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. 3:12-cv-596-MO

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Peter M. ("Mac") Lacy
(OSB # 013223)
Oregon Natural Desert Ass'n
917 SW Oak Street, Ste. 419
Portland, OR 97205
503-525-0193
lacy@onda.org

Laurence ("Laird") J. Lucas
(ISB # 4733)
P.O. Box 1342
Boise, ID 83701
208-424-1466 (phone/fax)
llucas@lairdlucas.org

David H. Becker
(OSB # 081507)
Law Office of
David H. Becker, LLC
833 SE Main Street #302
Portland, OR 97214
(503) 388-9160
davebeckerlaw@gmail.com

Attorneys for Plaintiffs-Appellants

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GLOSSARY OF ACRONYMS AND TERMS

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ER	Excerpts of Record
FSER	Federal Defendants' Supplemental Excerpts of Record
Monograph	*Greater Sage-Grouse: Ecology and Conservation of a Landscape Species and its Habitats*, 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
the Service	U.S. Fish and Wildlife Service

INTRODUCTION

The Secretary acknowledges how unique and indispensable winter habitat is for the Greater sage-grouse, and finally concedes that there is a population connectivity corridor in the Steens wind project area. In light of these concessions, the Secretary is left to frame her argument largely around pleas for deference to agency "methodology" and "scientific judgment" in the absence of direct evidence regarding whether the project site provides winter habitat and any evaluation of genetic connectivity in the EIS. The deference the Secretary seeks is unwarranted.

First, the modicum of inapt, off-site data BLM relied upon to make its inference regarding winter habitat could not satisfy NEPA's command that an agency *shall* obtain all data that is "essential" to a reasoned decision and for which the cost of obtaining it would not be "exorbitant." 40 C.F.R. § 1502.22(a). The state wildlife expert, ODFW, has determined that winter habitat is "critical to the persistence of the species" and "essential for greater sage-grouse populations." ER 426, 429. It follows that information on sage-grouse winter habitat *at the actual project site* is "essential" within the meaning of the NEPA regulation and this Court's interpretation of it. This is not a case of an agency having *some* information that is merely less-than-perfect; rather, this is a case of the agency having *no relevant* information—and where obtaining such information was as simple as conducting winter surveys in the project area sometime over the course

of the multi-year project planning process. BLM's failure to do so left the Secretary unable to draw any rational connection between facts found (none) and the choice made (to proceed in the absence of essential information).

Second, the Secretary asserts that BLM used a "habitat-based analysis" that more or less captured effects to genetic connectivity. That assertion is demonstrably wrong. The EIS's "habitat-based analysis" omits any discussion whatsoever of genetic—that is, population-to-population—connectivity on Steens Mountain. The Secretary also contends that even if the now-acknowledged connectivity corridor is destroyed, BLM-imposed mitigation measures will make up for that. That argument fails because it is inconsistent with the ODFW sage-grouse *Strategy* that Interior claims to have implemented. The Secretary repeatedly insists that the affected project lands are "Low Density" "Category-2" habitat for which a "no-net-loss-with-net-benefit" mitigation standard applies. However, as explained below, the *Strategy* expressly "elevates" sage-grouse connectivity corridors to "Category-1" habitat. Thus, if BLM had acknowledged the Steens Corridor during the NEPA process, it would have had to treat the project area as "Category-1" habitat subject to a strict "no loss" requirement under which projects must either be relocated or not authorized.

Because there is no way to get electricity generated at the Echanis site to the grid without crossing this "essential" habitat, BLM in its EIS should have analyzed

this as a "no authorization" project. It was only by failing or refusing to recognize the crucial connectivity corridor that the agency was able to skirt around this near-certain death knell for the project. Thus, BLM's failure to study this issue in the EIS, like the agency's failure to obtain essential winter habitat information, renders the Secretary's Record of Decision arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA.

ARGUMENT

I. THE EIS'S EVALUATION OF WINTER HABITAT AT THE PROJECT SITE VIOLATED NEPA

A. The Court Cannot Limit its Review to the Administrative Record Because Appellees did not Cross-Appeal

The district court considered a declaration submitted by Dr. Braun who, as noted, is one of the Nation's leading sage-grouse experts. ONDA Br. at 14. The Secretary complains that "reliance on a post-decisional declaration from Dr. Braun is improper." Ans. Br. at 54; *see id*. at 22–23, 36, 38–39; *see also* Harney Cnty. Br. at 19–20 (arguing reliance on extra-record material is improper). The Secretary suggests that *de novo* review of the district court's judgment means that this Court may confine its review to the administrative record even when the district court did not. Ans. Br. at 22–23 (citing *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014)).

The Court should disregard these arguments. Both Interior and the developer

moved to strike Dr. Braun's declaration (and that of Dr. Craig Miller) (ER 1158, Dkt ## 48, 53), but the district court denied those motions. ER 25. None of the appellees cross-appealed that portion of the district court's order, and this Court may not omit the material the district court admitted in the absence of a cross-appeal. *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1298 n.6 (9th Cir. 1999) ("a party that does not file a cross-appeal is not entitled to challenge favorable rulings by the district court"); *Spurlock v. FBI*, 69 F.3d 1010, 1018 (9th Cir. 1995) (disregarding argument of appellee who "failed to file a cross-appeal from the portion of the district court's order" he later challenged in this Court).[1] Dr. Braun's explanation of the importance and feasibility of obtaining site-specific winter habitat information is properly before this Court. *See* ER 178–80 (Dr. Braun discussing BLM's failure to survey and assess winter habitat).

B. BLM's Failure to Study Winter Habitat at the Project Site Violated NEPA

BLM failed to collect baseline information on winter habitat that was essential to evaluating whether (let alone how) sage-grouse would be affected by the Steens wind project for almost half of each year. As ONDA has explained,

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[1] By contrast, in *San Luis*, the federal agencies were *appellants*, and thus had properly challenged that district court's order admitting extra-record evidence, allowing this Court to limit its review to the administrative record after finding the district court erred in its evidentiary ruling. 747 F.3d at 603–04.

winter habitat is distinct from the sage-grouse's other seasonal requirements and is indispensable to the persistence of the species. ONDA Br. at 39–41. The critical importance of winter habitat cannot be understated. The ODFW describes it as "essential for greater sage-grouse populations." ER 429. ONDA provided BLM with published scientific literature explaining that even "[s]mall changes to availability of winter habitats have caused drastic reductions in some sage-grouse populations." ER 448. Data about whether sage-grouse use the project site for winter habitat, and an assessment of the project's effects on winter habitat, are *essential* to making a reasoned project decision. And because winter habitat information for the Echanis site was readily obtainable and not cost prohibitive, BLM's decision not to do so, and to instead rely upon "inference" from non-analogous survey sites, Ans. Br. at 45, was arbitrary and capricious—and, ultimately, resulted in the Secretary's inability to make a reasoned decision.

In response, the Secretary correctly acknowledges the distinct nature of winter habitat and how it is vital to sage-grouse survival. Ans. Br. at 7–8, 42–43. And the Secretary does not deny that winter habitat information was readily obtainable and does not claim that the cost of obtaining it would have been exorbitant. *See id*. at 42–54. However, to justify BLM's decision to proceed via "inference" based on incomplete information, the Secretary pleads that BLM is entitled to rely "on its own expertise." Ans. Br. at 44. The Secretary's argument

ignores industry-standard research norms and, most importantly, NEPA's requirement that "the Federal Government shall . . . initiate and utilize ecological information in the planning and development of resource-oriented projects." 42 U.S.C. § 4332(2)(H).

"An agency's obligation with respect to incomplete or unavailable information is spelled out in 40 C.F.R. § 1502.22." *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 496 (9th Cir. 2014). The regulation directs that if "the incomplete information relevant to reasonably foreseeable significant adverse 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). In other words, BLM had an obligation to gather essential, readily obtainable information on sage-grouse winter habitat that would be affected by the project—instead of relying upon inapposite, off-site, proxy data.

As this Court has explained, "[s]ection 1502.22 *clearly contemplates original research* if necessary" and "NEPA law requires research whenever the information is 'significant.' As long as the information is 'important,' 'significant,' or 'essential,' *it must be provided* when the costs are not exorbitant in light of the size of the project and/or the possible harm to the environment." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 n.5, 1249 (9th Cir. 1984) (emphasis

added); *see Point Hope*, 740 F.3d at 493 ("an agency must either obtain information that is 'essential to a reasoned choice among alternatives' or explain why such information was too costly or difficult to obtain") (quoting 40 C.F.R. § 1502.22); *S. Or. Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983) (§ 1502.22(a) required agency to independently assess the safety of the herbicides if existing data is inadequate). Here, BLM decided to "assume" there is no winter habitat in the project area. ER 348. But, under NEPA, an agency can rely upon inference *only* if "the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known." 40 C.F.R. § 1502.22(b). Because neither of those exceptions applies here, BLM was required to obtain essential information on sage-grouse winter habitat at the unique Echanis project site.

In response, the Secretary claims *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), stands for the proposition that there cannot be a "categorical on-site analysis requirement" where "there is another reasonable basis to uphold an agency's understanding of the project's impacts." Ans. Br. at 51 (quoting 537 F.3d at 992). The Secretary's selective quotation mischaracterizes this Court's holding. *Lands Council* was interpreting whether an agency must verify its scientific models with on-site studies to ensure compliance with the National Forest Management

Act ("NFMA"). The *en banc* Court's full statement was that "there is no legal basis to conclude that *NFMA* requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling." 537 F.3d at 992 (emphasis added). The Court's statement that an on-site analysis requirement *for compliance with NFMA* "cannot be derived from the procedural parameters of NEPA" does not obliterate the regulatory requirement to include essential information in an EIS, because that was not at issue in *Lands Council*. *See* 537 F.3d at 992. In any event, ONDA does not ask this Court to rule that NEPA imposes a "categorical on-site analysis requirement." Rather, under the facts of this case, BLM's "assumption" is unreasonable because the record shows why the off-site surveys could not possibly have provided information necessary to detect what is a very site-specific, physiographically compact type of habitat on the project site itself. ER 180, 411–19, 429.

As noted, the *only* exceptions to NEPA's mandatory requirement to obtain essential information are if obtaining the missing information would involve "exorbitant" costs or if "the means to obtain it are not known." 40 C.F.R. § 1502.22(b). Nowhere does the Secretary claim that collecting information on winter use was cost prohibitive or that BLM's biologists did not know how to perform winter surveys. *See* Ans. Br. at 42–54. Ground-based, winter surveys are an industry standard practice. ER 179–80 (Dr. Braun's declaration ¶¶ 17, 20–22).

Indeed, the ODFW has even explained that, although surveying winter habitat during the winter is ideal, "[d]ata collection can occur at any time since sagebrush distribution, cover and height are the only habitat indicators of concern." ER 437; *see also* ER 438 (stating "[w]inter measurements should be taken if the project area is accessible" but also noting that, if it is not, BLM had in place protocols "for describing [winter] habitat conditions during other seasons" at the project site). Thus, BLM had an obligation to obtain this essential information. 40 C.F.R. § 1502.22(a).

To cover for BLM's failure to do so, the Secretary complains in general terms that she is entitled to rely upon her own experts, falling back on the proposition that an agency need only cite "a study" that the agency "deemed reliable." Ans. Br. at 45, 52. The Secretary claims it was not "essential" to conduct winter use surveys at the Echanis site itself—and therefore that 40 C.F.R. § 1502.22(a) does not apply—because the two off-site surveys provided a good enough, inferential "basis for understanding that sage-grouse use of the turbine area stops after the snow accumulates." Ans. Br. at 53. In other words, without explicitly explaining why, BLM apparently deemed the off-site studies reliable.

The "deemed reliable" defense is not an absolute shield. It applies only if the agency's conclusion has "a substantial basis in fact" and the agency has not committed "a clear error of judgment." *See Native Ecosystems Council v. U.S.*

Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005) (quotations omitted). ONDA has explained the holes in the Secretary's argument here: the weight of scientific authority concluding that the higher elevation, windswept Echanis site is *more likely* to contain suitable winter habitat for sage-grouse than the lower-elevation, but snowier, East Ridge and West Ridge sites which the developer abandoned; and that both the Service and ODFW advised as much to BLM. *See* ONDA Br. at 44–46; *see also* ER 392 (topographic map provided by ONDA to BLM during NEPA process highlighting difference in locations of East and West Ridge project sites in relation to Echanis site).

The Secretary cites the "paucity" of sage-grouse sightings at the abandoned sites as support for BLM's no-winter-habitat conclusion. Ans. Br. at 44. In fact, the absence of sage-grouse in the deep snow of the lower elevation sites strengthens the position shared by the Service, the ODFW, and ONDA: that the birds likely move away from those areas and establish their compact winter refuge near the windswept escarpment on the Echanis site higher on Steens Mountain. ER 412, 416, 418–19, 438 (ODFW *Strategy*); ER 730 (Monograph study); ER 179–80 (¶ 20) (Dr. Braun). On this record, the Secretary is not entitled to unchecked "deemed reliable" deference where the evidence "points uniformly in the opposite direction from the agency's determination." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 715 (10th Cir. 2009). The Record of Decision therefore "is without

substantial basis in fact." *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 878–79 (9th Cir. 2009). The Secretary's reliance on an email from BLM's wildlife biologist, FSER 305–06, which contains no data regarding the project site and incorrectly equates the characteristics of the Echanis site to the other, abandoned sites, cannot satisfy the obligation to include "essential" information in the EIS because "NEPA documents are inadequate if they contain only narratives of expert opinions." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004).

Trying another tack, the Secretary complains that *Half Moon Bay Fishermans' Ass'n v. Carlucci*, 857 F.2d 505 (9th Cir. 1998), is distinguishable because there the agency had *no* baseline data and here it at least has *some* data. *See* Ans. Br. at 52. In fact, *Half Moon Bay* is precisely on point because here BLM had no *relevant* baseline information on whether winter habitat exists in the actual project area. Again, given how different the surveyed sites were in comparison to the unique Echanis site, and how straightforward it would have been to survey the Echanis site, and combined with the fact that winter habitat is essential to the sage-grouse's survival from one year to the next, the clear and unambiguous requirement at 40 C.F.R. § 1502.22(a) brooks no argument to excuse BLM's shortcut here. Indeed, under the facts of this case, the Secretary's recognition that there is "a generalized potential for wind to sweep the snow off of sagebrush on

ridge tops" (Ans. Br. at 46) only heightens the need for the agency to test that generalized potential at the project site itself, in order to arrive at a reasoned understanding of how and where sage-grouse use the landscape in and around the project area during the winter months.

In sum, there is no support in the law for the extraordinary level of deference the Secretary seeks in this case. The "deference accorded an agency's scientific or technical expertise is not unlimited. Deference is not owed when the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 799 (9th Cir. 2005) (internal quotation marks and citations omitted). BLM's failure to obtain and evaluate information essential to evaluating the project's impacts to unique winter habitat at the Echanis site rendered the Secretary's decision arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA. 42 U.S.C. §§ 4332(2)(C), (2)(H); 40 C.F.R. § 1502.22(a); *see also* 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.1, 1502.15, 1502.24 (regulations requiring informed analyses, scientific integrity of data relied upon, and establishment of a full and accurate environmental baseline).

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II. BLM FAILED TO EVALUATE THE PROJECT'S EFFECT ON GENETIC CONNECTIVITY

The Steens Corridor is one of only two connectivity corridors in southeastern Oregon that still links the large complex of interconnected leks roughly 150 kilometers west of the Idaho border with another interconnected complex in the southeastern corner of the state. ER 103 (map).[2] The Secretary failed to consider the impact to genetic connectivity from this project slicing across this habitat which the state expert wildlife agency identified as a vital connectivity corridor. This analytic gap is of heightened concern in the Steens Mountain Cooperative Management and Protection Area, where Congress expressly commanded the Secretary to protect "genetic interchange." 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a).

The Echanis generation site and transmission line will likely cut off genetic interchange along the Steens Corridor. Even the Secretary acknowledges that habitat disturbance would be 100% in the areas closest to the transmission line. Ans. Br. at 15. What will happen to sage-grouse in southeastern Oregon when one of the two tenuous corridors linking the two sagebrush areas—which the Secretary

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[2] *See also* Further Excerpts of Record (filed herewith and containing color versions of the maps at ER 91–103, which inadvertently were included in black & white in the paper copies of the ER).

acknowledges are already fragmented by human-caused barriers—disappears if the project is built? The EIS does not say, because it never acknowledged or evaluated the presence of this critical corridor. While the EIS does describe that the project will fragment habitat and that this may have some negative effects, without an evaluation of genetic connectivity across the Steens Corridor there is no way of evaluating the ultimate question whether cutting off neighboring sage-grouse populations in southeastern Oregon from each other will hasten the demise of the species. As ONDA explained in its opening brief, had the agency considered the issue, it would have fundamentally changed the environmental analysis and possibly even the Secretary's decision whether to grant the right-of-way.

The Secretary responds in three ways. First, she claims ONDA is precluded from raising this issue on appeal. Next, she claims BLM ensured the project was sited within "Low Density" habitat and therefore imposed adequate mitigation based on that habitat classification. And finally, she argues that in any event it is a "scientific judgment" whether fragmentation and connectivity need to be discussed separately, and thus BLM's "habitat-based analysis" was adequate. Neither of the Secretary's substantive responses withstands scrutiny under the arbitrary and capricious standard of review, and her preclusion argument lacks merit. Although the Secretary's argument highlights many aspects of the project's effects on sage-grouse that the EIS *did* evaluate, her assertion that "BLM took a hard look at

genetic connectivity," Ans. Br. at 32, does not follow from the agency's discussion of other sage-grouse issues.

A. The Record Does Not Support the Secretary's Reliance on the Shield of Mitigatable "Low Density" Habitat

ONDA explained that the EIS entirely failed to address genetic connectivity. *See* ONDA Br. at 52–54. Not once did BLM recognize (much less study) the issue—despite the facts that Congress directed the agency to protect "genetic interchange" on Steens Mountain, the Service highlighted the importance of genetic connectivity to the persistence of the species, ODFW identified the Steens Corridor as one of just eight "small and tenuous corridors" connecting neighboring sage-grouse populations in eastern Oregon, and ONDA raised the issue during the public comment period for the project.

In response, the Secretary complains that, even if BLM did not expressly address genetic connectivity in the EIS, any impacts to connectivity were somehow captured by the general discussion of habitat impacts or nevertheless mitigatable. Here, the Secretary—for the first time ever—acknowledges rather than denies the existence of the Steens Corridor. *See* Ans. Br. at 32 (claiming "BLM addressed the connectivity impacts within this corridor" and referencing "the connectivity corridor in this case").

By contrast, in the EIS and Record of Decision, BLM and the Secretary never once mentioned genetic or population connectivity or referenced the ODFW-

identified Steens Corridor. And, critically, the EIS failed to identify the corridor on its key map presenting BLM's understanding of the range and types of sage-grouse habitat areas on Steens Mountain. ER 350 (showing only "Core" and "Low Density" habitat areas); *compare* ER 102–03 (Dr. Miller's maps showing the location of the Steens Corridor, as omitted from the BLM map). BLM did describe two categories of sage-grouse habitat—Core and Low Density areas—but did not disclose or evaluate the effects on another important type of habitat—namely the ODFW-identified connectivity corridor connecting neighboring core areas and through which the transmission line would run. *See* ER 102–03, 350.

Only by turning a blind eye toward the corridor was BLM able to analyze the project as if it affected only Low Density habitat whose destruction could be mitigated. This error profoundly altered the trajectory of BLM's environmental analysis and the Secretary's final decision. To understand why requires a careful look at the ODFW *Strategy*, which the Secretary claims BLM is committed to following and upon which she relies so heavily in her answering brief. *See* ER 325 (the EIS stating that "[t]hese [*Strategy*] guidelines would be implemented for the Project"); ER 349 ("Big sagebrush habitat will be managed in accordance with . . . the [*Strategy*]."); Ans. Br. at 25 ("BLM adopted the approach outlined in the Strategy").

As described in ONDA's opening brief (pp. 19–20), the *Strategy* aims to

identify and protect the most important habitat areas essential to the survival of the sage-grouse. It does so by mapping "Core Areas" based on proximity to breeding sites and mapping "connectivity corridors" that link Core Areas and allow interchange among neighboring sage-grouse populations. *See* ER 423–25 (describing *Strategy*'s Core Area mapping and connectivity mapping).[3]

To protect these crucial areas, the *Strategy* establishes a two-tiered framework, conserving them as either "Category-1" or "Category-2" habitats. ER 426. Any habitat area that falls under Category-1 is "essential for greater sage-grouse populations," cannot be mitigated if lost, and, therefore, is "irreplaceable." ER 429. For these places, the ODFW established an unequivocal "no loss" standard. *Id*. A project that would affect Category-1 habitat must either be relocated, or, if that is not possible, then "[n]o authorization of the proposed development action" will be granted. *Id*. The *Strategy* provides no exceptions to this no loss/no authorization measure for "large-scale industrial developments" in Category-1 habitat. *Id*.

By contrast, areas classified as Category-2 habitat, while still "essential" for sage-grouse populations, are nevertheless considered to be amenable to mitigation

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[3] The *Strategy* also identifies winter habitat, recognizing that it is a type of habitat that, like connectivity corridors, "occur[s] outside of lek density strata delineations." ER 425.

measures. ER 429. The Secretary claims the Steens wind project only crosses Low Density, and therefore Category-2, habitat—and that mitigation measures thus are sufficient to offset any impacts to the now-admittedly-existent Steens Corridor. *See* Ans. Br. at 32. This assertion, however, ignores that the *Strategy* specifically "elevates" connectivity corridors in otherwise Low Density habitat to Category-1 status. ER 426.

Three types of sage-grouse habitat fall into Category-1: core areas centered upon leks, connectivity corridors that link populations, and winter habitat. *See* ER 426. The ODFW describes these habitat types as three "criteria" of Category-1:

- **Criteria-1:** Habitat centered on the most productive breeding areas for sage-grouse. These so-called "Core" areas cover less than one-third of all sage-grouse habitat in Oregon. The ODFW identifies Criteria-1 habitat by drawing circles ("lek density strata") around the most productive sage-grouse leks in Oregon. ER 426. The *Strategy* identifies 15 separate high-density population centers—"Core" habitat areas—in Oregon. *See* ER 92.
- **Criteria-2:** Habitat that is Low Density with respect to breeding (*i.e.*, outside the lek density circles) but which is independently essential because it provides connectivity between the high-density, core population centers. <u>These are the genetic connectivity corridors</u>. ER 426 (ODFW describing these areas as "important for connectivity between populations").

- **Criteria-3:** Habitat where sage-grouse spend the winter. These areas may or may not fall within the lek density circles. If BLM discovers that winter habitat is present in a project area, this criterion dictates that the area is, like the connectivity corridors, automatically elevated to Category-1 habitat. ER 426.

Thus, any area that falls within any of these three criteria—as the Steens Corridor does—is properly classified as Category-1 habitat, and therefore subject to the ODFW's no loss/no authorization standard for industrial energy development projects. ER 429. Because the EIS did not acknowledge the existence of the Steens Corridor or evaluate its role as a connectivity corridor, the EIS never determined whether the Low Density habitat *in this project area* should be Category-1 or Category-2. Because BLM never made this determination, the EIS's characterization of the project area's connectivity corridor as Category-2 habitat is inconsistent with the *Strategy* the Secretary purports to follow.

The *Strategy*'s explicit characterization of connectivity corridors as Category-1 habitat belies the Secretary's notion that these are "semantic" distinctions. *See* Ans. Br. at 38. It also demonstrates that her statement that "the ODFW connectivity corridor, at issue in this case, is movement, migration, or Category 2 habitat" is wrong. *Id*. Connectivity corridors—Category-1 habitat in ODFW's characterization scheme—are *not* the same as mitigatable migration

habitat that otherwise falls into Category-2 (such as habitat that allows migration between non-Core areas). ER 426. By failing to recognize the importance of *genetic* connectivity through the Steens Corridor, the EIS ignored an important aspect of the problem, thereby rendering the Secretary's decision to authorize the project arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *see also 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 . . . 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 *Lands Council*, 537 F.3d at 994 (emphasis added)).

ONDA understood that connectivity corridors may exist between core populations of sage-grouse and that these corridors are essential to the survival of the sage-grouse. Therefore, during the NEPA process, ONDA asked BLM to determine whether any connectivity corridors would be affected by the proposed wind project and transmission line. For example, in its detailed project comments, ONDA raised the issue of genetic exchange and connectivity, concluding, "[t]ransmission lines or turbine sites barring the path of sage-grouse between leks

will seriously impact sage-grouse." ER 500.[4] In asking the agency to ensure protection of sage-grouse habitat, ONDA explained to BLM that "Category 1 habitat encompasses habitat with very high, high, and moderate lek densities or *where low lek densities overlapped with local connectivity corridors* or where winter habitat use areas overlapped with occupied habitat or connectivity corridors." ER 489 (emphasis added).

The EIS, however, simply did not address connectivity corridors. *See* ER 307–80 (no mention of genetic connectivity or of the Steens Corridor). And up to this point, BLM has consistently denied ONDA's contention that the transmission line would bisect an important connectivity corridor on Steens Mountain. *See, e.g.*, ER 350 (BLM's sage-grouse habitat map, not showing the corridor which had been identified by ODFW in the *Strategy*). If BLM had taken a hard look at connectivity as ONDA requested, and as the *Strategy* calls for, the agency would have understood that the transmission line would bisect this important genetic corridor. That would have been a serious problem for the project: where such a corridor exists in otherwise Low Density habitat, the area would, as explained above, meet

[4] The Secretary's sarcastic comment that a two-and-a-half-foot tall bird ought to be able to walk beneath a transmission line misses the point. Ans. Br. at 36–37. Sage-grouse scientists, including the Secretary's *own experts* at the Service, understand that sage-grouse instinctively avoid structures like transmission lines that provide perches that the birds sense may provide platforms for predators such as raptors. ER 980 (power lines are "a particularly strong barrier to movement").

Criteria-2 for Category-1 habitat, thereby triggering the ODFW's no loss/no authorization standard. Instead, the Secretary proceeded under the mistaken assumption that the project area only affected Category-2 habitat in which impacts to sage-grouse could be mitigated. *See* ER 370 (the EIS's draft mitigation plan, stating that the "Project footprint as well as an area of displacement occupies areas of Category 2, 3 and 4" habitat and that the project "will avoid any permanent or temporary impact on lands identified as Category 1 habitat").

Now, at this late hour, the Secretary finally concedes that there is connectivity corridor, but argues that BLM more or less said so in implied terms in the EIS. Ans. Br. at 32–33. Whether the latter is true or not—and BLM's own map at ER 350 shows that it is not—the presence of a connectivity corridor in Low Density habitat by definition "elevates" the area to Category-1 protected habitat. ER 426.[5] As a result, the Secretary's argument crumbles because it relies upon the assumption that the Project only affects Category-2 habitat that can be destroyed but mitigated elsewhere. Again, for Category-1 habitat, the "no loss" mitigation requirement mandates that impacts shall be avoided either by moving the project to a different location or, if that is not possible, denying authorization of the project. ER 429.

[5] So would the presence of winter habitat if BLM conducted winter surveys at the Echanis site and discovered such habitat there. ER 426.

By failing or refusing to understand that the Steens wind project falls within a vital genetic connectivity corridor that should have been subject to a more stringent no loss/no authorization analysis, the Secretary's Record of Decision was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with NEPA, 42 U.S.C. §§ 4332(2)(C), (2)(H); 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.1, 1502.15, 1502.22(a), 1502.24.

B. No Deference to Scientific Judgment is Warranted on This Issue

The Secretary also complains that the Court should defer to BLM's "scientific judgment" to conduct what her lawyers now label as a "habitat-based analysis." Ans. Br. at 29–36. The phrase "habitat-based analysis" never appears in the 1,200-page EIS or in the Secretary's 54-page Record of Decision. More importantly, the Secretary's argument misses the critical point: a genetic connectivity corridor *is* a type of sage-grouse habitat, but it is distinct from the bird's breeding, nesting, brood-rearing, and over-wintering habitats. *See* ER 420–21, 432 (ODFW describing genetic connectivity); ER 95–103 and Further Excerpts of Record (ODFW and ONDA maps showing the Steens Corridor in relation to the wind project and to local and regional sage-grouse population centers). Studying one type of habitat, and mitigating for its loss, does not substitute for the lack of analysis of another critical type of habitat.

The Court should thus reject the Secretary's proxy argument. If an agency is

going to employ a proxy to assess an environmental problem, the agency must explain so, in clear terms, in the EIS—not through its post-decision litigation papers. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (in determining validity of agency decision, a court may defer only to rationales offered by the agency during the decision-making process). This Court has emphasized that an agency "must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable." *Lands Council*, 537 F.3d at 994. Because the EIS never mentions genetic connectivity, it follows that the EIS did not explain how the "habitat-based analysis" substitutes for an evaluation of the project's effect on genetic connectivity in the Steens Corridor. That failure of explanation violates the precept that "[c]larity is at a premium in NEPA because the statute, as we have said, is a democratic decisionmaking tool, designed to foster excellent action by help[ing] public officials make decisions that are based on [an] understanding of environmental consequences." *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 n.24 (9th Cir. 2010) ("*ONDA*") (internal quotation marks omitted).

Nowhere in the EIS or Record of Decision does the Secretary state that she was assessing impacts to genetic connectivity via some "habitat-based analysis" proxy that would implicitly assess effects to the Steens connectivity corridor which BLM failed to acknowledge or disclose on any map or in the text of the EIS. *See*

ER 344–53 (EIS section on sage-grouse, never recognizing the issue of genetic connectivity); ER 350 (BLM's sage-grouse habitats map, not recognizing the Steens Corridor); *see also, e.g.*, *ONDA*, 625 F.3d at 1121 (rejecting an analogous *post hoc* proxy argument where BLM's lawyers claimed an analysis of impacts to wilderness emerged if the reader cobbled together discussions of other resources in EIS: "in any event, the BLM never purported to have developed such a proxy methodology, by which consideration of other resource types could be melded together to produce an analysis of wilderness characteristics").

In short, this appeal is not, as the Secretary contends, a battle over agency methodology or scientific judgment. ONDA does not ask the Court to determine whether particular methods BLM devised to study genetic connectivity are appropriate. Here, BLM used *no* method to analyze or plan for the Project's effects on genetic interchange. It incorrectly classified the entire project area—including the connectivity corridor—as mitigatable Category-2 habitat. To the extent it used a "habitat-based analysis," BLM left out an essential habitat component: the unique corridor on Steens Mountain understood by the expert wildlife agencies to be critical to genetic interchange among neighboring sage-grouse populations. The Court "cannot defer to a void." *ONDA*, 625 F.3d at 1121.

Given the Steens Act's express language requiring the Secretary to manage lands on Steens Mountain to protect "genetic interchange," ONDA's bringing this

issue to BLM's attention, the scientific community's emphasis on this discrete issue apart from seasonal habitat issues, and the ODFW's determination that loss of genetic connectivity cannot be mitigated, it was arbitrary for BLM to not identify that it may have been using a proxy to assess this critical issue—hard as this is to believe on the face of the EIS itself—and, ultimately, for the Secretary to not disclose and discuss likely impacts to genetic connectivity.

C. The Court Should Reject the Secretary's Preclusion Arguments

1. ONDA put BLM on notice regarding genetic connectivity.

The Secretary makes two preclusion arguments—issue exhaustion and waiver—both of which fail. First, the Secretary alleges ONDA never raised this issue during the NEPA process. Ans. Br. at 29. This is wrong: ONDA put BLM on notice that the agency's environmental analysis was deficient in failing to study impacts to genetic connectivity between neighboring populations of sage-grouse. *See, e.g.*, ER 485, 489, 499–500 (describing that "genetic evidence proves that exchange between different leks by individual birds has not been restricted" and that "[b]ecause Echanis and the transmission line alternatives fall within the parameters of connectivity there will likely be impacts on the ability for sage-grouse to move across the landscape to lek sites for breeding and courtship"), 598, 615–16, 629.

This Court interprets the issue exhaustion requirement liberally. *See Nat'l*

Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1065 (9th Cir. 2010). A plaintiff must give the agency "sufficient notice" of the plaintiff's concerns. *Id*. Even simply alerting an agency "in general terms" to a particular issue is sufficient for exhaustion if the agency is given the opportunity to "bring its expertise to bear to solve [the] claim." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002)). ONDA raised the issue of genetic connectivity in its comments, thereby giving BLM the opportunity to address the issue—which it did not.

Even if ONDA had not done so, "in NEPA cases the agency bears the primary responsibility to ensure that it complies with NEPA" and an EIS's "flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (internal quotation marks omitted). Here, the Secretary has a duty under the Steens Act to protect "genetic interchange" on Steens Mountain—and therefore to study that issue in the EIS.[6]

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[6] The Secretary misunderstands ONDA's argument regarding the Steens Act. Nowhere does ONDA suggest that the Steens Act contains a substantive provision that "requires BLM to perform a separate analysis on genetic connectivity." Ans. Br. at 40. Rather, where a law provides an agency with direction about how to manage an area affected by a project, the EIS must include some analysis of the project's interplay with that management provision. *League of Wilderness Defenders/Blue Mtns. Biodiversity Project v. U.S. Forest Serv*., 585 F. App'x 613, 614–15 (9th Cir. 2014) ("Because PACFISH/INFISH provides the approved

When evaluating a project proposed within a special management area in which the Secretary has recognized a "regionally significant" sage-grouse population, ONDA Br. at 49, 56, it is "obvious" that the agency must consider the project's effects as they relate to that area's statutorily-prescribed management purpose. *See* 16 U.S.C. §§ 460nnn(5)(B), 460nnn-12(a).

The Secretary also complains that ONDA did not provide BLM with "data" on the Steens Corridor. Ans. Br. at 46. It was not ONDA's job to collect data for BLM. NEPA places that responsibility on the agency. *See* 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.1, 1502.15, 1502.22(a), 1502.24; *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs."); *Or. Natural Desert Ass'n v. Rasmussen*, 451 F. Supp. 2d 1202, 1212–13 (D. Or. 2006) ("ONDA did not have a responsibility to provide accurate information regarding any changes to the wilderness characteristics in the East-West Gulch before the EA was issued. BLM did."). The Secretary's issue exhaustion argument is meritless.

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strategy for managing riparian habitats . . . the Forest Service was required, under NEPA, to include an explicit PACFISH/INFISH analysis in its EIS.") (citing *ONDA*, 625 F.3d at 1109).

2. ONDA did not waive its right to challenge the Secretary's failure to assess genetic connectivity.

The Secretary also complains that ONDA "failed to raise this argument before the district court." Ans. Br. at 30. The Court should reject the Secretary's waiver argument because the district court understood that ONDA was raising this issue, describing connectivity as "the continuity that enables members of a species to move between habitat areas *and is important to maintaining genetic diversity*." ER 11–12 (emphasis added).[7] *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (argument is adequately presented if the district court is able to rule on it). But, although the district court acknowledged ONDA's argument, it erroneously conflated fragmentation and connectivity (following the Secretary's lead), claiming "[t]he concepts of fragmentation and connectivity are inherently intertwined"—and citing ONDA's brief—but then ignoring or misunderstanding ONDA's explicit argument that "a connectivity corridor exists on Steens Mountain

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[7] The district court even referenced Dr. Miller's explanation that BLM failed "to assess how the North Steens transmission line will not only contribute to fragmentation of sage-grouse seasonal habitats, but also threatens to sever key connectivity habitat on Steens Mountain, which links local and regional sage-grouse populations" (ER 71, ¶ 51), and his maps expressly illustrating the Steens Corridor. ER 11 (citing Dr. Miller's declaration at ¶¶ 44–70 (ER 68–77) and his connectivity maps at Exhibits D–L (ER 95–103), including his map highlighting the Steens Corridor "Connecting Two Major Sage-Grouse Populations").

linking local and regional sage-grouse populations." ER 12; FSER 10.[8]

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 12th day of June 2015.

Respectfully Submitted,

s/ Peter M. Lacy

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Peter M. Lacy ("Mac")
Oregon Natural Desert Association

Of Attorneys for Plaintiffs-Appellants

[8] In addition, waiver is discretionary, not jurisdictional. Even if ONDA had not presented this issue to the district court *at all*, this Court could still consider it on appeal because "the issue presented is purely one of law" and "the pertinent record has been fully developed" in the administrative record and materials considered by the district court. *Bolker v. Comm'r, IRS*, 760 F.2d 1309, 1042 (9th Cir. 1985).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,933 words.

June 12, 2015
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 June 12, 2015, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that I filed true and correct copies of Appellants' Further Excerpts of Record 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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Peter M. Lacy ("Mac")
Oregon Natural Desert Association

Attorney for Plaintiffs-Appellants

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 13-36078

I, Peter M. Lacy , certify that this brief is identical to the version submitted electronically on [date] Jun 12, 2015 .

Date Jun 18, 2015

Signature s/ Peter M. Lacy

(either manual signature or "s/" plus typed name is acceptable)