

Peter M. (“Mac”) Lacy (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Kristin F. Ruether (OSB # 05368)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
kruether@advocateswest.org

Laurence (“Laird”) J. Lucas, *pro hac vice*
P.O. Box 1342
Boise, ID 83701
208-424-1466 (phone and fax)
llucas@lairdlucas.org

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

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

Plaintiffs,

v.

**KEN SALAZAR, Secretary of Interior,
BUREAU OF LAND MANAGEMENT,**

Defendants,

**COLUMBIA ENERGY PARTNERS,
and HARNEY COUNTY,**

Intervenor-Defendants.

No. 3:12-cv-596-MO

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

Request for Oral Argument

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF RELEVANT FACTS.....	2
I. STEENS MOUNTAIN.....	2
II. THE IMPERILED SAGE-GROUSE.	5
III. OVERVIEW OF PROPOSED STEENS WIND DEVELOPMENT.....	7
IV. DETAILED DISCUSSION OF STEENS WIND PERMITTING PROCESS....	8
A. Harney County Conditional Use Permit.....	8
B. ODFW Recommendations.....	8
C. Initiation of the BLM Permitting Process.....	10
D. Notice of Intent And Scoping Comments.....	11
E. Preparation and Issuance of Draft EIS.....	12
F. BLM And Service Guidance on Eagles and Wind Energy Development.....	15
G. Comments on Draft EIS.....	16
H. Preparation of Final Environmental Impact Statement.....	18
I. The Final EIS.....	23
J. Record of Decision.....	24
ARGUMENT.....	26
I. STANDARDS OF REVIEW.....	26
II. NEPA’S REQUIREMENTS.....	26
III. THE FEIS AND ROD ARE GROSSLY DEFECTIVE IN THEIR TREATMENT OF GREATER SAGE-GROUSE.....	27
A. Sage-grouse Surveys Were Inadequate.....	28

TABLE OF CONTENTS (cont.)

B.	Sage-grouse Seasonal Habitats Were Not Identified Or Assessed.....	30
C.	The FEIS Did Not Assess Habitat Fragmentation And Connectivity....	33
D.	Defendants Failed To Follow Their Own Sage-grouse Policies.....	37
IV.	THE FEIS ALSO FAILED TO DISCLOSE LIKELY ADVERSE IMPACTS TO EAGLES AND OTHER RAPTORS.....	40
A.	Golden Eagles and Wind Development.....	41
B.	Inadequate Surveys and Habitat Descriptions.....	42
C.	Collision and Mortality Risks.....	44
V.	THE FEIS FAILED TO ANALYZE MITIGATION AS REQUIRED BY NEPA.....	46
	CONCLUSION.....	50

TABLE OF CASES AND AUTHORITIES**CASES**

<i>Atchinson v. Wichita Bd. of Trade</i> , 412 U.S. 800 (1973).....	46
<i>Ctr. for Biol. Diversity v. Lohn</i> , 296 F.Supp.2d 1223 (W.D. Wash. 2003).....	36
<i>Center for Biological Diversity v. U.S. Forest Service</i> , 349 F.3d 1157 (9th Cir. 2003)	37
<i>Earth Island Institute v. U.S. Forest Service</i> , 442 F.3d 1147 (9 th Cir. 2006)	3, 27, 36
<i>Found. for N. Am. Wild Sheep v. US Dept. of Agriculture</i> , 681 F.2d 1172 (9 th Cir. 1982).....	36
<i>Great Basin Mine Watch v. Hankins</i> , 456 F.3d 955 (9th Cir. 2006).	36
<i>Idaho Sporting Congress v. Thomas</i> , 137 F.3d 1146 (9th Cir. 1998)	46
<i>Klamath Siskiyou Wildlands Center v. BLM</i> , 387 F.3d 989 (9 th Cir. 2004)	30
<i>League of Wilderness Defenders v. Forsgren</i> , 309 F.3d 1181 (9 th Cir. 2002).....	33
<i>Motor Vehicle Mfg. Ass'n v. State Farm</i> , 463 U.S. 29 (1983).....	26, 40

TABLE OF CASES AND AUTHORITIES (cont.)

<i>Nat'l Audubon Socy' v. US Forest Serv.</i> , 46 F.3d 1437 (9 th Cir. 1993).....	3
<i>Native Ecosystems Council v. U.S. Forest Serv.</i> 418 F.3d 953 (9 th Cir. 2005)	27, 46
<i>Native Ecosystems Council v. Tidwell</i> , 599 F.3d 926, 937 (9 th Cir. 2010).....	3, 33
<i>NEDC v. BPA</i> , 117 F.3d 1520 (9 th Cir. 1997).....	3
<i>Neighbors of Cuddy Mtn. v. U.S. Forest Serv.</i> , 137 F.3d 1372 (9 th Cir. 1998).....	46
<i>NRDC v. U.S. Forest Service</i> , 421 F.3d 797 (9 th Cir. 2005)	27, 46
<i>Ore. Natural Desert Ass'n v. BLM</i> , 625 F.3d 1092 (9 th Cir. 2010).....	26
<i>ONRC v. Goodman</i> , 503 F.3d 884 (9 th Cir. 2007).....	33
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332, 351-52 (1989).....	46
<i>Seattle Audubon Society v. Espy</i> , 998 F.2d 699 (9 th Cir. 1993)	27, 46
<i>South Fork Band Council v. US Dept. of Interior</i> , 588 F.3d 718 (9 th Cir. 2009).....	3, 47, 49
<i>Western Watersheds Project v. Bennett</i> , 392 F.Supp.2d 1217 (D. Id. 2005)	33
<i>Western Watersheds Project v. Dyer</i> , 2009 WL 484438 (D. Idaho 2009).....	33
<i>Western Watersheds Project v. Kraayenbrink</i> , 632 F.3d 472 (9 th Cir. 2011).....	3, 26, 33-4
<i>Western Watersheds Project v. Salazar</i> , 2011 WL 4526746 (D. Idaho 2011).....	40

STATUTES

Administrative Procedure Act, 5 U.S.C. § 706(2)(A).....	26
National Environmental Policy Act, 42 U.S.C. § 4321 <i>et seq.</i>	1, passim
Steens Act of 2000. 16 U.S.C. §§ 460nnn <i>et seq.</i>	4-5

REGULATIONS

40 C.F.R § 1502.1.....	26
40 C.F.R. § 1500.1(b).....	27

TABLE OF CASES AND AUTHORITIES (cont.)

40 C.F.R. § 1502(a).....27

40 C.F.R. § 1505.2(c)..... 46

40 C.F.R. § 1502.16(h).....46

40 C.F.R. § 1508.25(b).....46

75 Fed. Reg. 13,910 (Mar. 23, 2010)..... 5-7

76 Fed. Reg. 3843, 3847 (Jan. 21, 2011)..... 46

Special Status Species Policy (BLM Manual, Section 6840).....37

GLOSSARY

ABPP --	Avian and Bat Protection Plan
APP --	Avian Protection Plan
CMPPA --	Cooperation Management and Protection Area
DEIS --	Draft Environmental Impact Statement
ECP --	Eagle Conservation Plan
FEIS --	Final Environmental Impact Statement
HMP --	Habitat Management Plan

INTRODUCTION

The Steens Mountain of southeastern Oregon offers outstanding ecological and recreational values, and is a stronghold for greater sage-grouse, golden eagles, and other declining species. But Steens Mountain and its sage-grouse, eagles, and other species are now threatened by industrial-scale wind energy development, approved in violation of the National Environmental Policy Act (“NEPA”) and federal sage-grouse and eagle conservation policies and requirements.

Specifically, defendants Interior Secretary Ken Salazar and the Bureau of Land Management (“BLM”) approved a Record of Decision (“ROD”) in December 2011, authorizing the grant of federal rights-of-way for the 49-mile North Steens Transmission Line and associated Echanis Wind Energy Project, proposed by intervenor Columbia Energy Partners LLC (“CEP”). Defendants’ approval is based on an October 2011 Final Environmental Impact Statement (“FEIS”) prepared by CEP’s own contractor, which CEP rushed through without conducting necessary biological surveys of sage-grouse, eagles, and other species.

The FEIS is riddled with scientific errors and inadequacies, and failed to disclose the likely adverse impacts of the Steens transmission line and wind project in fragmenting sage-grouse habitat and causing eagle and raptor mortalities, as discussed in the accompanying declarations of Drs. Clait Braun, Shawn Smallwood, and Craig Miller. As summarized by Dr. Braun, one of the leading sage-grouse researchers:

the FEIS does not present a scientifically credible analysis of current sage-grouse habitats and populations on Steens Mountain or the potential impacts of the proposed energy developments upon sage-grouse habitats and populations in this important area.

Braun Decl., ¶ 37. Dr. Smallwood, an expert on wind facility impacts on eagles and other raptors, likewise concludes:

[M]y review found numerous scientific errors and inadequacies in the Steens FEIS, beginning with its presentation of information about existing site conditions for eagles, raptors and other avian species, and reflecting the fact that inadequate surveys were performed for the FEIS. In addition, the FEIS made fundamental errors in employing eagle/raptor use rates of the site; and grossly underestimated likely collision risks and mortality risks for eagles and raptors. . . .

The Echanis Wind Energy project has the potential to cause substantial biological impacts, some of which could rival the impacts that have made the Altamont Pass Wind Resource Area so notorious. . . . The FEIS did not address the likely collision impacts at these types of locations, nor did it propose any meaningful mitigation measures for these impacts. The biological impacts caused by the transmission lines, including the displacement effects they are likely to have on species such as greater sage-grouse, could be devastating.

Smallwood Decl., ¶¶ 21, 111-12.

It is not just these experts who regard the FEIS and ROD as being fatally flawed and scientifically deficient. As the Administrative Record reveals, the Oregon Department of Fish and Wildlife (“ODFW”) and the U.S. Fish and Wildlife Service (“Service”) repeatedly advised BLM that the applicant’s biological surveys for sage-grouse, eagles and other birds and bats were inadequate; and that the EIS drafted by the applicant’s contractor was insufficient and inaccurate in assessing likely harms that the transmission line and wind project would inflict on sage-grouse, eagles, and other sensitive species. The Service even recommended that BLM deny the federal rights-of-way application because of adverse impacts that the transmission line and wind project threaten for sage-grouse, golden eagles, and other species on Steens Mountain. Yet these recommendations were brushed aside in Defendants’ zeal to expedite renewable energy development on public lands, as the discussion below demonstrates.

Because the FEIS and ROD ignored expert sister agency recommendations, failed to provide scientifically credible analysis of sage-grouse and eagle habitats and impacts, and disregarded Defendants’ own sage-grouse and eagle conservation policies, the Court must reverse and remand the FEIS and ROD as being arbitrary, capricious, and in violation of NEPA,

just as the Ninth Circuit has done in other recent cases. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) (reversing where BLM disregarded sister agency scientific recommendations and failed to assess impacts on sage-grouse and other sensitive species); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (reversing where agency failed to address sage-grouse seasonal habitats and impacts from proposed action).

In addition, Defendants approved the federal rights-of-way based on the unwarranted assumption that damage to sage-grouse and eagles from the transmission line and wind project would be fully mitigated; yet the FEIS failed even to identify such mitigation measures, much less assess their likely effectiveness. This is another NEPA violation, as the Ninth Circuit has confirmed. *See S. Fork Band Council v. US Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

Accordingly, for the reasons explained in detail below, the Court should grant summary judgment to Plaintiffs; and reverse and remand the challenged Steens FEIS and ROD.

STATEMENT OF RELEVANT FACTS

I. STEENS MOUNTAIN.

The Steens Mountain of southeastern Oregon offers spectacular views and a rich diversity of geological wonders, wildlife habitat, recreation opportunities, and wilderness values. *See* FEIS (AR 1893), Section 3 (describing Steens Mountain resource values).¹ *See also* Declarations of Brent Fenty, Robert Sallinger and Dr. Craig Miller (discussing Steens Mountain and Plaintiffs' extensive use and efforts to protect it).²

¹ "AR" refers to the Administrative Record filed by Federal Defendants, which fills several CD-ROMs that are in reverse chronological order. *See* Docket No. 29. "SAR" refers to the Supplemental Administrative Record materials subsequently filed by Federal Defendants after Plaintiffs noted some omissions in the original record materials. *See* Docket No. 33.

² The Court may properly consider the accompanying declarations because they underscore Plaintiffs' Article III standing and/or identify adverse environmental impacts that were not disclosed in the FEIS and ROD. *See NEDC v. BPA*, 117 F.3d 1520, 1527 (9th Cir.

Steens Mountain extends for about fifty miles in a north-south direction, rising up to 9,700 feet in elevation. *Id.* Less than a million years ago, alpine glaciers formed broad glacial valleys on top of the mountain, and carved dramatic gorges up to 2,000 feet deep, such as the Kiger Gorge. Numerous raptors – golden eagles, prairie falcons, kestrels, and many species of hawks – soar along the ridges and into the gorges of Steens Mountain as they hunt for ground squirrels and other prey below. *Id.*; *see also* Declaration of Shawn Smallwood (photos and description of Steens Mountain and raptor use).

Much of the area is sagebrush steppe habitat, and Steens Mountain provides year-round habitat for greater sage-grouse, as discussed below. Not only are numerous sage-grouse leks located on Steens Mountain, but it provides crucial connectivity habitat between local and regional sage-grouse populations. *See* Miller Decl., ¶¶ 51-84 & Exhs A-K (GIS maps).

Congress protected the ecological values of Steens Mountain from industrial development through the Steens Act of 2000. 16 U.S.C. §§ 460nnn *et seq.* The Steens Act prescribed a suite of special management designations, including by establishing the 170,000-acre Steens Wilderness Area, and creating the half-million acre Steens Mountain Cooperative Management and Protection Area (“CMPA”) “to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” 16 U.S.C. § 460nnn-12(a). *See also id.*, § 460nnn-21(a)(1) (mandating that Secretary of Interior manage federal lands of the CMPA to ensure its “conservation, protection, and improved management of the

1997) (declarations proper to establish standing); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir. 2006) (“We allow extra-record materials if necessary to determine whether the agency has considered all relevant factors and has explained its decision” in NEPA cases); *Nat’l Audubon Soc’y v. US Forest Serv.*, 46 F.3d 1437, 1147 (9th Cir. 1993) (allowing extra-record evidence where plaintiff alleges that “an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug”).

ecological, social, and economic environment,” including its “geological, biological, wildlife, riparian, and scenic resources”); *id.*, § 460nnn-42(a) (“Development on public and private lands within the boundaries of the [CMPA] which is different from the current character and uses of the lands is inconsistent with the purposes of this subchapter”).

II. THE IMPERILED SAGE-GROUSE.

The Service determined in March 2010 that greater sage-grouse is “warranted, but precluded” for Endangered Species Act listing due to population and habitat losses, and threats to remaining habitats from energy development and other human and natural factors. *See* 75 Fed. Reg. 13,910 (Mar. 23, 2010) (AR 16098-204) (“March 2010 Determination”).

The March 2010 Determination synthesized the large and growing body of scientific literature and data on sage-grouse habitat requirements, population trends, and threats, including from the recent USGS sage-grouse “Monograph.” *See id.* & Braun, Miller Declarations (discussing Monograph and March 2010 Determination). As described in the March 2010 Determination, sage-grouse “depend on a variety of shrub-steppe habitats throughout their life cycle,” including seasonal breeding, nesting, brood-rearing, and winter habitats. 75 Fed. Reg. at 13,915-17. Breeding habitats (“leks”) are open areas used for breeding displays and mating during spring, while nesting habitats generally offer taller sagebrush cover and good quality understory of native grasses and forbs, typically within 2-4 miles from leks but up to 12.5 miles away. *Id.* Females and chicks move to early and late brood-rearing habitats through the summer, which are typically wetland or mesic areas offering succulent green plants and insects to meet protein needs during the chicks’ rapid growth. *Id.* Sage-grouse winter habitats have sagebrush extending above snow for feeding. *Id.* *See also* Miller Decl., ¶¶ 23-26; Braun Decl., ¶¶ 16-21 (describing seasonal habitats and importance of assessing them).

Fragmentation of these sage-grouse habitats was identified by the Service as a key factor in the decline of sage-grouse populations. *See* 75 Fed. Reg. at 13,916-23. The Service defined habitat fragmentation as:

the separation or splitting apart of previously contiguous, functional habitat components of a species. Fragmentation can result from direct habitat losses that leave the remaining habitat in noncontiguous patches, or from alteration of habitat areas that render the altered patches unusable to a species (i.e., functional habitat loss).

Id., at 13,927. The Service underscored that preventing further habitat fragmentation and “maintaining habitat connectivity and sage-grouse population numbers are essential for sage-grouse persistence.” *Id.*, at 13,923. *See also* Braun Decl., ¶ 24-31 (discussing fragmentation and connectivity). Particularly relevant here, the March 2010 Determination noted that “south-central and southeastern Oregon have large areas of relatively unfragmented sage-dominated landscapes which are important for maintaining long-term connectivity” between remaining sage-grouse populations; yet this connectivity is threatened by proposed wind developments on BLM lands. *Id.*, at 13,950-51.

As the Service explained in the March 2010 Determination, extensive science shows that energy development – including industrial wind projects and associated transmission lines and roads – can cause fragmentation and degradation of sage-grouse habitats and adverse impacts to sage-grouse populations. *See* 75 Fed. Reg. at 13,942-54. Sage-grouse will avoid or abandon areas around tall structures, such as wind turbines and transmission lines and towers, presumably to avoid predators (raptors) perching on them. *Id.* at 13,927–29. Structures such as wind turbines and powerlines thus effectively cause habitat loss and sage-grouse population declines far beyond the actual “footprint” from construction of these facilities. *Id.* Roads are harmful by facilitating spread of invasive weeds and increasing human access, traffic, and noise, which the species avoid. *Id.* at 13,929–30.

III. OVERVIEW OF PROPOSED STEENS WIND DEVELOPMENT.

Beginning in 2007, CEP began pursuing development of four wind energy facilities on and near Steens Mountain, known as the Echanis, East Ridge, West Ridge, and Riddle Mountain wind projects. See FEIS, pp. ES-1 to -2, 3.19-1 to -4 & Figure 3.19-1 (describing proposed Steens wind projects and mapping their locations). Each of these four projects was limited to a stated maximum capacity of 104 mega-watts (“MW”) to avoid the State of Oregon’s wind power siting regulations, which require that the Oregon Energy Facility Siting Commission review and approve wind projects of 105 MW or larger. See AR 22766-79 (CEP application materials); Fenty Decl., ¶ 17.

The first of these projects – Echanis – would consist of 40 to 69 wind turbines with rotors extending up to 415 feet tall, located near the top of north Steens Mountain. The Echanis project would occupy 10,362 acres of private land, surrounded almost entirely by the Steens Mountain CMPA. See FEIS, Errata Sheet (inside cover, correcting project area description), and p. 1-5 & Figure 1.1-1 (map showing project location). Because the Echanis site is a ranch accessed by a rough two-track road, the project would require widening and upgrading 18.95 miles of access roads, including within the CMPA; building over 17 miles of new service roads, including on BLM lands; and constructing other facilities. *Id.*

To connect the Echanis and other proposed Steens wind projects to the electrical grid, CEP proposed to construct a new electrical transmission line via a westerly route down Steens Mountain and across the Malheur National Wildlife Refuge – a major stopping point along a world renowned migratory bird fly-way. See FEIS, pp. 2-2 to -17 (describing Alternative B, CEP’s proposed action). Because that would adversely affect the Refuge, the FEIS evaluated an alternative northern route. See FEIS, pp. 2-17 to -19 (Alternative C). This northern route would

cross private lands within the CMPA immediately after leaving the Echanis project site, and then continue nearly 49 miles over federal and private lands to interconnect with an existing line at Crane, Oregon. *Id.* & p. 1-10.

Importantly, the FEIS acknowledged that federal rights-of-way for the transmission line are required to allow development of the Echanis wind facility, since there is no other way to connect the project to the electrical grid – and hence BLM was obligated under NEPA to fully assess the likely impacts of the Echanis project along with the proposed transmission line:

Because development of the Echanis Wind Energy Project . . . would involve a federal action to approve, deny, or approve with stipulations the application for ROW [rights-of-way] for the transmission line, this EIS must analyze the indirect environmental effects of the Echanis Project at the same level of detail as the direct and indirect environmental effects of the proposed transmission line. In other words, because the transmission line could not built without crossing federal lands, a grant of ROW would be a Federal Action that would enable the Echanis Project to move forward.

FEIS, p. 2-1 (emphasis added).

IV. DETAILED DISCUSSION OF STEENS WIND PERMITTING PROCESS.

A. Harney County Conditional Use Permit.

CEP first applied for a conditional use permit from Harney County for the Echanis project in 2007. *See* AR 27982 (application). CEP had not completed any avian or wildlife studies at the time of this application. *See* AR 24595-96 (CEP email admitting this).

In April 2008, Harney County granted a conditional use permit for the Echanis project, without giving notice to ONDA or to the public, and without obtaining input from ODFW. *See* AR 24953-54 (Harney County letter describing CUP approval process); Fenty Decl., ¶¶ 13-15 (describing how ONDA was not given notice of the Echanis permit application or hearing).

B. ODFW Recommendations.

ODFW is the Oregon state agency charged with managing sage-grouse, eagles, and other

wildlife; and has adopted a series of sage-grouse conservation plans in recent years. ODFW only learned of the Echanis project in May 2008, after the county permit was granted, at which point ODFW sent Harney County its 2005 sage-grouse conservation plan. See Fenty Decl., Exh.1 (copy of 5/7/08 email from ODFW to Harney County). That plan called for excluding wind development within 5 miles of active sage-grouse leks, see AR 6431, 6526 – a recommendation that would have precluded the Echanis project, had Harney County followed it.

ODFW was concerned from the outset about impacts of CEP’s proposed Steens wind projects and the lack of biological studies. As one ODFW email stated:

[T]he Harney County process appears to be completely backwards from every other wind energy permitting process we have been involved in. In all other processes, the project proponents conduct biological studies prior to a permitting decision by the regulatory body so that all the information/data gets consideration. The Harney County process appears to acquire permits before beginning any biological studies – or perhaps does not consider the need for any biological studies or input to the permitting decision.

See Fenty Decl., Exh. 2 (8/12/08 ODFW email). ODFW underscored the importance of Steens Mountain as habitat for sage-grouse, raptors, bats, and other sensitive wildlife species, stating:

The high elevation montane shrubsteppe of Steens Mountain affords habitat, forage and migration corridors for a suite of sensitive wildlife species and yields a diversity of important habitat types. . . . The project area serves as a summer range for elk, mule deer, and pronghorn, as well as designated elk winter range. Multiple species of bats including pallid, Townsend’s big-eared, hoary, silver haired, long legged myotis, and long eared myotis are likely to occur in the project area and are vulnerable to significant habitat alteration. Golden eagles, northern goshawk, ferruginous hawks, and peregrine falcons occur in this region. There are important upland bird populations in the region including chukar, mountain quail and greater sage-grouse.

See Fenty Decl., Exh. 3 at p. 2 (8/15/08 ODFW comments on East Ridge proposal).

ODFW also described in detail sage-grouse breeding and other seasonal habitats, and the importance of “buffers” to protect them from wind development impacts. *Id.*, pp. 4- 5. ODFW recommended that CEP conduct two years of pre-construction surveys for sage-grouse and one full year of surveys for raptor and avian use, stating “[t]his information will be vital in

determining impacts to sage-grouse as well as other sensitive species and habitats.” *Id.*, p. 7.

In October 2008, ODFW further advised CEP of “the need to monitor for potential winter time use of sage grouse” in the project area. *See* Fenty Decl., Exh. 4 (ODFW 10/6/08 letter) (emphasis added). ODFW explained that “sage grouse are likely year-round residents, and studies of their use of the project area should occur throughout the year.” *Id.*, p. 2 (emphasis added). *See also* Fenty Decl., Exh. 5 (11/21/08 ODFW letter recommending sage-grouse winter use and other surveys). ODFW’s survey recommendations were not heeded, as shown below.

C. Initiation of the BLM Permitting Process.

The BLM permitting process began in December 2008, with submission of a right-of-way application for the proposed transmission line. *See* AR 26824. CEP submitted a proposed Plan of Development for the transmission line in February 2009. AR 26493.

In April 2009, BLM entered into a Memorandum of Understanding (“MOU”) and cost reimbursement agreement with Echanis LLC (a wholly owned subsidiary of CEP) to have an outside consultant prepare an EIS to assess the right-of-way application. AR 26109 & 26125. Under these agreements, BLM’s Burns District staff would review the EIS prepared by the outside consultant, and BLM’s staff costs for that work would be reimbursed by CEP. *Id.*

The MOU established a “tentative preparation schedule” which called for a Draft EIS (“DEIS”) to be released in April 2010, a final EIS in October 2010, and a ROD in December 2010. AR 26120-21. This schedule anticipated cultural, botanical, and wilderness inventories would be conducted before the DEIS, but did not provide for any wildlife surveys. *Id.* The consulting firm that CEP selected to prepare the EIS, Entrix, made clear that its work would not include any wildlife surveys, because CEP would not pay for them. AR 25888. Instead of undertaking necessary biological studies, CEP sought to push the EIS process along rapidly,

including by repeatedly seeking help from higher level officials in Washington, D.C. *See, e.g.*, AR 24836, 24936, 24948, 25200.³

D. Notice of Intent And Scoping Comments.

BLM published a Notice of Intent to prepare the North Steens EIS on July 27, 2009, launching a public “scoping” period under NEPA. *See* AR 24845. Plaintiffs submitted extensive scoping comments, which emphasized the special values of Steens Mountain, and advised that sage-grouse, raptors, bats, and other resources would be adversely affected, with extensive citations to supporting scientific literature. *See* AR 22893-4445.

For instance, Plaintiffs cited a 2009 study of wind energy impacts on sage-grouse by the Dept. of Energy’s Pacific Northwest National Lab (Becker *et al.*, 2009). *See* AR 25015. Similar to the March 2010 Determination, Becker *et al.* discussed sage-grouse seasonal habitat needs, including for breeding, brood-rearing, and winter use; and described the adverse impacts of energy development upon these seasonal habitats and sage-grouse behavior – including lek abandonment, reduced reproductive success, and disruption of winter habitat, among others. *See* AR 25027-34. Based on this and other literature, Plaintiffs’ scoping comments recommended that BLM should identify and map all sage-grouse seasonal habitats affected by the Steens transmission line and wind projects; and avoid disrupting those habitats by ensuring adequate “buffers,” such as a 5-mile buffer recommended by ODFW and the Service. *See* AR 24344-48.

The Service submitted its own scoping comments on August 26, 2009. *See* AR 24446-505. These requested that BLM “use and follow the ‘Service Interim Guidelines on Avoiding and Minimizing Wildlife Impacts from Wind Turbines’ (2003) in assessing the related impacts to

³ For example, CEP wrote to BLM higher-ups in July 2009 to complain about a proposed 24 month EIS schedule, AR 24936-37, and succeeded in getting headquarters to press the Burns District for “an expedited EIS timeframe for this project.” *See* AR 24948.

fish and wildlife resources in the EIS.” AR 24447-48. The Guidelines include recommendations for biological evaluations, which “should be conducted by a team that includes Federal and/or State agency wildlife professionals with no vested interest (e.g., monetary or personal business gain) in the sites selected.” AR 24618. Contrary to the Guidelines, however, CEP relied on its own “consulting partner” Northwest Wildlife Consultants to perform all biological surveys for the EIS. *See* AR 25996, 26006.

The Service’s 2003 Guidelines also advise careful siting of wind energy facilities, including to avoid “areas or features of the landscape known to attract raptors,” “[a]void placing turbines in habitat known to be occupied by [sage] grouse or other species that exhibit extreme avoidance of vertical features and/or structural habitat fragmentation,” and “avoid placing turbines within 5 miles of known” sage-grouse leks. AR 24453-54. Those recommendations also were not followed here. *See* Miller, Smallwood Declarations.

E. Preparation and Issuance of Draft EIS.

Even Entrix staff recognized the need for better studies of sage-grouse, eagles, and other sensitive species; but were instructed by CEP to prepare the EIS using studies by CEP’s contractor, Northwest Wildlife Consultants. *See, e.g.*, AR 22687-90, 22545, 22246, 17442. On August 28, 2009, for example, Entrix project head Jeremy Pratt expressed concerns about the existing studies being inadequate for an EIS, saying:

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.

AR 22567. Likewise, in January 2010, Pratt wrote CEP again voicing concerns about the inadequacy of existing biological information and CEP’s “low budget” for the EIS, stating:

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. . . .

AR 18841 (underscore added).

Just a month later – in February 2010 – the Service released its “Interim Golden Eagle Technical Guidance: Inventory and Monitoring Protocols,” which provided recommended inventory and monitoring for golden eagles in the permitting of renewable energy developments. *See* AR 18503-31. Among these, the Guidelines recommend that field inventories should be conducted for golden eagles within 10 miles of the project boundary, and during specific seasons and for specific durations. AR 18513, 18516-19. Yet the record shows that CEP, Entrix, and BLM all agreed that same month that the DEIS would be prepared on the basis of existing avian surveys, which did not meet this recommendation, because of CEP’s pressure to move the EIS process along rapidly. *See* AR 17442.

In April 2010, the BLM Oregon State Office commented on the preliminary DEIS produced by Entrix, stating flatly that greater sage-grouse “was not adequately covered in the Affected Environment or the Environmental Consequences” chapters. *See* AR 15547. The State Office requested that seasonal sage-grouse habitats be identified, asking: “Can we present the number of acres of suitable year-round sagebrush habitat that is present or break it down to acres of nesting, brood rearing, lekking and wintering habitat?” AR 15558 (comment r9). It also queried: “How will grouse be affected by the habitat fragmentation that will occur from the [transmission line] ROW and new roads?” AR 15578 (comment r61). Yet these questions were never answered, and no such analysis was ever done. *See* Miller Decl., ¶¶ 18-38.

The Service also commented on the preliminary DEIS in April 2010. *See* AR 14686-93.

The Service began by underscoring the need to preserve important sage-grouse and other wildlife habitat on Steens Mountain, stating:

The proposed Project is located in an area that includes a diverse topography of primarily native shrub-steppe. Portions of the project are within areas considered to be big game winter range . . . as well as important habitat for greater sage-grouse . . . migratory birds, raptors and bats. Due to these native habitats and known wildlife use, the Service has a number of natural resource concerns with the Project and with the adequacy of the evaluation of impacts and the proposed mitigation to offset Project impacts. . . . Specifically we recommend that wind projects not be sited within ODFW Mitigation Policy Category 1 and 2 habitats or other areas of high wildlife importance. Unfortunately, the proposed project appears to be largely sited on Category 1 and 2 habitats. . . .

AR 14688 (emphasis added). The Service further recommended that the DEIS should be delayed until adequate eagle studies were done in conformance with the February 2010

Inventory and Monitoring Protocols (discussed above):

The Service has identified concerns and recommendations pertaining to the Project's impacts on golden eagles. Golden eagle surveys should be conducted to assist in the evaluation of the potential project impacts and included in the DEIS. . . . The Project should initiate inventory and monitoring to determine and evaluate potential golden eagle use of Project habitats including nest sites, roosts, territories, and identify foraging locations during breeding and non-breeding periods. These data are a necessary component of short and long-term site-specific monitoring and management of local golden eagles and regional golden eagle populations.... [and] these golden eagle data are necessary for an informed impact analysis, including mitigation discussions, during the Project's NEPA process.

AR 14688-89 (emphasis added).

Regarding sage-grouse, the Service emphasized the need to protect sage-grouse winter and brood rearing habitat, and cited its March 2010 Determination as confirming that wind projects and transmission lines pose adverse impacts to sage-grouse. *See* AR 14689. The Service recommended that further surveys were needed to fully assess sage-grouse seasonal habitats and fragmentation impacts, as follows:

Nesting, brood rearing and wintering habitat and sage-grouse activity is likely in the area due to the natural attractant that higher elevations provide (higher moisture availability to plants, greater biomass production resulting in greater cover values (p.45 Freese). The BLM should survey for sage grouse use of the area and mitigate for the impacts and disturbance.

Fragmentation and displacement have been identified as main threats to sage grouse in the recent listing decision published by the Service (FR vol. 75 no. 55 pp. 13910-14014). The BLM should consider fragmentation and displacement affects to sage grouse from construction and operation of the transmission line and all connected wind turbine projects in the DEIS. . . .

With potential nesting, brood rearing, and over-wintering habitat in the vicinity of the project, and the additive nature of turbine noise (i.e., two turbines produce 3 dB(A) more than one turbine (Rogers et al 2006), the Service is concerned that significant indirect impacts may result. Additional nest and brood surveys for sage grouse should be conducted.

AR 14689-90 (emphasis added).

But BLM disregarded these comments, and released the DEIS drafted by Entrix for public comment on July 16, 2010, without requiring the biological studies recommended by the Service and ODFW. *See* AR 13075-963 (copy of DEIS); AR 12231-32 (Federal Register notice of DEIS availability). As the record shows, CEP continued to insist that the EIS move along quickly in order to get a decision by the end of the year. *See* AR 12247 (7/14/10 meeting notes that “CEP needs a ROD by Dec. 1”).

F. BLM And Service Guidance on Eagles and Wind Energy Development.

Just days after the DEIS was released, BLM’s national office issued Instruction Memorandum No. 2010-156, addressing eagle issues in permitting renewable energy projects on public lands. *See* AR 12184-87 (“Eagle IM”). BLM staff in Oregon recognized that this Eagle IM would apply to the Steens transmission line proposal. *See* AR 12183.

Under the Eagle IM, BLM directed that renewable energy projects that may affect eagles should use the NEPA process and consult with the Service to assess impacts to individual birds

and their habitat, as well as “potential direct and indirect impacts, if any, to the local or regional eagle population and their habitat.” *See* AR 12185. If the Service determined that an Avian Protection Plan (“APP”) was needed, the Eagle IM specified that: “a letter of concurrence must be sought and received from the [Service] that addresses the adequacy of the APP. The letter of concurrence must be included in the administrative record.” *Id.* (emphasis added).

On August 3, 2010, the Service issued its own “White Paper” to provide guidance for the development of APPs and Avian and Bat Protection Plans (“ABPPs”) for renewable energy projects. *See* AR 12144-59. The White Paper confirmed that the Eagle IM “directs BLM staff to acquire written concurrence from the Service that the portions of ABPPs/APPs applicable to federal trust species adequately addresses potential impacts. . . .” *See* AR 12147. Citing a variety of sources, the White Paper recommended “multiple survey techniques to ensure adequate data collection” for such plans, noting that “[m]ulti-year surveys, up to three years pre-construction, may be warranted” and “should be designed to ensure adequate data are collected on breeding, staging, migration, and winter bird/bat use of the project site.” AR 12151. The White Paper also reiterated the Service’s recommendation that the “project assessment should address whether there are nesting bald or golden eagles within 16 km (10 miles) of the project site.” AR 12152 (emphasis added). Again, BLM did not require such surveys here, contrary to the Service’s recommendations. *See* Smallwood Decl., ¶ 22-29.

G. Comments on Draft EIS.

In September 2010, Plaintiffs submitted comments highlighting many scientific and legal deficiencies of the DEIS; and submitted additional information and comments in January 2011. *See* AR 11546 (Sept. 2010 comments) & AR 8826, 8780, 4938-5107 (supplemental comments). Plaintiffs again emphasized the need for BLM to assess sage-grouse, raptors, bats, and other

species; and demonstrated that the DEIS was insufficient under NEPA, including because of the lack of adequate biological studies. *Id.* Plaintiffs requested that BLM prepare a supplemental DEIS after completing adequate studies, so the public could comment on full information before BLM issued a final EIS. *Id.* BLM did not heed this request. *See* Fenty Decl., ¶¶ 23-24, 29.

ODFW submitted its own critical comments, which advised that the DEIS “lacks specific details of what is proposed for mitigation if an action alternative is chosen,” that “wildlife survey data from the west route (alternative B) is incomplete,” and “there is no wildlife survey data included for the north route (alternative C),” such that “the department is unable to compare potential effects on wildlife.” AR 11577-78.

The Service likewise commented on the DEIS, again underscoring its concerns about inadequate analysis of sage-grouse, eagles and raptors, and other species. *See* AR 11504-19. The Service reiterated the points made in its April 2010 preliminary comments (discussed above), but added citations to scientific literature on sage-grouse seasonal habitats and impacts of energy development upon them. *Id.* The Service specifically faulted BLM for not mapping or analyzing sage-grouse seasonal habitats, stating:

The DEIS did not map seasonal sage-grouse habitats (wintering, brood rearing, and late summer) for any of the alternatives and did not characterize or quantify habitat types per the [ODFW] Sage-grouse Mitigation Whitepaper and use the associated habitat classifications to identify and analyze short and long term impacts to sage-grouse from each alternative.

Loss and degradation of contiguous sage-grouse habitat will likely occur from Alternatives B and C due to the proposed construction and operation of the transmission line, wind turbines, and associated facilities, thereby impacting sage-grouse and sage-grouse populations. . . . Based on the best available science, we believe that the Project as proposed, with less than a 2-mile setback of the transmission line in Alternative B and C from a known lek site, will result in a net loss of habitat for sage-grouse, the potential eventual abandonment of the sage-grouse lek, and the displacement of sage-grouse from nesting and brood-rearing habitat within at least a 2 mile area around the lek.

AR 11506-07 (emphasis added). The Service also recommended that the Final EIS should

specify mitigation measures, taking “into consideration that additional habitat loss for wide-ranging species, such as sage grouse, will occur due to fragmentation of the landscape and displacement of sage-grouse from year-round habitats.” AR 11507-08.

The Service’s comments regarding golden eagles were equally damning. *See* AR 11510. The Service found that existing data “indicate a high concentration of golden eagle use in the Project vicinity,” and it found “a higher risk of golden eagle injury or mortality from a turbine strike or transmission line collision” than predicted in the DEIS. *Id.* The Service recommended that the FEIS “provide additional analysis of direct, indirect, and cumulative impacts of the Project and interconnected wind projects on the golden eagle population on the Burns District,” and that turbines should be located “a minimum of six miles from a golden eagle nest” to avoid take of eagles. AR 11511-12 (emphasis added).

The Service ended its comment letter recommending that BLM deny the rights-of-way application in order to protect sage-grouse, eagles, and other resources, as follows:

In conclusion, the Service finds that either Alternative B or C will result in significant impacts to the human environment including impacts to sage-grouse and golden eagle. . . and we anticipate that cumulative effects to sage-grouse and golden eagles will be significantly greater with the additional wind projects that use the Project’s transmission capacity. Therefore the Service recommends the No Action Alternative. . . .

Should BLM decide to permit the Project as proposed, we believe that the impacts to Category 1 and 2 sage-grouse habitat, including impacts to the Little Kiger lek and sage-grouse nesting and brood-rearing habitat, will negatively affect the conservation status and potential for recovery of sage-grouse. We are concerned that BLM and the applicant have not conducted necessary surveys and analysis to assess Project impacts on golden eagles and have not included avoidance, adaptive management, and conservation measures that are consistent with the goal of maintaining a stable or increasing breeding golden eagle population.

AR 11515 (emphasis added).

H. Preparation of Final Environmental Impact Statement.

The Service’s recommendation that BLM select the “No Action Alternative” fell on deaf

ears. Records of internal meetings and memos among BLM and Entrix staff reveal they never even acknowledged the Service’s “no action” recommendation, much less gave it careful consideration. *See, e.g.*, AR 11423-31 at 11426 (summarizing Service as being “concerned about sage grouse and golden eagles” without mentioning “no action” recommendation); AR 11333-65 (Entrix memo summarizing Service comments, without mentioning “no action” recommendation); AR 10632-33 (BLM State Office memo on issues to address in FEIS, also not mentioning Service “no action” recommendation).

Instead, BLM continued to bow to pressure from CEP to get the EIS finalized and a decision issued as soon as possible. *See* AR 10860-66 (team notes stating that “schedule is paramount”); AR 10693-95 (team notes that BLM “needs to start the NOA process asap” for making FEIS available); AR 10626 (“latest version of our schedule indicates a printer ready FEIS by November 15”). BLM staff began analyzing which alternative should be identified as “preferred” in the FEIS, yet never considered denying the right-of-way application. *See* AR 10509-14 (notes of meeting and analysis of alternatives B and C); AR 10285-300 (briefing materials identifying Alternative C as “preferred” alternative).

BLM and Entrix did recognize, however, that the existing avian surveys were inadequate. *See* AR 10693-94 (team meeting notes that “[a]dditional biology work is needed” and discussing additional surveys); AR 10631 (memo of BLM call with ONDA, acknowledging “holes” in the surveys and “that we intended to do an interim survey this fall to fill those holes”); AR 10606 (similar memo noting BLM “identified approximately 10,000 acres of raptor surveys along the proposed transmission line routes that had either had not been properly recorded, mapped and/or reported, or 2) had not been surveyed”). BLM and CEP’s wildlife consultant thus scrambled to obtain more information on eagle nest locations, falcons, and sage-grouse for the FEIS – yet still

did not heed the Service's recommendations about the extent and nature of surveys that were necessary. *See* AR 10724-820, 10720-23, 10696-718, 10691, 10616-17; Smallwood and Miller Declarations.

On January 20, 2011, Ray Brady – a BLM headquarters representative on the Dept. of Interior's Energy Policy "Strike" Team – emailed CEP President Chris Crowley to advise that the Steens Wind project was placed on Interior's 2011 "priority list" for renewable energy projects. *See* AR 8992. But Brady cautioned other "Strike" Team members that further briefing would be necessary "[d]ue to the high level of potential concerns" over the Steens project, similar to "briefings on the controversial China Mtn wind project" in Idaho. *See* AR 8933.⁴

When the Service learned that the Steens wind project was placed on the 2011 priority list, it wrote to express concern. *See* AR 8664-5. The Service requested that the project be moved to the 2012 list to give more time for studies and analysis; but BLM insisted on adhering to its timeframe of releasing the FEIS and ROD by the end of 2011. *See* AR 8639, 8069, 8053. *See also* AR 8423-24 (CEP email pressuring to keep Steens project on 2011 priority list); AR 8163-64 (CEP email to BLM that "it is simply not appropriate to 'start over' at this stage").

CEP submitted a draft Avian and Bat Protection Plan to the Service in January 2011, and revised it in February. *See* AR 8998, 8387. The Service responded with numerous concerns about the draft ABPP, and underscored the need to have its concurrence before BLM could approve the project under the Eagle IM. *See* AR 8432, 7948-49, 7892-93.

⁴ As this memo reveals, BLM recognized that the China Mountain and Steens wind projects were both controversial because of significant adverse impacts to sage-grouse. *See also* AR 5282 (strike team considers both Steens and China Mountain as "sensitive" projects that "may be difficult to move through the permitting process"). But in contrast to Steens, BLM's China Mountain DEIS did map and assess seasonal sage-grouse habitats potentially affected by the wind development. *See* Miller Decl., ¶¶ 34-36 (China Wind DEIS sage-grouse maps and table). As explained below, the China Mountain example illustrates the arbitrary and capricious nature of BLM's failure to map and assess seasonal sage-grouse habitats for the Steens project.

In March 2011, ODFW announced a revised Oregon Sage-grouse Conservation Strategy, using a “core area” approach to protect key sage-grouse habitats and requiring habitat mitigation for damaging activities. AR 8070-71 & 6431-810. BLM and Entrix recognized this new ODFW Strategy would affect the Steens EIS. *See* AR 7927, 7500-01. Nevertheless, they continued preparing the FEIS, and made an administrative review copy available for BLM and cooperating agencies to review that same month. *See* AR 7912.

Negotiations also began at this time between CEP, BLM, and the cooperating agencies over habitat mitigation that CEP would commit to undertake, pursuant to the revised ODFW Strategy. *See* AR 7997-8047, 7698-765, 7401-08, 5778-79. In these discussions, and in comments on the administrative draft of the FEIS, both the Service and ODFW expressed concerns that mitigation proposed by CEP was not sufficient to offset impacts to sage-grouse and other species. *See* AR 7126-29, 7056, 7049-55, 7000-03. The Service also underscored the deficiencies in the draft FEIS, which did not analyze sage-grouse seasonal habitats and impacts of the proposed energy developments. *See* AR 7049-55.

On April 20, 2011, the Service provided further recommendations to BLM and CEP for golden eagles and other wildlife surveys. *See* AR 6828-32. The Service emphasized that additional field work should “commence immediately to begin the process of collecting data that will, in the future, reduce the uncertainty around the estimates of eagle risk, and fine tune the ABPP [and Eagle Conservation Plan] commitments regarding project siting, monitoring, adaptive management, and compensatory mitigation.” AR 6829. The recommendations again included eagle nest surveys within 10 miles of the project, two years of eagle point count surveys, and nocturnal raptor surveys. AR 6829-31. Illustrating BLM’s resistance to the Service’s recommendations, BLM’s project lead quickly dismissed them in an internal email,

stating: “I didn’t hear agreement on this today so I think it is just FWS wish list.” AR 6828.

On April 27, 2011, the Service provided written comments to CEP on the draft ABPP. AR 6325-32. The Service again advised that “additional recommended surveys” and “advanced conservation measures are anticipated to be necessary,” and reiterated its prior recommendations. AR 6325, 6330. After CEP revised the ABPP in May 2011, the Service provided further comments, AR 5920-26, which advised that the draft still did not contain adequate information, such as the “number and location of eagle nests within 10 miles of the Project,” “important eagle use areas,” or “use by golden eagles of the migratory corridor off the East Rim of the Steens.” AR 5923. The Service again disagreed with CEP’s characterization of the Echanis site “as a low risk site for golden eagles,” calling it instead a “high to moderate risk site.” *Id.* And the Service again suggested that its eagle Guidance and survey recommendations be followed, as well as survey recommendations for bats and other species. AR 5924-26. Yet these surveys were not done. *See* Smallwood, Miller Declarations.

Ironically, Entrix halted work on the FEIS for about three months in spring/summer 2011, because CEP refused to pay it; and CEP was behind in its reimbursements to BLM as well. *See* AR 6033, 6006-07, 5787, 5758, 5730-31, 5162-63, 4441-46, 4234-38, 3958-63. As BLM’s team leader noted in an email: “I think their [*sic*] trying to do this on the cheap.” AR 5731.

Drafting of the Final EIS resumed in August and September 2011, giving cooperating agencies (including the Service) very little time to review it. *See* AR 5307, 5282-83, 5251-52, 5247, 5162-63, 4793, 1878, 1841, 1768. In August 2011, ODFW provided guidelines on how to mitigate for noise impacts of renewable energy projects on sage-grouse. AR 5292-306. ODFW advised BLM that mitigation should be specified in the FEIS, not later. *See* AR 5119-20. The Service likewise advised that the DEIS “significantly understates acreage of affected sage-grouse

habitat and the currently proposed mitigation does not adequately address conservation standards,” and that the FEIS should fully address mitigation. AR 4823, 4827-28. But because of CEP’s and BLM’s insistence that the FEIS be released promptly, the FEIS did not specify or evaluate the effectiveness of mitigation measures to implement the ODFW guidelines, despite ODFW and the Service’s urgings to do so. *See* AR 5283, 5251-52, 5162 (Service email to BLM stating “we are especially concerned that BLM’s FEIS and ROD timelines do not reflect the unresolved sage-grouse and golden eagle issues”).

The Service provided further detailed comments to CEP on the inadequacies of its proposed ABPP in August 2011, again reiterating that CEP was relying on inadequate surveys and underestimating risks to eagles. *See* AR 5221-39, 5165-86. And the Service provided BLM with extensive comments and questions about the draft FEIS in September 2011, which highlighted the failure to assess seasonal sage-grouse habitats or mitigation. *See* AR 3466-561, 3470-74. Even BLM’s Oregon State Office commented that the draft FEIS “does not provide sufficient information as to (1) what mitigation actions we intend on taking; and (2) why (i.e., effectiveness of those type of measures).” *See* AR 3784.

I. The Final EIS.

Despite all these concerns, BLM pushed forward and publicly released the FEIS on October 21, 2011. *See* AR 1893-3152 (FEIS), AR 1610 (Federal Register notice of FEIS availability). The record shows that BLM decided not to include analysis of proposed habitat mitigation in the FEIS, and instead delayed decisions about habitat mitigation requirements to the ROD. *See* AR 3300, 3259, 3191-93 (“BLM is unable to provide the specificity desired by FWS due to critical timeframes associated with the project schedule . . . Once [the FEIS is] released BLM plans to work with FWS, ODFW, Harney County, the applicant and others to

develop a detailed mitigation plan that can be incorporated into the ROD”).

The FEIS used underlining to identify the changes made from the DEIS, including the Wildlife section in Chapter 3 regarding sage-grouse, eagles, bats, and other sensitive species. *See* FEIS Section 3.5 (AR 2163-252). While the underlining shows that these (and other sections) certainly added more discussion from the DEIS on sage-grouse, eagles and other sensitive species – adding references to the March 2010 Determination and Monograph, for instance – the analysis in the FEIS of these topics remains inadequate, incomplete, and incorrect, as discussed below and in the accompanying Miller, Braun, and Smallwood Declarations.

The Service highlighted the inadequacies of the FEIS in a November 2011 letter to BLM after the FEIS was published. *See* AR 1143-45. The Service stated that “the Project’s Proposed and Connected Actions cause adverse impacts to sage-grouse, golden eagle, other migratory birds, and bats that have not been adequately analyzed, avoided, and mitigated,” and that although the “FEIS contains some of the additional information and analysis regarding Project impacts to sage-grouse, golden eagles, and migratory birds and bats that we requested in our comment letters, we remain concerned that the FEIS lacks essential information.” *Id.*, at 1144-45 (emphasis added). The Service reiterated that “the Project will result in significant adverse impacts to sage-grouse and its habitat,” the FEIS “does not adequately analyze effects or describe proposed mitigation actions sufficient to determine if the mitigation will offset Project impacts to sage-grouse,” and “the FEIS does not provide adequate measures to offset impacts to golden eagles and other migratory birds and bats.” *Id.*

J. Record of Decision.

On December 28, 2011, Interior Secretary Ken Salazar signed the ROD approving the grant by BLM of rights-of-way over federal lands for the North Steens transmission line and

related access roads and facilities. *See* AR 8-12, 13-256. Just prior to the Secretary's approval, the Steens ROD was approved by the DOI Energy Policy "Strike" team and BLM Director Bob Abbey. *Id.* & AR 548.

The ROD conceded that the North Steens transmission line and associated Echanis wind project will cause adverse impacts to visual and recreational resources on federal lands, including the Steens CMPA and adjacent wilderness study areas, as well as to sage-grouse, eagles and other wildlife. *See* AR 15-16, 40, 47-56. Nevertheless, the ROD emphasized that the federal grant would serve Interior's policies of promoting renewable energy development on public lands, while wholly ignoring DOI's policies regarding sage-grouse conservation. *See* AR 27-56, 63 (ROD discussion); AR 257-350 (sage-grouse conservation policies). As discussed below, by focusing on energy development policies without assessing sage-grouse conservation policies and directives, the ROD was arbitrary, capricious, and contrary to law.

The ROD also was approved even though the Service never concurred in an ABPP for the Echanis project, as required by the Eagle IM. Instead the Service submitted a "Letter of Acknowledgement" to BLM on December 12, 2011, which acknowledged simply that CEP had submitted a proposed ABPP/ECP which the Service was working on with CEP. *See* AR 568-70.

Contrary to BLM's earlier promises that the ROD would include requirements for habitat mitigation, the ROD approved the grant of federal rights-of-way based on the assertion that the CEP would enter into a Habitat Mitigation Plan in the future to offset impacts of the transmission line upon sage-grouse habitat. *See* AR 31-44. The ROD also assumed that Harney County, the Service, or other regulatory agencies would require habitat mitigation and other measures to address the Echanis wind project's adverse impacts. *Id.* As explained below, these assumptions that mitigation would fully offset project impacts on sage-grouse and eagles are unwarranted.

ARGUMENT

I. STANDARDS OF REVIEW.

The Court reviews Plaintiffs' challenges to the FEIS and ROD under the Administrative Procedure Act (APA), to determine whether they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Agency action must be reversed and set aside under these APA standards where the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfg. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

II. NEPA'S REQUIREMENTS.

In enacting NEPA, Congress "recognized the profound impact of man's activity on inter-relations of all components of the natural environment," and set out to "create and maintain conditions under which man and nature can exist in productive harmony." *Kraayenbrink, supra*, 632 F.3d at 486, *quoting* 42 U.S.C. § 4331(a).

NEPA requires that an EIS "provide full and fair discussion of significant environment impacts of the proposed actions and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Ore. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010), *quoting* 40 C.F.R § 1502.1. That discussion serves two purposes:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made

available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

Id., at 1099, quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). To fulfill this mandate, an EIS must “consider every significant aspect of the environmental impact of a proposed action,” including the direct, indirect, and cumulative impacts. *Id.*, at 1100. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b).

Where an EIS fails to take the requisite “hard look” at environmental impacts, the courts must reverse and remand. See *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159-60 (9th Cir. 2006) (reversing EIS that presented misleading information and did not explain its conclusions); *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (holding EIS unlawful for violating NEPA's requirement to “present complete and accurate information to decision makers and to the public”); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964-66 (9th Cir. 2005) (reversing where EIS did not provide “full and fair discussion of the potential effects of the project”); *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (reversing EIS that rested on “stale scientific evidence, incomplete discussion of environmental impacts, and false assumptions”).

As discussed below, the FEIS and ROD violate these NEPA requirements in multiple respects, particularly regarding their treatment of sage-grouse, eagles, and mitigation, just as the Service and Plaintiffs repeatedly advised BLM, and as Plaintiffs’ expert declarations confirm.

III. THE FEIS AND ROD ARE GROSSLY DEFECTIVE IN THEIR TREATMENT OF GREATER SAGE-GROUSE.

The Service was right: the FEIS failed to present sufficient information and accurate scientific analysis of sage-grouse and impacts of the Steens transmission line and wind project.

The defects include the following, all identified by the Service and Plaintiffs in their comments, and confirmed by the accompanying Declarations of Dr. Craig Miller and Dr. Clait Braun.⁵

A. Sage-grouse Surveys Were Inadequate.

As the detailed discussion of the Administrative Record above establishes, CEP avoided funding the biological surveys that ODFW and the Service recommended as necessary to assess sage-grouse presence and habitat uses that would be impacted by the project. Even BLM's team leader recognized that CEP was trying to have the EIS prepared "on the cheap." AR 5731. The Service's comments on the FEIS confirmed that inadequate surveys were performed for sage-grouse. See AR 1143-45.

The surveys that were done for sage-grouse were far too limited to document and understand sage-grouse presence and use of areas potentially impacted by the Echanis wind facility and transmission line. See Miller Decl., ¶¶ 29-30 (describing surveys); FEIS, Appendix E (providing wildlife surveys) & Appendix F, pp. 6-12 (listing all surveys). These were principally a fall 2007 avian use survey on the Echanis site and a one-year avian use study in 2009-10 of the northern transmission line route – both aimed at detecting all avian use, not just sage-grouse – plus surveys of the proposed East and West Ridge project sites. *Id.* This means that the Echanis site was never evaluated on a year-long basis to determine sage-grouse presence and seasonal habitat use, and no multi-year studies were performed of any area, as both the Service and ODFW recommended.

⁵ Dr. Braun is the author or co-author of over 65 sage-grouse articles and was technical editor of the recent "Monograph." See Braun Decl., ¶ 5 & Exh. 1. Chief Judge Winmill of the District of Idaho has acknowledged Dr. Braun as one of the world's leading sage-grouse experts, including in a decision rendered after a 2-week trial at which Dr. Braun testified regarding sage-grouse habitat needs and threats. See *WWP v. Dyer*, 2009 WL 484438 (D. Idaho 2009). See also *WWP v. Salazar*, 2011 WL 4526746, at *16 (D. Idaho 2011) (in ruling against BLM on sage-grouse claims, noting that "BLM points to nothing in the Administrative Record that rebuts the testimony of Dr. Braun, a leading expert on the sage grouse").

Moreover, the studies performed were limited in duration and scope, failing to identify all sage-grouse use and seasonal habitats of either the Echanis project area or the transmission line northern route. See Miller Decl., ¶¶ 29-30. Five 800-meter plots were used to assess all avian use of the 16,350-acre Project site, without any explanation of how the plots were chosen. See FEIS, Vol. II, Appendix E, pp. 4-7 & Appendix F, pp. 6-12. The north transmission line avian study used just six 800-meter plots to assess the entire 49-mile route, without justifying why so few sites were utilized. See FEIS, Appendix E, pp. 7-15. The sites were principally on private lands even though at least 25 miles of the route lies within “high viability” sage-grouse habitat on BLM lands, according to ODFW, indicating this study was inadequate to detect sage-grouse presence. See Miller Decl., ¶ 30 & Ex. D (map of northern route and sage-grouse habitat).

Because of the paucity of data, it is unsurprising that the FEIS could not answer basic questions about sage-grouse presence and use of habitats within either the Echanis project area or northern transmission line route – precisely one of the deficiencies noted by the Service in its many comments. The FEIS acknowledged abundant sage-grouse presence at the Echanis site, yet it could not explain how sage-grouse utilize the project area during different times of the year. The FEIS stated, for example, “there is no evidence that supports what proportion of these birds utilize sagebrush habitat in the Project area,” and it simply assumed no winter sage-grouse use occurred in the Project area, while admitting no winter surveys were done. See FEIS, p. 3.5-22 to -24. See *also* Miller Decl., ¶ 37 (explaining how proper surveys would provide information to identify sage-grouse use of the project area); Braun Decl., ¶¶ 20-22 (discussing need for and feasibility of winter surveys).

NEPA does not allow an agency – as BLM has done here in the FEIS – to just throw up its hands and say it has no idea how a sensitive species uses the area of a proposed industrial

energy development, when the agency has not even undertaken the field surveys or other data gathering recommended by its sister expert agencies to answer that question. An EIS must contain a “full and fair discussion” of significant environmental impacts that is “supported by evidence that the agency has made the necessary environmental analyses.” 40 C.F.R. § 1502.1. “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(a) (emphasis added). BLM violated these NEPA commands here.

Moreover, “conclusory statements, without any supporting data, do not constitute a “hard look” at the environmental consequences of the action as required by NEPA.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 974 (9th Cir. 2006). Instead the agency must provide “a sufficient description of the actual environmental effects that can be expected.” *Klamath-Siskiyou Wildlands v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) (emphasis added). Again, the FEIS violated these NEPA principles by failing to provide even basic information about sage-grouse presence use of the area of potential project impacts, because of the lack of adequate surveys. Accordingly, the Court must reverse and set aside the FEIS and ROD as being arbitrary and capricious and in violation of NEPA under these and other cases cited above.

B. Sage-grouse Seasonal Habitats Were Not Identified Or Assessed.

The inadequate sage-grouse surveys are compounded by the FEIS’s failure to identify seasonal sage-grouse habitats and assess how they may be potentially impacted by the wind facility and transmission line. As discussed above, this failure to identify or assess seasonal sage-grouse habitats is another key defect identified by the Service, *see* AR 14689-90, 11506-07, 1144-45, and even by the BLM’s State Office. AR 15558 & 15578.

The FEIS acknowledged the seasonal habitat requirements of sage-grouse as including nesting, brood rearing and winter habitats. FEIS, pp. 3.5-23 to -24 & 3.5-43 to -44. Citing the March 2010 Determination and the Monograph, the FEIS further recognized the importance of protecting these seasonal habitats from fragmentation impacts, including by wind projects and transmission towers and lines. *Id.* Yet these seasonal habitats were never mapped or assessed, based on BLM's assertion that such seasonal habitats are too "variable" to identify, as follows:

These seasonal greater sage-grouse habitats (~~wintering, brood-rearing, and late summer~~) ~~have not been mapped to date~~ have not been mapped because of their variability, so specific estimates for acres of these habitats surrounding the Project are not available.

FEIS, p. 3.5-24 (underscoring and strikeouts in original, showing changes from DEIS).

This assertion that sage-grouse seasonal habitats cannot be identified and mapped because of their variability is flatly wrong, and belied by a wealth of scientific literature and data, as Drs. Braun and Miller explain. *See* Braun Decl., ¶¶ 16-22; Miller Decl., ¶¶ 31-43. The Service's Wind Turbines Guidelines Advisory Committee recommended in March 2010, for instance, that sage-grouse nesting and brood-rearing habitats be mapped to assess possible wind project impacts, stating:

While surveying leks during the spring breeding season is the most common and convenient tool for monitoring population trends of prairie grouse and sage grouse, documenting available nesting and brood rearing habitat within and adjacent to the potentially affected area is recommended. Suitable nesting and brood rearing habitats can be mapped based on habitat requirements of individual species. The distribution and abundance of nesting and brood rearing habitats can be used to help in the assessment of adverse impacts of the proposed project to prairie grouse and sage grouse.

See Miller Decl., ¶ 33 (quoting USFWS 2010a, p. 35).

A vivid illustration of the fact that BLM could and should have identified and mapped sage-grouse seasonal habitats is the extensive mapping and analysis of sage-grouse seasonal habitats done on the China Mountain wind project, for which a DEIS was released in March

2011 – before the Steens EIS was completed. See Miller Decl., ¶ 34-35.⁶ The China Mountain DEIS examined and mapped sage-grouse seasonal habitats at four different scales: (a) project site, (b) a 4-mile sage-grouse “avoidance area,” (c) a 12-mile “mid-scale” analysis; and a 50-mile regional analysis. *Id.* Both male and female seasonal habitats were identified, with the DEIS providing tables of seasonal habitat acreages that might be affected by the wind facility and equipment haul route, as this excerpt illustrates:

Table 3.2.2-4. Female¹ Sage-grouse Fixed Kernel Use Areas (95%) by Season for the Project Area, Haul Routes, and Total (acres).

	Spring	Summer	Fall	Winter	Nesting
Project Area	15,245	30,821	28,019	1,735	18,321
Northern Inbound Haul Route	820	794	295	18	746
SHR ² Option 1	251	410	462	70	197
SHR Option 2	363	528	581	89	297
Outbound Haul Route	1,127	1,097	295	18	1,066
Total Acres Available ³	237,028	401,994	334,728	58,726	214,835

See Miller Decl., ¶ 35 (Table 3.2.2-4 from China Mtn. DEIS p. 3-80). And the China Mountain DEIS provided many maps of seasonal habitat and potential project impacts, examples of which are provided in Dr. Miller’s declaration. *Id.*

While ignoring sage-grouse seasonal habitats, the Steens FEIS paid little more attention to sage-grouse leks within the project area. The FEIS reported two lek complexes and five other leks within 6.2 miles of the proposed transmission line route alternatives and the Echanis Project. FEIS, p. 3.5-24. Yet the FEIS made no effort to analyze how much nesting and brood rearing habitat around these leks might be affected by the transmission line and wind project, even though it acknowledged the most nesting and brood rearing habitat is generally located within 2 to 3 miles, and up to 12.5 miles, from leks. *Id.*; Miller Decl., ¶ 32.

⁶ The China Mountain DEIS is available on BLM’s website at: http://www.blm.gov/id/st/en/prog/planning/china_mountain_wind/china-mtn_Draft-EIS.html.

The Ninth Circuit recently reversed another agency decision that failed to assess sage-grouse seasonal habitats in conformance with sage-grouse management guidelines. *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010). Likewise, the District of Idaho has reversed BLM decisions that failed to identify and assess potential impacts on sage-grouse seasonal habitats. *See WWP v. Dyer*, 2009 WL 484438 (D. Idaho 2009); *WWP v. Bennett*, 392 F.Supp.2d 1217 (D. Idaho 2005). This is consistent with NEPA’s “hard look” requirement that an EIS must disclose all likely environmental impacts, particularly on sensitive species. *See ONRC v. Goodman*, 503 F.3d 884 (9th Cir. 2007) (agency violated NEPA by failing to study sensitive species habitat and populations). Because it failed to take the required “hard look” at sage-grouse seasonal habitats here, the FEIS must similarly be reversed and remanded.

Moreover, BLM’s failure to identify and assess sage-grouse seasonal habitats in the FEIS was contrary to the repeated advice and recommendations of ODFW and the Service, the expert federal agency in the Dept. of Interior on sage-grouse. By failing to heed ODFW’s and the Service’s concerns and recommendations – not even acknowledging in the FEIS that they advised further studies and analysis of sage-grouse seasonal habitats – BLM again acted arbitrarily, capriciously, and contrary to NEPA, requiring reversal. *See Kraayenbrink*, 632 F.3d at 493 (reversing where BLM EIS “gave short shrift to a deluge of concerns” from sister agencies, including Service and state wildlife agencies); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1191-92 (9th Cir. 2002) (“unanswered concern of a sister agency . . . weighs as a factor pointing toward the inadequacy of the EIS”).

C. The FEIS Did Not Assess Habitat Fragmentation And Connectivity.

These errors are compounded by BLM’s failure to assess how the Echanis wind project, North Steens transmission line, and associated roads and other facilities would contribute to

sage-grouse habitat fragmentation on a large scale, and particularly would fragment essential sage-grouse connectivity habitat on Steens Mountain. See Braun Decl., ¶ 23-37; Miller Decl., ¶¶ 44-70 & Exhs. A, D-L (maps illustrating fragmentation and loss of connectivity).

The FEIS generally acknowledged that the project and surrounding areas contain sage-grouse habitat, and that infrastructure such as roads, powerlines, and renewable energy development can degrade and fragment sage-grouse habitat. See FEIS at 3.5-23. It also recognized the scientific literature, including from the Monograph and the March 2010 Determination, showing that sage-grouse avoid powerlines, transmission towers, and other tall structures. *Id.* at 3.5-25 to -26 & 3.5-65.

However, when addressing the impacts of the Echanis wind project and associated transmission line and towers, the FEIS failed to apply these scientific principles in any meaningful way. To the contrary, BLM again threw up its hands and declared in the FEIS that “very little is known about wind energy and sage-grouse,” and “studies have not been completed to quantify wind energy impacts” on sage-grouse. See FEIS, p. 3.5-25 (citing Becker *et al.* 2009). Based on its assertion that the nearest sage-grouse lek would be greater than 3 miles from the nearest turbine, the FEIS further stated flatly that “courtship and breeding would not be affected by the Project.” FEIS 3.5-43 (emphasis added).

These assertions badly misrepresent the state of scientific understanding and literature. As noted above, the Becker *et al.* (2009) study cited in the FEIS actually provides a detailed description of how sage-grouse have been documented in the scientific literature to suffer adverse impacts from energy development, including tall structures, roads, and noise, leading to abandonment of occupied habitat and population declines. See AR 25027-34. And while the precise extent of wind turbine impacts or transmission lines and towers upon sage-grouse may

not be fully understood, the scientific literature confirms that such developments will likely to lead to sage-grouse “avoidance” of otherwise suitable habitats on a large scale, much further than the 3 mile area mentioned in the FEIS. *See* Braun Decl., ¶¶ 14, 30-36; Miller Decl., ¶¶ 40-48. The Service thus recommended nearly a decade ago that wind farms be located more than 5 miles from sage-grouse breeding areas; and the literature has identified adverse impacts from energy development out to 12 miles away. *Id.*⁷

Notably, as discussed above, BLM itself used a 4-mile sage-grouse “avoidance area” in analyzing potential impacts of the China Mountain wind proposal, in which it assumed all sage-grouse would abandon suitable habitat within 4 miles of the turbines and haul road; and it also looked at a 12-mile “mid-scale” and 50-mile “regional scale” analyses in order to assess potential habitat fragmentation impacts. *See* Miller Decl., ¶ 34 (citing China Mtn. DEIS). BLM made no similar effort to map sage-grouse “avoidance” areas, or to conduct any kind of mid-scale or regional analysis, was done in the Steens FEIS. The China Mountain example thus refutes BLM’s assertion here that wind facility impacts will not occur more than 3 miles from breeding areas, or that there is no way to assess sage-grouse habitat fragmentation on a larger scale, again underscoring the arbitrary and capricious nature of BLM’s decision-making in this case.

Demonstrating conclusively that the FEIS is unscientific and unsound is BLM’s utter failure to consider how the Echanis wind project and transmission line could fragment sage-grouse connectivity habitat. *See* Braun Decl., ¶¶ 24-32. Using ODFW’s sage-grouse lek data and analytical tools established in the scientific literature, Dr. Miller has mapped sage-grouse

⁷ The FEIS assertion that the nearest turbine would be more than 3 miles from the closest lek is itself inaccurate. Neither the FEIS nor the ROD specify where the Echanis turbines must be located; and the FEIS maps simply show one possible array as an illustration. *See* Miller Decl., ¶ 47-49 & Exh. P. GIS data layers from applicant CEP for other possible arrays are in the Administrative Record, and ONDA’s GIS expert Dr. Miller has used them to demonstrate that turbines could be located as close as 2.1 miles of the nearest lek (Dollar Lake lek). *Id.*

leks and complexes to illustrate that a crucial sage-grouse connectivity corridor exists on Steens Mountain, linking local and even regional sage-grouse populations. *See* Miller Decl., ¶¶ 51-70 & Exhs. A, D-L (describing and mapping this “Steens Corridor”). The Echanis wind project and North Steens transmission line are located within the Steens Corridor, and threaten to completely eliminate the corridor as suitable sage-grouse connectivity habitat through displacement and avoidance impacts on sage-grouse. *Id.*

ODFW has underscored the importance of protecting sage-grouse connectivity corridors, and its own mapping has identified the same important connectivity corridor on Steens Mountain as Dr. Miller. *Id.*, ¶¶ 53-56 & Exhs. E-F. Likewise, the Dept. of Interior’s National Sage-grouse Technical Team recognized the importance of identifying and protecting sage-grouse connective corridors; and has recommended that BLM make connective habitats “right-of-way avoidance areas.” *Id.*, ¶¶ 67-70; AR 283-85 & 288.

By failing to assess impacts of the proposed Steens energy development on sage-grouse connectivity habitat, BLM has again violated NEPA’s command that an EIS must analyze and disclose potential adverse environmental impacts, not just shrug them off. *See Earth Island Inst.*, 442 F.3d at 1159 (EIS must contain a “discussion of adverse impacts that does not improperly minimize negative side effects”); *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003) (reversing where “Final EIS fails to disclose responsible scientific opposition to the conclusions upon which it is based”); *Found. for N. Am. Wild Sheep v. US Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (agency violated NEPA in failing to address “certain crucial factors, consideration of which [is] essential to a truly informed decision”). And as explained further below, by not heeding the recommendations of Interior’s own team of national sage-grouse experts, BLM has further acted arbitrarily and capriciously, in

violation of NEPA, thus requiring reversal of the FEIS and ROD. *See Kraayenbrink*, 632 F.3d at 492-93; *Ctr. for Biol. Diversity v. Lohn*, 296 F.Supp.2d 1223, 1239 (W.D. Wash. 2003) (deference owed to agency’s expertise “only to the extent that the agency utilizes, rather than ignores, the analysis of its experts”).

D. Defendants Failed To Follow Their Own Sage-grouse Policies.

BLM and the Dept. of Interior have acknowledged the threats facing sage-grouse populations and habitats, and have adopted policies intended to ensure conservation of sage-grouse and avoid ESA listing. Yet these policies and the science underlying them were not followed – indeed, were ignored –in the Steens FEIS and ROD.

Even before the Service placed sage-grouse on the candidate list for ESA protection, BLM designated greater sage-grouse as a “sensitive” species under its Special Status Species Policy (BLM Manual, Section 6840). *See* SAR 538. Because sage-grouse is now a candidate species for ESA listing, that Policy directs BLM to “ensure that actions requiring authorization or approval by [BLM] are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species . . . under the provisions of the ESA.” *Id.*, § 6840.02 (emphasis added).

Remarkably, the FEIS does not even mention the Special Status Species Policy, and it certainly does not evaluate whether approval of the Steens wind development would violate that Policy by contributing to the need to list sage-grouse under the ESA. This omission is even more remarkable in light of the Service’s express warning that approval of the Steens transmission line and associated Echanis wind project “will negatively affect the conservation status and potential for recovery of sage-grouse.” AR 11515.

Likewise, the FEIS omits any discussion of BLM’s 2004 National Sage-grouse Habitat

Conservation Strategy, which BLM adopted “to guide future actions for conserving sage-grouse and associated sage-brush habitats,” and “help BLM ensure that it successfully incorporates sage-grouse conservation measures into all of its ongoing programs and activities.” See SAR 955, 957. Among its “guiding principles,” this National Strategy requires that “BLM use the best available science and other relevant information to develop conservation efforts for sage-grouse and sagebrush habitats.” SAR 961 (emphasis added). The FEIS and ROD here fail that test, as underscored by the Service’s comments (discussed above) emphasizing that BLM did not employ the best available science and information.

The FEIS and ROD also wholly ignore the latest sage-grouse conservation policies and directives, which the Dept. of Interior initiated in August 2011 to ensure adequate sage-grouse conservation measures are put into effect to avoid sage-grouse being listed under the ESA. See AR 261, 269-76; SAR 294-301. Under this new National Sage-grouse Planning Strategy, BLM is in the process of amending its Resource Management Plans across the sage-grouse range to include adequate conservation measures for sage-grouse. *Id.* As noted above, the Dept. of Interior convened its “Sage-grouse National Technical Team” of experts to review the best available science and make recommendations for sage-grouse conservation measures. *Id.*

On December 21, 2011, the National Technical Team issued a “Report on National Greater Sage-grouse Conservation Measures” (“NTT Report”). See AR 261, 277-350. Based on the scientific literature, the NTT Report recommended protection of remaining priority sage-grouse habitats, including by avoiding impacts of transmission lines and energy development. See AR 280-85, 288-90, 294-97. The NTT Report was followed by BLM’s issuance of two new sage-grouse Instruction Memoranda on December 27, 2011. See AR 257-68 (IM 2012-043 & -044). These include interim conservation policies and directives for “ongoing proposed

authorizations and activities that affect the Greater Sage-grouse . . . and its habitat” while the national sage-grouse planning process is underway. AR 261-68. These interim measures emphasize that BLM field offices should protect unfragmented sage-grouse habitats, minimize habitat loss and fragmentation, and maintain “conditions for all sage-grouse life history needs.” *Id.* They also identify “preliminary priority habitats” for protection as including “breeding, late brood-rearing, and winter concentration areas.” *Id.* For pending right-of-way applications that would have more than “minor adverse impacts” on sage-grouse – such as the Steens application here – IM 2012-043 directs that the proposed decision must be elevated to the National Sage-grouse Policy Team where there is disagreement on appropriate mitigation, which is exactly the situation seen here, as the Service’s disputes with BLM over the Steens proposal show. AR 263.

Again, this new BLM sage-grouse conservation initiative was launched in August 2011 before the FEIS was finalized; and the NTT Report and interim instruction memoranda were issued before the ROD was approved by Secretary Salazar on December 28, 2011. Yet none of these sage-grouse conservation policies or recommendations was even mentioned in the FEIS or ROD; nor is there any indication in the Administrative Record that they were considered at all by BLM or Dept. of Interior officials before the ROD was approved.

Moreover, as discussed above, BLM’s Eagle IM (IM 2010-156) directed that a ROD may not be approved without a concurrence letter from the Service on an ABPP, and that concurrence letter must be in the administrative record. AR 12184-87. Here, the Service did not provide any concurrence letter to BLM before the ROD was signed, but instead simply acknowledged that it was working on a draft ABPP submitted by the applicant. AR 568-70.

By failing even to discuss their own sage-grouse policies, and by failing to follow the directives of their own guidance for sage-grouse conservation, such as the Eagle IM and IM

2012-043, Defendants acted arbitrarily, capriciously, and contrary to law, requiring reversal under NEPA and the APA. *See Western Watersheds Project v. Salazar*, No. 4:08-cv-516, 2011 WL 4526746 at *13-*15 (D. Idaho, Sept. 28, 2011) (holding that BLM was arbitrary and capricious in not following its sage-grouse conservation policies in land use planning).

Moreover, the FEIS and ROD placed heavy emphasis on policies favoring renewable energy development, even while it ignored sage-grouse conservation policies. The FEIS discussed renewable energy policies, while ignoring the sage-grouse conservation policies identified above. *See* FEIS, pp. 1-21 to -22, pp. 3.18-1 to -11. The ROD stated repeatedly that serving renewable energy policies was a primary consideration in the decision to approve the Steens rights-of-way, not only to facilitate the Echanis wind farm but also other potential projects. *See* AR 38-42, 63-64, 69. It is arbitrary and capricious for an agency to invoke one set of policies in approving an action while ignoring other policies that would not be served by the proposed action, thereby effectively abandoning or nullifying them without even admitting it. *See Atchinson v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (agency that modifies or overrides its policies “has the duty to explain its departure from prior norms”); *Motor Vehicle Mfrs.*, 463 U.S. at 57 (“an agency changing its course must supply a reasoned analysis”).

In short, because the FEIS and ROD do not even acknowledge BLM’s sage-grouse conservation policies and directives, much less follow them, they are arbitrary, capricious and contrary to law under NEPA and the APA; and must be reversed and remanded.

IV. THE FEIS ALSO FAILED TO DISCLOSE LIKELY ADVERSE IMPACTS TO EAGLES AND OTHER RAPTORS.

As established in the discussion of the Administrative Record above, the Service was critical of BLM’s failure to properly study and analyze eagle populations and habitats at risk from the Echanis project and North Steens transmission line. *See* AR 14688-89, 11510-15,

6828-32, 1143-45. Yet BLM did not heed the Service's comments, and relied on the defective FEIS to approve the ROD, thus again violating NEPA and requiring reversal under the APA.

A. Golden Eagles and Wind Development.

Steens Mountain, and specifically the Echanis project area, is prime habitat for golden eagles and other raptors. See FEIS, pp. 3.5-28 to -29 (summarizing eagle sightings in area); Smallwood Decl., ¶¶ 10-20, 38-40. Eagles nest on cliffs, the tops of trees, or on artificial structures. AR 18511. Golden eagles typically forage within 6 to 9 km from their nests, but these distances may be further in dry habitats, such as Steens Mountain. AR 18524. Some golden eagles migrate in the winter to milder areas; however, others stay near their nest sites throughout the year. AR 18512. Golden eagles are quite sensitive to human disturbance, such as construction or human interactions, which cause nest abandonment. AR 18511, 18513 (2010 Service Interim Golden Eagle Inv. & Mon. Protocols).

"Golden eagle populations are declining." AR 11509 (Sept. 2010 Service comments) (citing literature). "Data from long-term studies of golden eagle migration, population models, and surveys sponsored by the Service indicate cause to be concerned about population trends for this species." *Id.* Because of this trend, as well as substantive protections provided by the Bald and Golden Eagle Protection Act, the Service "has established a no-net loss threshold for golden eagles." FEIS at 3.5-28 (emphasis added).

Wind energy development kills and causes "crippling injuries" to eagles from collisions with turbine blades and transmission lines, as well as greatly increasing human disturbance (such as roads). See AR 11510-11 (Service comments). "Because golden eagles are long-lived, take four years to reach reproductive age, and have low productivity," these losses may be significant to breeding golden eagle positions. *Id.*

B. Inadequate Surveys and Habitat Descriptions.

As explained above, the Service's February 2010 Interim Guidance recommended that field inventories should be conducted for golden eagles within 10 miles of the project boundary, and during specific seasons and for specific durations. AR 18513, 18516-19. Likewise, the Service's August 2010 White Paper on eagle permitting for wind projects recommended that surveys identify numerous habitat types potentially used by eagles, including nest sites, roosts, territories, and foraging locations during both breeding and non-breeding seasons; and that surveys for eagle nest locations should be done out 10 miles from the project location. See AR 14688-89, 12152.

The Service repeatedly advised CEP and BLM that they needed to conduct much more extensive surveys for eagles and other raptors than CEP was willing to undertake. See AR 14688-89, 11511-12, 6828-32, 6325-30, 5924-26, 5221-39, 5166-86. In April 2011, the Service recommended that "additional field work commence immediately" to reduce the uncertainty around estimates of eagle risk, such as "point counts" over the course of two to three years, nest surveys within a 10-mile perimeter, telemetry surveys, and migration surveys. AR 6829-30. Yet BLM immediately dismissed the Service's comments as just a "wish list." AR 6828.

The FEIS shows that the same limited avian surveys as used for sage-grouse (discussed above) were principally relied on to evaluate raptor presence and nest locations, *i.e.*, the fall 2007 survey of the Echanis site and the 2009-10 survey of the northern transmission line route. See FEIS, p. 3.5-9 to -10 & Appendices E & F. No nocturnal raptor species surveys were conducted at all. FEIS, p. 3.5-9. The raptor nest survey in 2007 only looked for nests within two miles of the Echanis project boundary, not 10 miles as the Service recommended; and the 2010 raptor nest survey only looked out 1 mile from the northern line route. FEIS, p. 3.5-9 to -10 &

Appendices E & F. The 2007 survey on the Echanis site spent a total of 18.6 hours to detect birds; while the northern route survey performed 216 20-min surveys at 6 sites, for a total survey effort of 72 hours. *See* FEIS Appendices E & F. Dr. Smallwood explains in detail how this amount of time is woefully insufficient to accurately identify eagle and other raptor presence. Smallwood Decl., ¶¶ 24-27.

Yet BLM relied on this weak monitoring effort in the FEIS, noting in its discussion of “direct effects” that “[t]he nearest active golden eagle nest in 2010 was 2.5 miles from the Project Area footprint,” and that “[w]ildlife surveys did not reveal much, if any, foraging activities by golden eagles within the footprint of the Echanis site, thus this type of disturbance is expected to be minimal” FEIS at 3.5-44.⁸

Dr. Smallwood is an expert scientist on raptors and wind energy, having performed numerous studies and publication of research articles. *See* Smallwood Decl., ¶¶ 5-9 & Exh. 1. Echoing the Service’s critical comments about the inadequate eagle and raptor surveys, Dr. Smallwood explains that “[p]erforming one raptor nest survey within 2 miles of a project boundary is grossly insufficient to locate nest sites for raptors that may be affected by construction and operation of an industrial wind facility, such as the Echanis project,” and that “[f]ewer than 19 hours at the wind project site . . . and 36 hours at the North Route were insufficient amounts of time to detect multiple raptor species and many other bird species.” Smallwood Decl., ¶¶ 24 & 28. He underscores that even much larger amounts of survey time at other wind projects, such as the Altamont Pass in California, failed to detect multiple species that are killed by wind turbines. *Id.* He explains that the Steens raptor surveys were inadequate for

⁸ The FEIS is again inaccurate here, having missed a golden eagle nest located 1.5 miles from the nearest turbine site that Dr. Smallwood observed on September 2, 2012, which he describes as a “notable omission which alone casts doubt on the adequacy” of the raptor survey of the Echanis site. *See* Smallwood Decl., ¶¶ 17 & 23 and Photo 6.

numerous reasons, including because they were only diurnal, too brief, and too restricted to assess raptor presence and usage of the area. *Id.*, ¶ 50.

Dr. Smallwood also identifies numerous omissions and misleading or inaccurate statements in the FEIS regarding raptor habitats and presence, “which result in the FEIS being virtually useless from the point of view of disclosing how eagles, raptors and other birds currently utilize the Steens Mountain area and may be impacted by the wind farm and transmission line.” *See* Smallwood Decl., ¶¶ 10-20, 30-45. These include improperly using vegetation cover to describe habitat types, instead of identifying actual habitats used by eagles and raptors; erroneously assuming that prey are not present at the Echanis project site or that development of the site would reduce prey base for eagles and thus potential eagle mortality; and wrongly asserting that turbine locations would avoid eagle and raptor use of the project site. *Id.*

By failing to heed the Service’s advice and recommendations about the necessity of adequate surveys to identify and document eagle and other raptor usage of areas potentially affected by the Echanis project and transmission line, BLM has thus again acted arbitrarily, capriciously, and in violation of NEPA, requiring reversal under the cases above.

C. Collision and Mortality Risks.

The Steens FEIS is also not scientifically credible in its evaluation of potential collision and other mortality risks to golden eagles and raptors. As discussed above, the Service disputed BLM’s assertion that risks of the wind project to eagles were “low to moderate,” instead calling the wind project as presenting a “high to moderate” of eagle mortalities. *See* FEIS, pp. 3.5-46 to -47; AR 11510, 5924-26, 1144-45. The Service ultimately concluded that “the FEIS lacks essential information” and “does not provide adequate measures to offset impacts to golden eagles,” well as other migratory birds and bats. AR 1145 (emphasis added).

Dr. Smallwood agrees that the FEIS made fundamental errors in its projections of eagle mortality rates and seriously understated collision and mortality risks associated with the Echanis project and transmission line. *See* Smallwood Decl., ¶¶ 46-58. The FEIS understated eagle and raptor usage of the project site because of the inadequate surveys; and then compounded this error by making unfounded statistical assumptions about mortality risks based on partial data from other wind projects. *Id.* For example, the FEIS improperly used all raptor mortalities at other wind facilities to project eagle mortalities at the Echanis site, an error Dr. Smallwood describes as a classic case of “pseudoreplication.” *Id.*, ¶ 47-48. Moreover, the FEIS fatality projections used mean figures without reporting the full range of mortalities, which would show a much larger potential range of eagle and raptor deaths at the Echanis project. And the FEIS failed to disclose that actual mortalities have been much higher than projected at other wind facilities. *Id.*, ¶¶ 61-68.

The FEIS downplayed collision and mortality risks from the transmission line as well, by misrepresenting (for example) that eagles and raptors would not fly in low-light conditions and wrongly assuming away electrocution risks. *Id.*, ¶¶ 83-88. Dr. Smallwood also identifies numerous inaccuracies and problems in the draft Eagle Conservation Plan prepared by CEP, which the FEIS wrongly suggested would assure that eagle mortality risks are “minimized” by project design and mitigation features. *Id.*, ¶¶ 69-82.

Again, NEPA’s “hard look” requirement demands that BLM must use accurate data and sound science in evaluating potential environmental impacts – not the inadequate surveys, statistical errors, and misleading information provided in the FEIS here regarding eagle and raptors. Because the FEIS failed to take the requisite “hard look” at eagle and raptor impacts, the Court must reverse and remand. *See NRDC*, 421 F.3d at 813 (reversing EIS that violated

NEPA's requirement to “present complete and accurate information to decision makers and to the public”); *Native Ecosystems*, 418 F.3d at 964-66 (EIS unlawful when it relied on inaccurate and misleading information, and did not allow for a “full and fair discussion of the potential effects of the project”); *Seattle Audubon*, 998 F.2d at 704-05 (reversing EIS that rested on “stale scientific evidence, incomplete discussion of environmental impacts, and false assumptions”).

V. THE FEIS FAILED TO ANALYZE MITIGATION AS REQUIRED BY NEPA.

NEPA’s “hard look” requirement includes analysis of potential mitigation measures that are relied upon to eliminate or reduce adverse environmental impacts. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (“mitigation [must] be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated”). CEQ’s NEPA regulations require that the agency analyze possible mitigation measures in defining the scope of the EIS, 40 C.F.R. § 1508.25(b), discussing consequences of a proposed action, 40 C.F.R. § 1502.16(h), and explaining its ultimate decision, 40 C.F.R. § 1505.2(c). Recent CEQ guidelines on mitigation emphasize that agencies must ensure that mitigation commitments are implemented, enforced, and effective. 76 Fed. Reg. 3843, 3847 (Jan. 21, 2011).

The Ninth Circuit has repeatedly held that an agency cannot satisfy the NEPA “hard look” requirement by just listing or generally describing possible mitigation measures. *See Neighbors of Cuddy Mtn. v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (“mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA,” and setting aside EIS in part because mitigation analysis contained only “broad generalizations and vague references”); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998) (“Without analytical detail to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a ‘mere listing’ of good management

practices”). A decision to proceed with a project may not be based on arbitrary assumptions about mitigation success either. *See S. Fork Band Council v. US Dept. of Interior*, 588 F.3d 718 (9th Cir. 2009). As the court explained there, in reversing a BLM EIS that did not address the effectiveness of mitigation measures for dewatering caused by proposed mining operations:

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. . . . A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.

Although the District Court's written order finds that the EIS discusses the effectiveness of each mitigation measure, close inspection reveals that the EIS does not in fact assess the effectiveness of the mitigation measures relating to groundwater. It states only, “Feasibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan.” Nothing whatsoever is said about whether the anticipated harms could be avoided by *any* of the listed mitigation measures. This discussion is inadequate.

Id., at 727 (citations omitted, emphasis in original).

The FEIS here likewise fails this NEPA test. As demonstrated above, the Administrative Record shows that both ODFW and the Service urged BLM to specify and evaluate mitigation measures for sage-grouse, eagles, and other wildlife in the FEIS; but that was not done. Instead, the FEIS relied on assumptions that the project applicant, CEP, would agree in the future to a sage-grouse Habitat Mitigation Plan (“HMP”) under ODFW’s mitigation policy; and that CEP would also work out an ABPP and Eagle Conservation Plan (“ECP”) with the Service for eagle mitigation. *See* FEIS, pp. 3.5-52 to -57, 3.5-69 to -71, 3.5-79 to -85. The FEIS attached CEP’s draft HMP and ABPP/ECP as an appendix, neither of which had been accepted or approved by any agency. *See* FEIS, Appendix F. These mitigation plans still were not final when the ROD was issued, so the ROD just provided “principles and standards for development of a habitat

mitigation plan” for sage-grouse, while again attaching the draft ECP prepared by CEP for eagles (which the Service had not accepted). *See* ROD Attachments D & E (AR 116-89).⁹

By failing to identify what mitigation measures would be adopted to offset adverse impacts on sage-grouse, eagles, and other species, and failing further to analyze the potential effectiveness of possible mitigation measures, the FEIS and ROD thus violated NEPA, requiring reversal and remand under *South Fork Band* and the other cases cited above.

It bears underscoring that uncertainty about potential effectiveness of sage-grouse mitigation is a significant question that the FEIS should have, but failed, to explore. The FEIS assumed that CEP would agree to mitigation under ODFW’s sage-grouse mitigation policy, which calls for a “no net loss/net benefit” to sage-grouse from habitat mitigation. *See* FEIS, p. 3.5-25 to -26, 3.5-69 to -71 & 3.5-79 to -85. The ODFW habitat mitigation policy uses assumptions about the extent of impacts of roads and transmission lines on sage-grouse, and noise modeling to assess impacts of wind turbines, which the FEIS used to calculate the amount of acreage on public and private lands for which mitigation would be required. *See* FEIS, pp. 3.5-52 to -57. But as the Administrative Record shows, the ODFW habitat mitigation policy was only finalized in August 2011, as the FEIS was itself being completed. *See* AR 5292.

It is uncertain whether the policy’s assumptions about the spatial extent of impacts on sage-grouse are accurate, as is the efficacy of off-site habitat mitigation to offset such impacts.

⁹ The ROD distinguished between sage-grouse habitat mitigation that CEP would undertake for the transmission line on federal lands, which BLM would approve; and private land mitigation for the Echanis Project, which the ROD assumed Harney County would approve and thereby mitigate sage-grouse impacts from the wind project. *See* AR 15-16, 26, 36, 41. Yet the FEIS reveals this assumption is unwarranted, stating that “[w]hile the BLM’s decision could include any of the listed mitigation measures discussed in Sections 2 and 3, implementation of some of the measures are beyond BLM’s jurisdiction because they would apply to private land. There is a probability, therefore, that some of the proposed mitigation would not be implemented.” *See* FEIS, p. ES-19 (AR 1915) (emphasis added). The ROD is thus arbitrary and capricious in assuming all private land impacts will be mitigated.

See Miller Decl., ¶ 34-35. Indeed, there are serious scientific uncertainties about how such mitigation might be accomplished successfully, which require careful evaluation and testing, and which BLM has not done in the Steens FEIS and ROD. *Id.* The FEIS never addressed other key questions about the proposed HMP for sage-grouse, including where and what kinds of mitigation would be undertaken, and how they would purportedly meet the ODFW “no net loss/net gain” standard. *Id.*

Moreover, the private lands of the Echanis site were excluded from sage-grouse protective classifications under the 2011 ODFW sage-grouse conservation strategy simply because Harney County issued a conditional use permit for the Echanis project back in 2008, even though the site previously was recognized by ODFW as being high-quality, occupied sage-grouse habitat from which wind projects should be excluded. See Miller Decl., ¶¶ 89-90. Likewise, ODFW in 2011 designated large portions of the northern transmission route as “low density” (Category 2) habitat even though they are in close proximity to sage-grouse leks and should qualify as “core” habitat, apparently because of errors in ODFW’s database. *Id.*, ¶¶ 87-88. This means that 26,402 acres of sage-grouse habitat loss will not be mitigated under BLM’s FEIS and ROD, yet the FEIS did not acknowledge that the anticipated HMP would fail to mitigate for sage-grouse habitat loss at this scale. *Id.*, ¶ 90. Neither did the FEIS analyze how the proposed mitigation could make up for the fragmentation impacts on the Steens connectivity corridor, which is irreplaceable. *Id.*, ¶91.

By failing to specify any required mitigation for sage-grouse, eagles, or other wildlife, and by failing to evaluate the likely effectiveness of proposed mitigation – particularly when it has major gaps, as here – the FEIS is thus arbitrary, capricious and contrary to law under NEPA, again requiring reversal. See *South Fork Band*, 588 F.3d at 727.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' summary judgment motion; and reverse and remand the FEIS and ROD as being arbitrary, capricious, and contrary to law under NEPA and the APA.

DATED: October 5, 2012.

Respectfully submitted,

/s/ Laurence ("Laird") J. Lucas
Attorney for Plaintiffs