's imperiled status. ER 980–81, 1002–04.

In the 2010 decision, the Service specifically identified southeastern Oregon—where Steens Mountain is located—as a high risk area with respect to wind energy generation. Commercial-scale developers had targeted this part of Oregon as a “focus area” for wind projects. ER 1002. That was problematic, pointed out the Service, because the region has “large areas of relatively unfragmented sage-dominated landscapes which are important for maintaining long-term connectivity between the sage-grouse populations.” ER 1002.

In July 2010, BLM released a Draft EIS describing the likely environmental effects of the North Steens Transmission Line and Echanis generation site. In addition to ONDA and other members of the public, federal and state agencies criticized the draft study. For example, the Service criticized BLM's decision to site the project in habitats identified by both federal and state scientists as essential to the survival and recovery of the sage-grouse. ER 960. The Service stated that BLM needed more survey information in order to evaluate the project's impacts on sage-grouse over-wintering habitat on Steens Mountain. ER 960.

The Service's criticism echoed the ODFW's specific advice—fully two years earlier—that BLM needed to collect monitoring information to understand the project area's importance to sage-grouse as winter habitat. ER 441 (2008 letter to BLM identifying sage-grouse as a “species of concern” to the State of Oregon

and recommending on-foot and helicopter winter surveys because the project area “may [] provide crucial winter habitat for sage grouse”); *see also, e.g.*, ER 546, 575–90 (ONDA also expressing concern over Draft EIS’s deficient winter habitat information and potential displacement of sage-grouse from winter habitat, and providing BLM with a leading published study on sage-grouse winter habitat).

Because sage-grouse rely upon different and widely distributed areas over the course of their annual life cycle, having information on only the bird’s spring and summer breeding, nesting, and brood-rearing habitats on Steens Mountain is insufficient to understand the bird’s distinct winter habitat needs. *See* ER 178–80 (¶¶ 16, 20); ER 58, 77 (¶¶ 26, 68). The birds have to go somewhere between December and April each year. Without proper winter habitat, their survival hangs in the balance. In the Monograph, researchers concluded that “[s]agebrush removal in winter habitats may be especially detrimental because of the relatively long periods that winter habitat may be occupied by sage-grouse annually.” ER 735.

Even BLM’s own NEPA consultant recognized these data gaps. In 2009, for example, the consultant’s project lead expressed concern about the adequacy of the developer’s wildlife surveys:

It stretches the imagination a bit that there really are no issues with . . . sensitive species that would need to be better defined in the field preparatory to writing an EIS. . . . if we really are being directed to go with what we’ve got (not all of which we’ve been able to see yet) that’s fine—but we MUST document that “in our experience” a certain level of study, documentation and consultation are required to

prepare defensible documents under NEPA.

ER 1072. In 2010, the consultant again voiced concern about the inadequacy of the biological information and the developer's "low budget" to collect information necessary to an informed analysis in the EIS:

In comparison to an analysis that is based on conducting detailed studies, an analysis that is based on whatever information is available will appear more "superficial." In many cases, our discipline leads have had a very limited information base and this has been expressed in our weekly calls; some of them have not even been budgeted to do a field reconnaissance, much less studies. In our Portland meeting I described for you the difference between the low budget we are working under to complete this project and the typical budget for a full EIS with complete field studies.

ER 1066 (underlining added). However, at the developer's insistence, the hired consultant and the agency pushed on with incomplete and in some cases missing information. *See, e.g.*, ER 1065, 1071, 1074–77.

In April 2011, the ODFW issued its *Conservation Assessment and Strategy* for sage-grouse. ER 394. As described, the ODFW used a "Core Area" approach to identify breeding, nesting, and brood-rearing habitats, and a complimentary "connectivity corridors" approach to identify unique places that link local and regional populations. ER 422. Consistent with the highest-priority importance that the National Technical Team ascribed to connectivity habitat later that same year, ER 276, the state agency identified all sagebrush communities within these connectivity corridors as high priority habitats that are "essential and limited." ER

426. The ODFW identifies winter habitat as “critical to the persistence of the species.” ER 426. And the *Strategy* specifically identifies the Steens corridor linking the biologically important population on Steens Mountain with neighboring populations to the east. ER 432; *see also* ER 95.

In October 2011, BLM released a Final EIS. Reviewing that document, the Service warned that the project would “cause adverse impacts to sage-grouse, golden eagles, other migratory birds, and bats that have not been adequately analyzed, avoided, and mitigated” and that the EIS “lacks essential information.” ER 301–02. Despite that warning, then-Secretary of the Interior Ken Salazar signed a Record of Decision in December 2011, granting a right-of-way for construction and operation of the transmission line and effectively authorizing the project to proceed. ER 257. ONDA filed suit in federal district court challenging that final approval. ER 1120. The parties briefed cross-motions for summary judgment, and, in September 2013, the district court granted summary judgment to BLM and the intervenors. ER 25. ONDA appealed. ER 26.

But after Interior granted the right-of-way, the other regulatory and financial underpinnings of the project collapsed. Around February 2013, the developer withdrew its application to the Bonneville Power Administration for an interconnection agreement, which is required to connect the North Steens Transmission Line—and the project’s power—to the grid. Around that same time,

BLM revoked the developer's Notice to Proceed and refunded the developer's posted project bond. Then, Southern California Edison cancelled the developer's Power Purchase Agreement—meaning the developer now has no buyer for the project's power. *See* ER 30–43 (a status report from the parties describing these developments). Based on these developments, it seems likely that the county land use permit, granted in April 2007, has expired because the developer has yet to undertake any construction for the project. *See, e.g.*, Harney County, Or., Zoning Ordinance § 6.040 (2009) (“Authorization of a conditional use shall be void after one year or such lesser time as the authorization may specify unless substantial construction has taken place.”).

Recognizing the project was crumbling, ONDA petitioned the Secretary to withdraw the Record of Decision, in March 2013, and again in April 2014. The Secretary never answered ONDA's petition, although BLM's Oregon/Washington state office director sent ONDA a letter in June 2014 effectively denying the petition and insisting that BLM still views the Steens wind project—despite all evidence to the contrary—as viable.¹¹ Therefore, following unsuccessful negotiations facilitated by one of this Court's mediators, this appeal remains on the docket.

¹¹ *See* <http://onda.org/what-we-do/conservation-laws/steens-wind-onda-v.-salazar> (last visited Nov. 23, 2014) (petitions and BLM response).

SUMMARY OF THE ARGUMENT

Interior violated NEPA in two critical ways, making the Secretary's decision to grant the transmission line right-of-way uninformed, arbitrary, and capricious. First, BLM failed to collect and evaluate fundamental baseline information on sage-grouse winter habitat areas that would be affected by the Steens wind project. NEPA demands "[a]ccurate scientific analysis" and conclusions that are "supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. §§ 1500.1(b), 1502.1. As this Court has explained many times, establishing an accurate environmental baseline is essential to an informed analysis under NEPA. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011); *Am. Rivers*, 201 F.3d at 1195 & n.15; *Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1379–80 (9th Cir. 1998); *Half Moon Bay*, 857 F.2d at 510.

Winter habitat is distinct from the sage-grouse's other seasonal habitat requirements and is indispensable to the species's population persistence. Loss of winter habitat is irreversible, as scientists currently know of no way to restore or create winter habitat once it is lost. Although federal and state expert wildlife agencies raised the alarm that the project area was likely important winter habitat, BLM—based on several off-site, time-limited, and largely inapposite surveys conducted elsewhere—elected to "assume" that no sage-grouse winter habitat

exists near the project area.

The record shows that is not at all the case. And, in fact, the Service—Interior’s own expert wildlife agency—advised BLM to assume just the opposite: that winter habitat *is* present in the project area. The district court erred in deferring to the Secretary’s decision to grant the right-of-way when BLM did not collect, disclose, or evaluate reliable and accurate baseline information about sage-grouse winter concentrations on the Echanis turbine site and other affected lands on Steens Mountain. *N. Plains Res. Council*, 668 F.3d at 1083.

Second, BLM did not evaluate the impact to genetic connectivity from a project slicing across lands identified by the expert wildlife agencies as a vital connectivity corridor. BLM completely omitted this critical topic from the EIS—despite warnings from expert wildlife agencies (and ONDA), and in disregard for the Steens Act’s requirement that BLM protect “genetic interchange” on Steens Mountain. Had BLM considered the issue, it would have had to concede that sage-grouse scientists currently are aware of no measures that can effectively mitigate for the loss of genetic connectivity between neighboring populations—and the Secretary might have made a different decision whether to grant the right-of-way.

Where an agency “concludes that a project will not jeopardize a wildlife corridor, it must support that conclusion with at least some study or analysis of how the reduced corridor will affect the species at issue.” *Or. Natural Res. Council*

v. Goodman, 505 F.3d 884, 892 (9th Cir. 2007). But where, as here, the agency “entirely fail[s] to consider an important aspect of the problem,” its decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It was error for the district court to “defer to a void.” *ONDA*, 625 F.3d at 1121.

If this Court agrees that Interior violated NEPA in one or both of these ways, the Court must reverse the district court’s judgment, hold unlawful the Record of Decision granting the right-of-way and the associated EIS, and vacate the Record of Decision. 5 U.S.C. § 706(2)(A); *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 300 (2003) (“agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’”) (other citations omitted); *Nw. Envtl. Def. Ctr. v. Bonneville Pwr. Admin.*, 477 F.3d 668, 681 (9th Cir. 2007) (“Under the APA, we must set aside [the agency]’s action if it was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court’s ruling on cross-motions for summary judgment. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). The Administrative Procedure Act (“APA”), 5 U.S.C. §§

701–706, governs review of the Department of the Interior’s compliance with NEPA. *See Ctr. for Biol. Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 641 (9th Cir. 2010). Under the APA, this Court will set aside Interior’s decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035, 1041 (9th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). This standard requires the Court to “ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011).

Although the arbitrary and capricious standard does not allow the Court “to substitute its judgment for that of the agency,” *Motor Vehicle Mfrs.*, 463 U.S. at 43, this Court “cannot infer an agency’s reasoning from mere silence.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005). “It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Natural Res. Def. Council v. EPA*, 735 F.3d 873, 877 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 50); *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (“our review of an administrative agency’s decision begins and ends with the reasoning that the agency relied upon in making that decision”).

The APA standard of review requires the Court to undertake an “inquiry into

the facts [that is] searching and careful.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007) (internal quotation omitted). Courts act as a crucial corrective for poorly reasoned or factually unsupported agency actions. *See id.* at 1023 (“We will defer to an agency’s decision only if it is fully informed and well-considered, and we will disapprove of any agency’s decision if it made a clear error of judgment[.]”) (internal quotation marks and citations omitted). No deference is due where an agency’s “conclusions . . . do not have a basis in fact.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001).

II. THE SECRETARY’S DECISION WAS ARBITRARY BECAUSE BLM DID NOT STUDY WINTER HABITAT

The Department of the Interior violated NEPA’s requirement to collect, disclose, and evaluate baseline data that was necessary to assess the impact of the project. 40 C.F.R. §§ 1500.1(b), 1502.15, 1502.24. While BLM assembled some information on breeding, nesting, and brood-rearing habitats, the agency omitted winter habitat from its environmental review. Instead, it decided to “assume” that no sage-grouse winter habitat exists in the project area, ER 348—even though Interior’s own expert wildlife agency recommended just the opposite: “Based on survey information for East and West Ridge, [BLM] *should assume* that Echanis provides winter habitat.” ER 385 (emphasis added) (comment to BLM from USFWS in 2011, on the draft Final EIS).

That omission is fatal to a reasoned and properly informed decision because

winter habitat is “critical to the persistence of the species.” ER 426 (ODFW *Strategy*); *see also* ER 949 (“Impacts to wintering habitat may have disproportionate effects on regional population size and persistence.”); ER 1089 (Department of Energy’s U.S. Geological Survey, stating same); ER 298–99 (National Technical Team explaining that sage-grouse show high fidelity to winter concentration areas and that “loss or fragmentation [of these areas] can result in significant population impacts”). Indeed, loss of winter habitat is *irreversible*: as the ODFW notes, “currently there are no studies or methods for restoring or creating winter habitat if it is lost.” ER 426. Thus, to ensure that the Secretary and the public were properly informed of the *full* impacts of the project, NEPA required BLM to collect accurate baseline information on potentially affected sage-grouse winter habitat.

NEPA requires that an agency provide the data on which it bases its environmental analysis to the public and to the decisionmaker. *See N. Plains Res. Council*, 668 F.3d at 1083–85, 1100 (invalidating a decision, and ordering the agency to issue a new decision, where agency failed to collect data on sage-grouse habitat, including wintering areas that would be affected by proposed railroad lines); *Neighbors of Cuddy Mtn.*, 137 F.3d at 1379–80 (invalidating decision where agency failed to provide information regarding how many woodpecker home ranges there were within a timber sale area, or how many home ranges would be

affected by the logging). “Without establishing the baseline conditions which exist [in the project area before the project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA.” *Half Moon Bay*, 857 F.2d at 510.

Once a project begins, “the ‘pre-project environment’ becomes a thing of the past” and evaluation of the project’s effect becomes “simply impossible.” *N. Plains Res. Council*, 668 F.3d at 1083 (quoting *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988)). A proposal that lacks “site specific data” regarding potential environmental effects “lacks any rational basis.” *Half Moon Bay*, 857 F.2d at 510. It therefore violates “NEPA’s requirement of ensuring that the decision maker has the information necessary to consider environmental factors and make a reasoned decision.” *Id.* at 511; *see also Am. Rivers*, 201 F.3d at 1195 & n.15 (an accurate and complete baseline against which to compare potential effects of reasonable alternatives is “critical” to the NEPA process); *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, 681 F.3d 581, 588 (4th Cir. 2012) (“A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.”). Without information about how the project would affect sage-grouse survival on Steens Mountain during the difficult winter months, the Secretary’s decision to approve the right-of-way was arbitrary.

A. Collecting Winter Use Data was Essential to a Reasoned Decision

As described above, there is scientific consensus that sage-grouse survival depends on access to different habitat areas within the sagebrush ecosystem over the full course of a year as the birds breed, nest, raise chicks, and over-winter. These areas can span dozens of miles across broad landscapes, making sage-grouse “a true landscape species.” *See* ER 967 (on an annual basis, individuals may occupy areas as vast as 237.5 square miles). BLM recognized this key premise in the EIS. *See* ER 345 (stating that sage-grouse “use different sagebrush and riparian habitats throughout the year for courtship (lekking), nesting, brood rearing, and wintering” and that “[s]pecific habitat needs can be described in terms of breeding habitat, brood rearing habitat, and winter habitat”).

With regard to winter habitat specifically, the EIS generally acknowledges that, during winter months, sage-grouse move to places where sagebrush plants are exposed above the snow to provide adequate food and cover. ER 346–47. BLM also apparently understood that there “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 the ODFW *Strategy*).

Yet, despite accurately describing winter habitat as (1) critical to the sage-

grouse's survival and (2) distinct from the sage-grouse's other seasonal habitats, and despite information from expert agencies highlighting the highest-priority importance of this issue, ER 385, 426, BLM failed to collect, disclose, or study information about where such winter habitat exists in and around the project area. *See* ER 361–65, 366–69; *see also* ER 59–60 (¶¶ 29–30) (summarizing the surveys). The agency simply admits that “[w]inter avian surveys were not conducted at the Echanis site.” ER 348. And because BLM did not collect that baseline information, it could not evaluate the project's impacts to winter habitat—and therefore impacts to local populations' ability to survive over the winter on Steens Mountain. BLM conceded that, because it failed to identify winter and other seasonal habitats on Steens Mountain, it could not provide “specific estimates for acres of these habitats surrounding the Project.” ER 347.

BLM claimed it could not collect this baseline habitat information because of the “variability” of the sage-grouse's seasonal habitats. ER 347. However, as leading sage-grouse expert Dr. Braun explained, the agency's excuse is “inconsistent with the scientific literature and common practices of federal and state agencies. . . . These habitats can be, and regularly are, identified, assessed, and mapped by agency and independent scientists.” ER 179 (¶ 17) (including citations to published scientific studies).

Without baseline information on winter habitat, BLM was left to rely solely

on lek locations to assess impacts to sage-grouse. But, as described above, that information is unsuited to evaluate effects to winter habitat. *See supra* Section II.C. (pp. 18–20); ER 179 (¶ 18). Winter habitat is unique from, and independent of, breeding sites. In its sage-grouse *Strategy*, the ODFW explains that its studies indicate that “critical winter range occur[s] *outside* of lek density strata delineations.” ER 425 (emphasis added). Put differently, identifying *winter* habitat—in contrast to identifying nesting and brood-rearing habitat—is not simply a matter of drawing concentric circles around breeding sites. This is why the ODFW undertook a separate analysis, distinct from basic “Core Area” modeling focused on lek sites, to identify winter habitat. ER 425. But BLM arbitrarily failed to follow the expert wildlife agency’s lead and take the logical and necessary steps to delineate *all* of the habitat that the project would affect.

This conflicts with NEPA’s requirement that an agency must collect and use accurate, readily obtainable information, which in turn is prerequisite to a reasoned decision. *See N. Plains Res. Council*, 668 F.3d at 1083–85; 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.1, 1502.15, 1502.24; *see also W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1191–92 (9th Cir. 2002) (both holding agency violated NEPA where it did not address sister agency recommendations and concerns). Under NEPA, if incomplete or unavailable information relevant to environmental

impacts “is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency *shall* include the information in the environmental impact statement.” 40 C.F.R. § 1502.22(a) (emphasis added). *Only* if obtaining the missing information would involve “exorbitant” costs or “the means to obtain it are not known” can the agency instead rely upon “theoretical approaches” or “generally accepted” research methods. *Id.* § 1502.22(b).

Here, it is clear that baseline information on winter habitat is “essential” to a reasoned decision. *See* ER 412, 416, 418–19, 438, 730–31, 735. But BLM *does not* in the EIS claim exorbitant costs of collecting that information or that the agency did not know how to conduct winter surveys. *See* ER 348. Dr. Braun points out not only that winter habitat surveying is critical to understanding how sage-grouse use the landscape all twelve months of the year, but also that *field* surveys (not just mapping exercises) “are essential” to identify winter concentration areas. ER 180 (¶ 21); *see also N. Plains Res. Council*, 668 F.3d at 1085 (rejecting agency’s claim that “rough terrain” precluded agency from surveying sage-grouse use of project area during NEPA review when it admitted it planned to conduct post-construction surveys). Identifying such areas is critical because large numbers of sage-grouse congregate in small areas of ideal winter habitat to survive four long months until the spring thaw announces the new mating season and draws birds out of their winter hideaways and onto far more visible leks. *See* ER 180 (¶ 21); ER 735.

Without establishing a baseline for winter habitat in the wind project area, BLM was flying blind when it decided to just “assume” that sage-grouse do not use the project area over the winter—contrary to the specific findings and warnings by both Interior’s and Oregon’s expert wildlife agencies. Although an agency does not always “violate NEPA when it does not defer to the concerns of other agencies,” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013), NEPA requires BLM to show exactly where in the EIS the agency “consider[ed] these concerns and explain[ed] why it finds them unpersuasive.” *Id.*; *see also Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (where “evidence and opinions directly challenge the scientific basis upon which the Final EIS rests and which is central to it,” an agency is “required to disclose and respond to such viewpoints in the final impact statement itself”); *Kraayenbrink*, 632 F.3d at 492 (BLM violated NEPA where it “offered no reasoned analysis whatsoever in support of its conclusion—which is in direct conflict with the conclusion of its own experts and sister agency, [USFWS]—that there will be no environmental effect”); *N. Plains Res. Council*, 668 F.3d at 1085 (“The problem here, however, is that the [agency] did not collect this data in the first place, and was therefore unable to consider it during the EIS process.”). Because BLM’s no-winter-habitat assumption is not tied to any rational basis in fact, it violates NEPA. *Robertson*, 490 U.S. at 349.

B. BLM Had No Rational Basis to Extrapolate Information Regarding Winter Use on the Echanis Site From Off-Site Proxy Data

Although BLM did not collect or review any data regarding winter habitat on the Echanis site itself, the agency did review limited survey information collected at the separate, lower-elevation, ultimately withdrawn East Ridge and West Ridge sites. ER 348. A surveyor failed to note any sage-grouse at those sites during one-time, multiple-species, general bird counts in January, February, and March of 2009. ER 348 (also noting, however, that sage-grouse *were* found in December at those sites). BLM suggested that it could then use those other sites as proxies and “extrapolate” from those limited surveys that “sage-grouse are assumed not to utilize the Echanis Project Area for winter habitat.” ER 348. BLM also speculated that the Echanis site was less likely than the other sites to contain sage-grouse winter habitat because it is higher in elevation and therefore likely receives more snow, which could bury the sagebrush too deeply for the sage-grouse to use. *See* ER 348.

The record makes clear this extrapolation and speculation were unreasonable. The scientific consensus—which BLM does not address in the EIS—shows that the Echanis site is, in fact, *more likely* than the other sites to contain sage-grouse winter habitat because of its close proximity to Steens

Mountain's abrupt, wind-swept eastern escarpment.¹² *See* ER 100, 109 (topographic and shaded relief maps showing the project area in reference to the local landscape). The wind sweeps the snow off the sagebrush, leaving it partially uncovered and therefore available as sage-grouse food and cover. At high elevation sites like Echanis, sage-grouse select “relatively exposed, windswept ridges or draws and swales” as winter habitat for this very reason. ER 730 (Monograph study); *see also* ER 412, 416, 418–19, 438 (ODFW *Strategy*); ER 180 (¶ 20) (“This assumption [that sage-grouse do not use the Echanis site in winter] is unpersuasive, and most likely wrong as greater sage-grouse are known to use wind-swept sites at similar elevations during winter[.]”) (scientific citations omitted).

This also is exactly what the ODFW told BLM during the NEPA process, recommending “monitoring grouse use of project areas during winter months” because—logically—“the wind-swept areas that may serve as preferred wind turbine locations may also provide crucial winter habitat for sage-grouse.” ER 441; *see also* ER 416 (ODFW *Strategy* referencing “[w]indswept ridges that keep sagebrush exposed during the winter” as suitable winter habitat). BLM failed to do so, despite even the Service’s expert agency recommendation that, “[b]ased on

¹² The East Ridge and West Ridge sites are several miles down the mountain, both lower in elevation than the Echanis site and situated much further away from the escarpment, and hence not comparable to the Echanis site. *See* ER 100, 112 (maps); ER 122 (¶ 16) (photograph showing escarpment at project site location).

survey information for East and West Ridge, [BLM] *should assume* that Echanis provides winter habitat.” ER 385 (emphasis added).

In other words, all of the state and federal expert wildlife agencies disagreed with BLM’s assumption and all explained that the science points in the opposite direction from BLM’s conclusion. Sites like Echanis are *precisely* the kinds of places where sage-grouse experts expect to find the birds over-wintering in a landscape such as Steens Mountain. As Dr. Braun later concluded, BLM’s “failure to assess or determine whether sage-grouse winter habitat may be impacted by the Steens energy development [] undermines the scientific validity of the FEIS.” ER 179 (¶ 20).

Thus, it was unreasonable of BLM to simply “assume,” based on non-analogous reference sites, and contrary to the wildlife agencies’ expert opinions, that the project area lacks winter habitat for sage-grouse. BLM’s “extrapolation” (ER 348) therefore was arbitrary in the face of scientific findings suggesting just the reverse and absent any reasoned explanation in the EIS as to why BLM found ODFW’s and the Service’s expert opinions “unpersuasive.” *Alaska Survival*, 705 F.3d at 1087; *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 878–79 (9th Cir. 2009) (“While our deference to the agency is significant, we may not defer to an agency decision that ‘is without substantial basis in fact.’”) (quoting *Fla. Pwr. Comm’n v. Fla. Pwr. & Light Co.*, 404 U.S. 453, 463 (1972)); *Kraayenbrink*, 632

F.3d at 493 (BLM violates NEPA’s “hard look” requirement where it gives “short shrift to a deluge of concerns from its own experts, [US]FWS, the EPA, and state agencies”); *see also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 715 (10th Cir. 2009) (where evidence “points uniformly in the opposite direction from the agency’s determination, we cannot defer to that determination”) (quoting *ONDA*, 625 F.3d at 1121 (“We cannot defer to a void.”)).

In short, the project’s impacts to essential winter habitat on and near the Echanis site was an important issue BLM failed to consider. That failure renders the Secretary’s decision arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA’s requirement that agencies take a “hard look” at the environmental impacts of proposed actions. 42 U.S.C. § 4332(2)(C).

III. THE SECRETARY’S DECISION WAS ARBITRARY BECAUSE BLM DID NOT STUDY GENETIC CONNECTIVITY

Interior also violated NEPA’s “hard look” requirement by granting the right-of-way without studying the Steens wind project’s effects on genetic connectivity through a biological corridor fundamental to maintaining gene flow among sage-grouse populations, not just on Steens Mountain but regionally. If built, the project’s strings of enormous spinning turbines, construction and maintenance roads, power poles, and transmission line would seriously inhibit sage-grouse movement through this corridor, reducing or eliminating the intermixing of local populations that is vital to maintaining genetic diversity and to

the species's survival.

The likelihood that the project's infrastructure will inhibit sage-grouse movement through the corridor is clear from the record. *See supra* section II.B. at pp. 13–16 (describing the likelihood that sage-grouse will avoid all of the elements of the project). Evidence in the record also demonstrates that, as summarized by Dr. Braun, this loss of connectivity “will likely cause sage-grouse population declines through lek abandonment, lack of recruitment, and loss of suitable nesting, brood-rearing, and winter habitats on a far larger scale than indicated by the very limited discussion provided in the FEIS.” ER 181 (¶ 23). Despite federal and state expert wildlife agencies (and ONDA) highlighting the issue, BLM never even acknowledged, let alone studied, the project's effect on genetic connectivity. That violates NEPA's requirement to study *all* significant environmental effects of a project. 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1502.1 (an EIS is “an action-forcing device” that “shall provide full and fair discussion of significant environmental impacts”).

As described above, “connectivity” connotes movement—both spatial and genetic. That is, birds within a single population move among connected seasonal habitat areas, but biologically critical gene flow occurs when birds move beyond local population boundaries and mingle with neighboring populations. *See* ER 182–85 (¶¶ 27–30, 36); 869–918. The ability of sage-grouse populations to

intermix promotes genetic diversity, protecting against inbreeding that is detrimental to the species's survival. ER 1011, 1037–38. Simply put, connectivity corridors that link local and regional populations are, according to the Service, “essential for sage-grouse persistence.” ER 976.

This issue is particularly crucial where Congress, in the Steens Act, specifically directed BLM to conserve, protect, and maintain “genetic interchange” on Steens Mountain. 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a). BLM’s NEPA review of a project that would place 69 wind turbines in essential sage-grouse habitat on land surrounded by the CMPA, and a transmission line across BLM-administered lands on Steens Mountain, necessarily must be driven by this underlying, substantive statutory obligation. For example, where BLM had the authority, under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–87, to manage for wilderness values on public land, the agency therefore had an obligation, under NEPA, to consider effects to wilderness when it undertook an action that could affect those values. *ONDA*, 625 F.3d at 1112; *see also Mont. Wilderness Ass’n*, 725 F.3d at 1002. And here, BLM’s obligation to study genetic connectivity stems not just from “authority” to do so, but from a statutory directive to do so, under the Steens Act. 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a).

As the Department of the Interior recognized fifteen years ago, the sage-grouse population on Steens Mountain is “regionally significant.” Statement of

Robert T. Anderson, *supra* n.3. The ODFW in 2011 identified just eight corridors *in all of eastern Oregon* connecting sage-grouse population groups. ER 432; ER 72 (¶¶ 53–54), 95–96 (maps). One is the Steens corridor, situated precisely where the developer proposed (and the Secretary approved) the transmission line. ER 72 (¶ 55), 97 (map). The ODFW has pointed out that, “[d]espite the vast area of sagebrush” that covers much of eastern Oregon, “several areas within these [sagebrush regions] remain contiguous *only because of small and tenuous corridors.*” ER 420 (emphasis added); *see also* ER 421; ER 97–98, 101, 103 (ODFW and ONDA maps showing eastern Oregon’s two major, contiguous areas linked by these “small and tenuous” corridors).

When industrial infrastructure—such as a power line or a string of wind turbines—cuts across a connectivity corridor, it reduces or eliminates the sage-grouse’s willingness and ability to travel between population areas. In other words, the connection is potentially lost. *See supra* section II.B. at pp. 13–16 & ER 980–81, 1002–05 (USFWS explaining, among other concerns, that sage-grouse exhibit strong avoidance behavior toward power poles and transmission lines because instincts alert them to the fact that these structures may serve as perches for predators); *see also* ER 105, 107–11 (maps highlighting avoidance areas for both turbine site and transmission line); ER 569 (computer-generated visualization of turbines).

The Service also highlighted the importance of genetic connectivity in this particular area. Of all the sage-grouse Management Zones delineated by state wildlife agencies across the West, the Northern Great Basin Management Zone—where Steens Mountain is located—ranks lowest of all in terms of its intensity of “human footprint” and consequent effects.¹³ ER 1002–03. In other words, this portion of the sage-grouse’s entire range is presently the *least* affected by human development. This, the Service concludes, “could be contributing to the substantial connectivity that still exists between the Northern Great Basin, Snake River Plain, and the Southern Great Basin Region populations.” ER 1002–03. In short, the Steens corridor is at the very heart of an area connecting some of the most important—and still relatively intact—remaining populations of sage-grouse in the West. *See* ER 97–98 (maps illustrating this regional significance).

ONDA brought this issue to BLM’s attention during the NEPA process. *See, e.g.*, ER 485, 489, 499–500, 598, 615–16, 629; *see also* ER 71 (¶ 52) (describing how, by not acknowledging the Steens corridor, BLM failed to evaluate the effects of the project’s splitting “the sagebrush habitat in Oregon into two pieces (west and

¹³ Sage-grouse scientists use the term “human footprint” to refer to the “cumulative effects of human actions on landscapes.” ER 797. It includes the physical footprint of land surface occupied by anthropogenic features or converted from sagebrush to agricultural and other development, as well as the ecological footprint where the physical footprint influences ecological processes beyond its physical location. ER 797–98.

east)”).

The EIS does not address genetic connectivity *at all*. It contains not a single map even acknowledging the existence of the Steens corridor.¹⁴ In the document’s “Affected Environment, Environmental Consequences, and Mitigation” section for Greater sage-grouse, BLM did recognize the spatial aspect of connectivity: that the bird moves among habitat areas—breeding, nesting, brood-rearing, and overwintering habitats—over the course of the seasons each year. ER 346–47. BLM acknowledged that sage-grouse avoid tall structures such as power poles and wind turbines. ER 351. And it recognized that new access roads “would further fragment” seasonal habitats. ER 353.

But, critically, BLM only talks about fragmentation in terms of “reducing the *size* of contiguous sagebrush” habitats. ER 353 (emphasis added). The EIS simply does not recognize or address the project’s likely effects on the genetic connectivity corridor—identified by ODFW—that links sage-grouse that live in core habitat areas on Steens Mountain to sage-grouse that live in nearby core habitat areas in the northern Great Basin and Snake River Plain to the east.

Thus, never once does BLM mention the independent issue of potential loss

¹⁴ For this reason, ONDA in the district court submitted a series of maps highlighting this key gap in the EIS, illustrating how the project would affect the corridor—and therefore neighboring sage-grouse populations. ER 95–105, 107–08, 112.

of *genetic* connectivity between local (let alone regional) populations. *See* ER 344–49, 351, 353. In fact, the word “connectivity” appears only four times in the entire, 1,200-page EIS.¹⁵ The word “genetic” appears just twice, both times referring to wild horses. ER 355, 356. A search for “gene flow” or “population isolation” and other similar words and phrases yields no relevant results. This is not a case of an agency not taking a “hard enough” look; rather, it is a case of an agency completely failing to consider an important aspect of the problem. *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (a decision is arbitrary and capricious if agency “entirely failed to consider an important aspect of the problem”). That violates NEPA. *Or. Natural Res. Council*, 505 F.3d at 892 (“Where the [agency] concludes that a project will not jeopardize a wildlife corridor, it must support that conclusion with at least some study or analysis of how the reduced corridor will affect the species at issue.”); *ONDA*, 625 F.3d at 1121 (“We cannot defer to a void.”).

The EIS’s section on mitigation further confirms that BLM completely failed to recognize this issue. While the agency proposes some mitigation for direct

¹⁵ In the text of the EIS, BLM recognizes only the spatial connectivity of seasonal habitat areas, stating simply, “The 12-Month Finding (DOI 2010) states that maintaining habitat connectivity and sage-grouse population numbers are essential for sage-grouse persistence.” ER 346. The only other times the word “connectivity” appears in the EIS are in three places where BLM reprints a comment received from the public. ER 377–79 (the last of which referred to the unrelated issue of instream connectivity of spawning habitat for redband trout).

loss of habitat, it *does not* mitigate for disruption (let alone loss) of genetic connectivity through the Steens corridor. *See* ER 370–76 (no mention of connectivity corridor in draft Habitat Mitigation Plan). Put differently, BLM focused myopically on ground disturbance (*i.e.*, physical footprint), failing to appreciate the potential loss of gene flow at a population level. Of course, loss of genetic interchange across the Steens corridor likely *cannot* be mitigated. ER 72–73 (¶ 56); ER 181 (¶ 23). That makes BLM’s omission that much more serious. *See Marble Mtn. Audubon Soc’y v. Rice*, 914 F.2d 179, 182 (9th Cir.1990) (holding Forest Service violated NEPA when it failed to discuss the importance of maintaining a biological corridor, in approving a logging project).

The district court erroneously conflated connectivity with fragmentation, stating that “[t]he concepts of fragmentation and connectivity are inherently intertwined.” ER 12. Yet, like BLM in the EIS, the district court mistakenly understood connectivity only in the spatial sense of connected seasonal habitats within a single sage-grouse population—failing to appreciate the distinct issue of genetic connectivity through interbreeding among neighboring populations. *See* ER 12. This is not about cutting off access to, for example, potential nesting habitat that limits the choice a female sage-grouse has for nest sites after leaving the lek. Instead, it is about cutting off the genetic connection *between neighboring populations*, and thus stopping the gene flow that is necessary for the species to

survive. There has to be linkage for populations to persist. *See* ER 182, 184–85 (¶¶ 27–29, 36) (and references cited therein). That population-to-population, *i.e.* genetic, connectivity is a distinct and vitally important issue is evident from the fact that both the Monograph and the Service’s “warranted” decision include entire sections devoted exclusively to this topic. *See* ER 676 (Monograph’s Part IV, particularly Knick & Hanser’s Chapter 16, *available at* ER 869–918); ER 975–76 (USFWS discussion of connectivity).

Even if fragmentation and connectivity were indistinguishable, the district court erred in finding that BLM “could have” reasonably decided “to discuss them together” when the court rejected the argument that BLM must consider the project’s effects on genetic connectivity. ER 12. BLM did not, in fact, actually discuss fragmentation and connectivity together. As noted above, the EIS only mentions *habitat* connectivity in a single sentence in the document, and never once mentions anything having to do with *genetic* or *population* connectivity. *See* ER 344–49. A district court may not supply a rationale for an agency’s conclusion that the agency itself failed to provide and which has no rational basis in fact in the EIS itself. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (a decision is arbitrary and capricious if agency “entirely failed to consider an important aspect of the problem”); *Ariz. Cattle Growers*, 273 F.3d at 1236 (agency not entitled to deference where its “conclusions do not have a basis in fact”); *Nw. Coal. for Alternatives to Pesticides*

v. *EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (no deference due if agency decision is not complete, reasoned, and adequately explained, because the “keystone” of the Court’s review “is to ensure that the [agency] engaged in reasoned decisionmaking”).

In short, the Steens wind project’s potential disruption to genetic connectivity between the “regionally significant” Steens Mountain sage-grouse population and neighboring populations is more important than most other issues in evaluating project’s environmental effects—particularly for this project slated for a specially designated area in which Congress has commanded the Secretary to conserve and protect “genetic interchange.” 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a). The Secretary’s decision to grant the transmission line right-of-way in the absence of an evaluation of this critical issue in the EIS was arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA’s requirement that agencies take a “hard look” at the environmental impacts of proposed actions. 42 U.S.C. § 4332(2)(C).

CONCLUSION

For the foregoing reasons, ONDA respectfully requests that this Court issue an opinion on *de novo* review reversing the judgment of the district court, holding unlawful the Record of Decision granting the right-of-way and the associated EIS, and vacating the Record of Decision.

DATED this 26th day of November 2014. Respectfully Submitted,

s/ Peter M. Lacy

Peter M. Lacy (“Mac”)
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Of Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

ONDA is aware of no related cases currently pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,045 words.

11/26/2014

Date

s/ Peter M. Lacy

Peter M. Lacy (“Mac”)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs-Appellants

PROOF OF SERVICE

I hereby certify that on November 26, 2014, I electronically filed the foregoing Opening 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 further certify that I filed true and correct copies of Appellants' Excerpts of Record (Volumes I–V) simultaneously using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

s/ Peter M. Lacy

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