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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WESTERN WATERSHEDS PROJECT; CENTER FOR BIOLOGICAL DIVERSITY; UPPER GREEN RIVER ALLIANCE,

Petitioners - Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; NADA WOLFF CULVER, in her official capacity as Deputy Director of the U.S. Bureau of Land Management,

Respondents - Appellees,

and

JONAH ENERGY, LLC; STATE OF WYOMING,

Intervenors Respondents - Appellees.

No. 22-8022

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:19-CV-00146-SWS)

Wendy Park, Center for Biological Diversity, Oakland, California (Sarah Stellberg, Advocates for the West, Boise, Idaho, and Edward B. Zukoski, Center for Biological Diversity, Denver, Colorado, with her on the briefs), for Petitioners-Appellants.

Sommer H. Engels, Attorney, Environmental and Natural Resources Division, United States Department of Justice, Washington, D.C. (Todd Kim, Assistant Attorney General,

and Thomas W. Ports, Attorney, Environmental and Natural Resources Division, United States Department of Justice, Washington, D.C. and Of Counsel Philip C. Lowe, Office of the Solicitor, United States Department of the Interior, Washington, D.C., with her on the brief), for Federal Respondents-Appellees.

Travis S. Jordan, Senior Assistant Attorneys General (D. David Dewald, Senior Assistant Attorneys General, Wyoming Attorney General's Office, Cheyenne, Wyoming, with him on the brief), for Intervenors Respondents-Appellee State of Wyoming.

Kathleen C. Schroder (Gail L. Wurtzler, Davis Graham & Stubbs LLP, Denver, Colorado, with her on the brief), for Intervenors Respondents-Appellee Jonah Energy, LLC.

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Three conservation groups challenge the United States Bureau of Land Management's approval of Jonah Energy's development project on state and federal land in southwestern Wyoming. The project is designed to drill exploratory wells on lands for which Jonah possesses development rights.

The conservation groups argue the district court erred in upholding BLM's approval under the National Environmental Protection Act and the Federal Land Policy and Management Act. In particular, they contend BLM inadequately considered the impacts of the project on sage-grouse populations and pronghorn antelope migration and grazing patterns. They also object to BLM's approval of the order of development of the affected lands, arguing that BLM should have required a different sequence of development.

We conclude that BLM adequately collected and considered information on the sage-grouse and pronghorn, and selected a development plan that meets the statutory requirements. We therefore affirm.

I. Background

A. *Legal background*

Two statutes frame this appeal: the National Environmental Protection Act and the Federal Land Policy and Management Act.

NEPA guides federal agencies as they evaluate the "likely environmental impacts of the preferred course of action as well as reasonable alternatives." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). It does so by imposing procedural requirements that promote reasoned decision-making. *Id.* at 704. One such requirement demands agencies compare a proposed course of action with reasonable alternatives and explain a choice between them in an environmental impact statement. 42 U.S.C. § 4332(c); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1226 (10th Cir. 2017) ("The alternatives analysis 'is the heart of the environmental impact statement.'" (quoting 40 C.F.R. § 1502.14)).

NEPA does not, however, set substantive benchmarks. It does not even require agencies to promulgate environmentally friendly rules. *Richardson*, 565 F.3d at 703. The statute "merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

Because NEPA concerns procedure, we assess agency compliance by asking whether it took a "'hard look' at the environmental consequences" of the proposal and its alternatives. *WildEarth Guardians*, 870 F.3d at 1227. We will not disturb agency action just because the plaintiff identified "[d]eficiencies in an EIS that are mere 'flyspecks,'" so long as those flyspecks "do not defeat NEPA's goals of informed decisionmaking and informed public comment." *Richardson*, 565 F.3d at 704. Our review is further buttressed by "a presumption of validity to the agency action" and a "burden of proof [that] rests with the appellants who challenge such action." *Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1034 (10th Cir. 2023) (cleaned up). When an agency falls short its decision is arbitrary and capricious under the Administrative Procedure Act. *WildEarth Guardians*, 870 F.3d at 1227; 5 U.S.C. § 706(2)(A).

While NEPA structures an agency's process, FLPMA sets an action's substance. FLPMA requires the Bureau of Land Management to develop land use plans. 43 U.S.C. § 1701(a)(2). These plans guide development on government-owned land. The Bureau must develop land use plans with an eye towards balancing various factors, including the competing land interests, the resources at stake, and the environmental significance of the area. *See* 43 U.S.C. § 1712(c). Future agency actions touching the land must adhere to that plan. 43 C.F.R. § 1610.5-3(a). When they do not, we again consider the action arbitrary and capricious under the APA. *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006); 5 U.S.C. § 706(2)(A).

The Bureau promulgated a land use plan that now governs the proposed development area. The Plan incorporated conservation measures originally established by the State of Wyoming. App-III-777–90; App-II-379–87. These conservation measures include special standards called "required design features," which, in part, put up guardrails for development projects in the proposed development area. App-II-381. The Plan has over 70 design features that cover a variety of issues, from sagebrush protection to refuse disposal, that all aim to protect the wellbeing of the public lands.

The Bureau, however, can waive design feature implementation if at least one of three conditions pertain to the development. First, an action need not comport with a design feature if it "is documented to not be applicable to the site-specific conditions of the project/activity." App-II-381. Second, the Bureau can waive compliance when "[a]n alternative RDF, a state-implemented conservation measure, or plan-level protection is determined to provide equal or better protection for [the sage-grouse] or its habitat." *Id.* Third, coal-mining actions follow a different playbook. *Id.* But in all cases the Bureau's NEPA analysis must demonstrate that one of the three conditions has been met. *Id.*

B. *Sage-Grouse and Pronghorn*

The challenged development project would further develop the Wyoming Upper Green River Valley. Two species of interest call the Valley home: the greater sage-grouse and the pronghorn.

The sage-grouse inhabits large swaths of the western United States. The bird lives in the Valley year-round. Every winter, the sage-grouse congregates in "winter concentration areas," which feature dense sage brush that it uses for food and shelter. The proposed development area, around 140,000 acres, captures around 48,000 acres of protected sage-grouse habitat and about 28,000 acres of winter concentration areas. The federal government does not consider the sage-grouse endangered, but industrial development threatens its habitat and disrupts mating and migratory patterns.

The sage-grouse lives alongside the pronghorn. The pronghorn is a species of mammal that closely resembles the antelope. The proposed development may impact the Sublette Herd, a group of nearly 30,000 pronghorn that inhabits the Valley and fans outside the region as far north as Grand Teton National Park. A small sub-group of about 300 pronghorns—the Grand Teton Herd—migrates from Grand Teton National Park to the Valley each fall. The Teton Herd travels a 170-mile migratory route called the "Path of the Pronghorn." Its journey lasts about three days. On the way to the Valley, the Teton Herd winds through narrow corridors and routes, cramped by growing development. The Path of the Pronghorn is the Teton Herd's last workable migratory path to the Valley because of other development. The United States Forest Service protects a significant portion of the Path from development, but these protections do not involve the proposed development site.

C. *The Proposed Project*

The Groups challenge a project nearly a decade in the making. In 2010, Jonah Energy's predecessor proposed a plan to expand its natural gas development in the Valley. The so-called "Normally Pressured Lance Project" would build on Jonah's preexisting lease rights by drilling 3,500 new wells over 10 years. Jonah proposed programmatically drilling test wells across the Project Area to help scout resource-rich land. The test wells would help Jonah decide where to locate larger gas well sites for further development. All told, the Project would dot about 5% of the leased land.

The Bureau evaluated the Project for years. In April 2011, it solicited public comments on the Project to help guide its research priorities and analysis. By July 2017, the Bureau released a draft environmental impact statement for public review and comment. The agency mulled over the public's comments and, in June 2018, published its final EIS. The Bureau released its Record of Decision detailing an anticipated course of action about one month later.

The Bureau's final EIS reasoned through four potential alternative courses of action. It ultimately selected one proposed option, but because its comparative analysis rests at the heart of the EIS, each option deserves some attention. *WildEarth Guardians*, 870 F.3d at 1226.

The Bureau's first alternative was Jonah Energy's plan: the "proposed action alternative." App-III-622. Under the company's plan, Jonah would develop up to 3,500 new wells over 10 years. Inside protected sage-grouse habitats, Jonah would

limit multi-well pad construction (each supporting up to 64 wells) to just one pad per 640-acre section.

The Bureau's second alternative was to do nothing at all: the "no-action alternative." *Id.* This option amounted to a rejection of further development but permitted Jonah to maintain its preexisting development rights. The company's oil leases would remain valid, and Jonah could continue applying on an ad hoc basis for individual permits as it had since 1997.

The Bureau's third alternative was "Alternative A." App-III-622–23. This plan focused on protecting wildlife resources and would strictly regiment Jonah's development activities in geographically-defined phases. The Bureau would allow different levels of development in designated "Development Areas" based on the wildlife habitats in that area. Most notably, development in protected sage-grouse habitats would labor under additional phasing requirements: the Bureau would further divide those zones into smaller parcels that would undergo development in different phases. These phasing requirements would help minimize the Project's disruption of sage-grouse habitats.

The Bureau's fourth alternative (and preference) was "Alternative B." App-III-623. This approach focused on conserving a broad range of resources and balancing varied interests beyond wildlife preservation, such as paleontological resources and surface water features. Like Alternative A, Jonah's development would occur across three Development Areas, and each Area would operate under different rules depending on Area resources.

Alternative B included a further subtlety. It proposed two development scenarios that the Bureau could invoke to commit Jonah Energy to different development standards in sage-grouse winter concentration areas (WCAs). Under Scenario 1, the Bureau would apply the standard seasonal timing limitation set out in the land use plan: Jonah Energy could not develop in WCAs during the winter. Under Scenario 2, the Bureau would impose additional protection measures. But under both scenarios WCA development would occur on only a limited scale. And under both scenarios the agency would conduct studies concurrent with Jonah's development to improve its understanding of WCAs. These studies would then shape the Bureau's site-specific NEPA reviews and inform specialized development requirements.

The Bureau selected Alternative B in its Record of Decision. The agency clarified that its approval required it to continually review Jonah Energy's drilling permits, and that it would further study WCAs as it reviewed the company's specific development plans.

D. ***District court litigation***

The Groups challenged the Bureau's project approval in federal district court. The Groups alleged that the Bureau violated FLPMA by failing to mandate that Jonah Energy phase development across the Project Area as required by the land use plan. The Groups also maintained that the Bureau violated NEPA by failing to collect essential information on sage-grouse WCAs, and similarly failed to take a "hard look" at the Project's impact on the Path of the Pronghorn, the Grand Teton Herd,

and Grand Teton National Park. All of this amounted to an arbitrary and capricious action under the APA. Jonah Energy and the state of Wyoming intervened to help defend the Bureau's action.

The district court rejected the Groups' petition and this appeal followed.

II. Analysis

The Groups raise four challenges on appeal: (1) the district court erred in analyzing the phasing design feature; (2) similarly, the Bureau should have collected more information about sage-grouse habitat; (3) the Bureau should have evaluated the Project's effect on the pronghorn herds; and (4) the Bureau should have considered the Project's indirect effect on Grand Teton National Park. We consider each in turn.

A. *The "phasing" required design feature*

The Groups contend that the Bureau violated FLPMA by failing to demand that Jonah comply with a required design feature from the land use plan. They single out one of the plan's several dozen requirements that approved development schemes should "[a]pply a phased development approach with concurrent reclamation." App-II-383. They claim Alternative B does not require Jonah to apply such an approach. But we need not reach that argument because the Groups failed to raise it to the Bureau as required by administrative exhaustion rules.

A party challenging an agency action often must *first* raise its objection to that agency—not a federal court. To satisfy the exhaustion requirement, "plaintiffs generally must structure their participation so that it alerts the agency to the parties'

position and contentions, in order to allow the agency to give the issue meaningful consideration." *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011) (internal quotation marks omitted). If a party fails to raise its objection, it has failed to exhaust its administrative remedies and has consequently forfeited its argument. *See Ark Initiative v. U.S. Forest Serv.*, 660 F.3d 1256, 1261 (10th Cir. 2011).

We enforce the exhaustion requirement for good reason. The requirement turns on the principle that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). And it "tends to economize on effort on the part of courts, agencies and to some extent even parties, including reducing the need for shuttling cases back to the agency for an explanation of its choices. It further increases the potential benefits of the notice-and-comment process itself." *Koretoff v. Vilsack*, 707 F.3d 394, 400–01 (D.C. Cir. 2013) (Williams, J., concurring). When a party withholds objections to an agency action until it reaches federal court, it gums up the process for everyone and, sometimes, "[w]e sense a bit of sandbagging." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013). That's why courts often cast a skeptical eye towards plaintiffs that have been involved throughout the administrative process yet rely on a peripheral or newfound theory only when thrust before a federal court. *See, e.g.*, *id.* at 310–11; *see also Village of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 770 (10th Cir. 2014).

But most rules come with caveats and the exhaustion requirement is no exception. The Groups acknowledge that they failed to raise their specific phasing objection before the agency but invoke the "obviousness" exception to resurrect it. The contemporary obviousness exception finds its roots in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). There, the Supreme Court declined to reach certain issues the respondents failed to raise before the agency. In dicta, the Court reflected, "[a]dmittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Id.* at 765 (internal citations omitted).

The district court agreed with the Groups that the *Public Citizen* obviousness exception applies here. It theorized that the agency knew what the land use plan required. After all, the agency referenced the phasing requirement in communications with different parties, and expressly considered how it might implement phasing. We review de novo whether a plaintiff exhausted administrative remedies, but "what remains is the question whether to dismiss the case in light of the policies the exhaustion requirement is meant to serve." *Koch v. White*, 744 F.3d 162, 164 (D.C. Cir. 2014) (internal quotation marks and citations omitted). We review the court's excusal for an abuse of discretion. *Carr v. Comm'r, SSA*, 961 F.3d 1267, 1270 n.2 (10th Cir. 2020). As we explain below, the district court misapplied the *Public Citizen* exception, and should have enforced the exhaustion requirement here.

We have referenced the *Public Citizen* obviousness exception only a handful of times and have meaningfully applied it only once. In that case, *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043 (10th Cir. 2015), we decided that the challenger environmental groups waived their argument that the U.S. Army Corps of Engineers failed to consider the risk of oil spills in its EA analyzing an oil pipeline construction permit. Like the Groups here, the *Bostick* groups invoked the obviousness exception to back its late-game objection; after all, the risk of oil spills from an oil pipeline is obvious. We disagreed with how the challengers cast the obviousness exception, and explained that "the fact that pipelines create a risk of spillage does not mean the alleged deficiency"—failing to consider the risk of a spill—"in the Corps' environmental assessment for the construction, maintenance, and repair of utility lines would have been obvious." *Id.* at 1049. In so doing, we distinguished between a challenger's role in highlighting an obvious flaw in the *analysis*, which the obviousness exception takes care of, and the obviousness of an issue's *relevance*, which the obviousness exception does not cover. The two may overlap. But *Bostick* establishes that our inquiry concerns whether the agency's reasoning was obviously deficient, not whether the agency should have considered an obvious issue.

Under *Bostick*, the exception saves only objections to plainly deficient analysis, and here, the Bureau did not make an obvious mistake in its phasing analysis. In the agency's Record of Decision, it explained it would assess that possibility on a site-by-site basis as it considered possible disturbances at individual drilling sites. App-III-570. Each new well application, after all, would still undergo

NEPA review under Alternative B. And in rejecting Alternative A, it explained why that proposal, which included phasing, was not the best option for the overall project objectives. In short, the agency's approval put project phasing at the back-end of the approval process.

To be sure, the Groups contest whether the phasing design feature can be meaningfully implemented on a site-by-site basis. They also argue that the EIS does not commit the Bureau to consider the phasing requirement with each permit. This all may be so. But under *Bostick*, the obviousness exception is a narrow one, and courts should only apply it to save forfeited challenges to manifestly inadequate agency analysis. And here, the agency's decision did not suffer from analytical defects "so obvious that there [was] no need for a commentator to point them out specifically." *Pub. Citizen*, 541 U.S. at 765.

We accordingly affirm the district court's rejection of the Groups' FLPMA challenge to Alternative B.[1]

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[1] Even so, we agree with the district court's rejection of the challenge to the phasing design feature on the merits. It is not unlawful for the Bureau to delay a decision on phasing until it acquires better, site-specific information. In fact, the land use plans specifically contemplate that, at times, "site-specific circumstances" may render some RDFs inapplicable to some projects. App-II-381. This approach is consistent with the plan's guidance for development in winter concentration areas, which provides that activities in protected areas "could be allowed on a case-by-case basis." App-II-380. The Groups' objections are primarily animated by a suspicion that the Bureau will not follow through on its obligation to address phasing in site-specific analyses. But the Groups remain free to challenge the Bureau should it ultimately neglect its responsibility.

B. *Essential information about winter concentration areas*

The Groups next argue that the Bureau violated NEPA by failing to collect information essential to a decision to approve Project activities in winter concentration areas. This undermined the agency's responsibility to take a "hard look" at the proposed alternatives, *Richardson*, 565 F.3d at 704, and rendered the decision arbitrary and capricious, *WildEarth Guardians*, 870 F.3d at 1233. The district court found the missing information not-so-essential and rejected the claim. We agree.

Recall that NEPA regulates an agency's collection and consideration of information. It "ensure[s] that agencies carefully consider information about significant environmental impacts" and "guarantee[s] relevant information is available to the public" to aid public input. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 067 (9th Cir. 2011).

Agencies therefore may face a difficult task of deciding what to include or exclude from environmental impact statements. On the one hand, a draft EIS must provide "full and fair discussion" of relevant issues to enable informed commenting, 40 C.F.R. § 1502.1, and a final EIS must allow us to trace the agency's decision-making rationale. On the other hand, an EIS "shall be concise, clear, and to the point," *id.*, and a final EIS typically cannot exceed 150 pages, § 1502.7.

NEPA's implementing regulations manage this tension by focusing agencies on certain troves of information. Relevant here, "[w]hen an agency is evaluating reasonably foreseeable *significant* adverse effects on the human environment in an

environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." § 1502.22 (2018) (emphasis added).[2]

But not all information is created equal. When the information is "relevant" to "reasonably foreseeable significant adverse impacts," but the agency cannot dig up the data due to cost or other practical limitations, it need not expend significant resources patching up the deficiency. Instead, the agency just needs to explain that the information is unavailable, address why or why not the information is relevant, discuss what current evidence suggests about the suspected impact, and detail what the agency makes of the information it does have. § 1502.22(b)(1)–(4).

An agency has different requirements when the information it lacks is "essential to a reasoned choice among alternatives" and gathering that information would not be cost prohibitive. § 1502.22(a). In that case, the agency "shall include the information in the environmental impact statement." *Id.* It does not enjoy the luxury of extrapolating a conclusion based on already-available information as when the relevant data is out of reach.

The Groups claim that the Bureau violated § 1502.22 when it approved development in winter concentration areas without "essential" information. According to the Groups, the agency needed to procure data on "the full extent of [WCAs], because prior aerial surveys were incomplete," "the extent to which core-

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[2] The regulation has since been moved to 40 C.F.R. § 1501.22 and amended with changes not relevant here.

area birds from outside the Project Area use these sites," "the timing of movements and the travel corridors birds use to reach [WCAs]," and "the location of sage-grouse geophagy sites for sage-grouse winter nutrition." Aplt. Br. at 50–51 (internal quotation marks omitted). Without the missing data, the Bureau "could not understand the impacts of the NPL Project on local and regional core-area populations, and the specific areas that should be protected and how." Aplt. Br. at 52.

This challenge fails for two reasons: it overstates the extent to which the Bureau lacked information on the WCAs, and it misconstrues the meaning of "essential" in this context.

First, the Groups construct their challenge on the premise that the Bureau acted without so much as "baseline" knowledge of the impact the alternatives would have on sage-grouse WCAs. *See, e.g.*, Aplt. Br. at 50. The Bureau's EIS offers some support for this claim; in it, the agency reflected, "it is important to note that there is limited research on Sage-Grouse use of the [WCAs] in the NPL Project Area and the potential impacts that could occur to Sage-Grouse from development in and around these areas. As a result, the potential impacts on Sage-Grouse resulting from development in the [WCAs] is not well understood." App-II-688.

The agency owned up to its information deficit, but that does not mean it flew blind. For example, the BLM reviewed two years of winter studies between 2010 and 2011 to inform its analysis. App-III-662. With these studies, it discerned 27,292 acres of WCAs in the Project Area. *Id.* It mapped the WCAs. App-III-756. It relied

on data from a collection of "flight days," or one-day observatory snapshots of the area. App-I-271; App-II-348–49. It clocked 2,000 sage-grouse through these studies. App-III-662. And it relied on other studies from 2005 to 2011 that tracked radio-collared sage-grouse during the winter, though it acknowledged "the travel paths and timing of movements [in the Project Area] are not well studied." App-III-663. Separate studies revealed the presence of sage-grouse outside WCAs but still in the Project Area. *Id.* Additionally, the Bureau relied on studies that discussed the behavior of wintering sage-grouse in other regions and extrapolated conclusions based on differences between those environments and the Project Area. App-III-688.

The Groups point to cases where courts docked agencies for failing to gather "baseline information," but as recounted above, the Bureau here was differently situated. For example, the Groups highlight *Oregon Natural Desert Association v. Jewell*, 840 F.3d 562 (9th Cir. 2016). There, the court scrutinized an EIS that failed to dig up information on an animal's presence in a development site. Instead, it relied on shaky assumptions about the animal's absence plainly rebutted by available evidence. *Id.* at 569. This violated the "practical requirement in environmental analysis" that the agency work from a "baseline" of knowledge to "identify the environmental consequences of a proposed agency action." *Id.* at 568 (quoting *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999)). As our overview of the Bureau's research demonstrates, the agency here was not similarly handicapped.

Second, the Groups' claim falters for a more fundamental reason: the Bureau has adequately explained why the information the Groups want it to procure is not

"essential." The Groups offer some reasons to think otherwise. They argue that without the information, the Bureau could not understand which areas should be protected and how. Aplt. Br. at 52. This is because, according to expert testimony, any development in the WCAs would cause "marked declines" in sage-grouse populations. Aplt. Br. at 55. It was not enough to acknowledge "various adverse effects"; the EIS's underdeveloped look at WCAs left the Bureau "uninformed as to the unique impacts of development in these sites." Aplt. Br. at 57 (internal quotation marks omitted).

We disagree. Recall the regulatory text: the Groups must show that the missing information—about flight patterns, aerial surveys, and so on—was "*essential* to a *reasoned choice among alternatives*." § 1502.22(a) (emphases added). In other words, could the Bureau thoughtfully choose one of the four alternatives without the requested information? Like the district court, we think it could. The Bureau clearly possessed enough information to anticipate how development would affect the sage-grouse and WCAs under the selected action. It discussed how the Project would destroy wintering habitat, App-III-685–86, contribute to sagebrush loss, and further displace sage-grouse from WCAs, App-III-688. It is not clear how the additional information is "essential" such that it would likely materially alter the agency's choice to select Alternative B.

At bottom, the Groups conflate information that would be "nice to have" with information that is "essential to a reasoned choice *among alternatives*." § 1502.22(a) (emphasis added). The Bureau might have benefited from additional information on

the location of geogaphy sites or travel corridors.[3] But under the essential information regulation, the Groups must go one step further: they must explain how this information is *central* to choosing *between* the proposals. They do not connect these dots; instead, the Groups chiefly claim that the deleterious impact on WCAs might be worse than the agency realizes. But we do not sit "as a panel of scientists that instructs the [agency] how to validate its hypotheses . . . choose[] among scientific studies . . . and order[] the agency to explain every possible scientific uncertainty." *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008).

From there, we have little trouble concluding that the Bureau complied with its remaining regulatory responsibilities. We grant for the sake of argument that the missing WCA information triggered the responsibilities detailed by § 1501.22(b), namely that the Bureau evaluate the impacts of the Project based on widely-accepted scientific methods. § 1501.22(b)(4).

The Groups first argue that the Bureau did not live up to its obligations because it had to explain *why* it could not collect the absent information. Section 1501.22 does require the agency to take the relevant steps only when the information "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known." § 1501.22(b). But it does not require the agency

[3] The Bureau will conduct additional analysis of the Project's sage-grouse effects at each proposed drilling site. The Groups point to this plan as an admission that the Bureau issued the FEIS prematurely. But as we explain, the information it anticipates collecting later is not required at this moment, and the Bureau should be credited, not penalized, for continuing to study the WCAs as a part of its on-going management of the project.

to detail *how* the costs are exorbitant or *why* the means to obtain the information are not known. We have rejected a similar reading of this regulation in the past, explaining that an agency need not "include a separate formal disclosure statement" to the effect that affected "population data is incomplete or unavailable." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999). After all, "Congress did not enact the National Environmental Policy Act to generate paperwork or impose rigid documentary specifications . . . an additional, formal statement . . . would serve no useful purpose." *Id.* at 1173; *see also Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 158 (D.D.C. 2014) (explaining that the regulation "does not impose a requirement that the agency *explain why* the [costs] of obtaining [the missing, essential information] are exorbitant or the means to obtain it are not known—just that it provide the four enumerated statements in the EIS *if* the costs to obtaining the information are exorbitant" (internal quotation marks omitted)). Such is the case here.

The Groups chiefly complain that, even if the Bureau did not violate the above "threshold" requirement, it did violate § 1501.22(b)(4). That subsection requires the agency to conduct an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." § 1501.22(b)(4).

The Groups contend that different, better modeling methods were available to aid the Bureau, and that the EIS needed to explain why the Bureau did not take those approaches. Aplt. Br. at 59. To support its argument, it cites evidence entered at

trial and only one comment offered on the Draft EIS. *See id.* In the comment, an environmental group asked the Bureau to develop an "experimental model" that "explore[s] the characteristics" of WCAs, and "determine[s] what types of disturbance elicit negative response from the birds, and which do not." App-II-417. It suggested that "[t]he model should be developed by a scientific team, experienced with sage-grouse." *Id.* But the Groups make no effort to explain in its briefing *how* the extrapolations and literature the Bureau *did* rely upon fell short of the regulatory standard, and only cursorily allege that the agency's literature review was insufficient. It is not enough to suggest that a different scientific approach would be preferred; the Groups must show that the agency's approach did not constitute a "method[] generally accepted in the scientific community." § 1501.22(b)(4).

Accordingly, we affirm the district court's determination that the Bureau adequately explained the action's impacts on the sage-grouse and the WCAs.

C. *The Path of the Pronghorn and the Grand Teton Herd*

Next, the Groups contend that the Bureau violated NEPA by failing to take a "hard look" at the Project's impact on the Path of the Pronghorn and the Grand Teton Herd.

The Groups' challenge has two elements: (1) they contend that federal regulations required the Bureau to pay special attention to the Path of the Pronghorn and the Grand Teton Herd due to their special aesthetic and environmental characteristics; (2) they claim that the EIS ignored both the Path and the Herd. Neither argument is persuasive.

First, the Groups read federal regulations to require the Bureau's EIS to take special care in discussing the Path and the Teton Herd. The Groups ground their argument in the statutory mandate that the Bureau provide a "detailed statement" on "major Federal actions *significantly* affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). They stress that "significantly as used in NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27 (2018).[4] The word "intensity" is of particular interest, because "intensity" concerns the "severity of impact," § 1508.27(b), which is deduced in part by consideration of "[u]nique characteristics of the [affected] geographic area such as proximity to historic or cultural resources, park lands," § 1508.27(b)(3), and "[t]he degree to which the action may . . . cause loss or destruction of significant scientific, cultural, or historic resources," § 1508.27(b)(8). According to the Groups, this all adds up to the Bureau's affirmative duty to thoroughly consider the Project's impact on scientifically and culturally significant wildlife fixtures, like the Path and the Teton Herd.

The Groups misunderstand the regulations. They do not require the Bureau to pay special attention to special resources. Instead, they instruct agencies to assess the "significance" of an action by reference to the unique characteristics the action threatens to impact. This assessment goes to whether a detailed statement is

[4] We cite to the version of the regulation active at the time of the agency decision, as any changes do "not operate retroactively." *See NRDC v. McCarthy*, 993 F.3d 1243, 1246 n.1 (10th Cir. 2021). The same regulation is currently reserved.

necessary *at all*, not to the statement's content. *See, e.g.*, *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1166 (10th Cir. 2012).[5]

Second, the Groups maintain that, even apart from the Bureau's supposed special duty, the agency failed to take a hard look at the Project's impact on the Path and the Teton Herd.

Start with what the agency did say. The Bureau—though not explicitly invoking the Path or the Teton Herd—discussed the action's impact on the migratory paths generally and the larger Sublette Herd. The Bureau discussed the pronghorn's seasonal habitats, App-III-656, recounted its "seasonal migration movements" and corresponding studies, and observed the "three pronghorn migration routes that cross the analysis area," App-III-657. It mapped out a cumulative impact analysis far beyond the Project's boundaries, SA-IV-994, and indirectly referenced the Teton Herd itself, *see* App-III-657 (describing the "pronghorn radiomarked in the Grand Teton National Park [that] do use the winter ranges present within the Project Area").

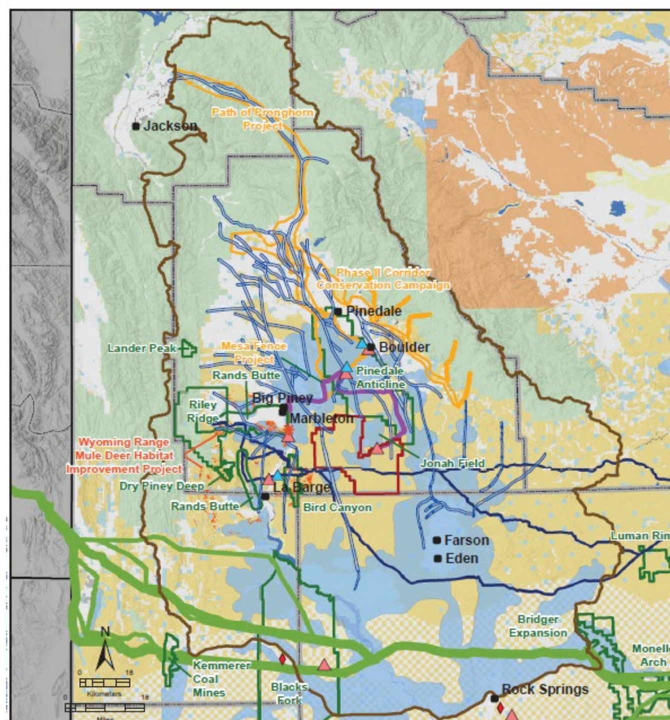
The Bureau also scrutinized the action's potential adverse impacts on the Sublette Herd and pronghorn migration routes. It observed,

> Degradation of seasonal habitat and disruptions in migratory routes are of particular concern for pronghorn due to the presence of crucial winter range within the general wildlife analysis area and the presence of

[5] For this reason, many of the cases the Groups cite are inapplicable. *See, e.g.*, *Anderson v. Evans*, 314 F.3d 1006, 1019 (9th Cir. 2002); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211–16 (9th Cir. 1998); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 231–35 (D.D.C. 2003).

> migration routes that connect pronghorn crucial winter range and other pronghorn habitats in the analysis area and the region . . . pronghorn . . . exhibit high utilization of the Project Area, particularly the southeastern portion, which is predominantly undeveloped. *The level of activity under the Proposed Action is likely to cause displacement and disrupt (i.e., severely impede or alter) migration patterns of pronghorn populations through the Project Area.* Disrupted migration could prevent herds from reaching high quality forage . . . *Development in crucial winter range and migration routes could also eliminate the herd's migration memory and break the tradition of migration to the most suitable winter habitats, thus reducing the viability of pronghorn Herd Unit 401 in perpetuity.*

App-III-674 (emphases added). The agency thus expressly considered the Project's negative impacts on the pronghorn migration and population viability, canvassing seasonal migratory routes and how drilling might interrupt them. The agency's cumulative impact analysis map, for example, took account of pronghorn migration routes, marked on the image below as gray lines with a blue outline.



SA-IV-994.

To be sure, the Bureau analyzed the Project's impact on the pronghorn population and migratory routes using units of analysis different from what the Groups would prefer. The Groups request more explicit consideration of a particular pronghorn subgroup and a particular migratory path. But we "do not decide the propriety of competing methodologies" and decline to second-guess the Bureau's analytical lens; "we determine simply whether the challenged method had a rational basis and took into consideration the relevant factors." *Haaland*, 59 F.4th at 1034 (internal quotation marks omitted).

The agency's decision to use broader units of analysis had a rational basis. The Bureau had a good reason, for example, to focus on the broader Sublette Herd rather than the Grand Teton Herd. The agency expressly chose to analyze the Sublette Herd as a stand-in for the impacted pronghorn population in its Cumulative Impact Analysis because the Wyoming Game and Fish Department also used that population unit to scrutinize population goals. SA-IV-846. And the agency relied on WGFD information to understand, for example, pronghorn migratory patterns, App-II-373; App-III-656–57, just as it used WGFD data to learn about impacts on the sage-grouse, App-III-637, 640. "[Our] role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious," and the Bureau's decision to forge ahead by focusing on the Sublette Herd was neither arbitrary nor capricious. *Balt. Gas & Elec. v. NRDC*, 462 U.S. 87, 97–98 (1983) (internal quotation marks omitted).

Similarly, we see no reason to conclude that the Bureau's treatment of migratory paths as a general unit of analysis failed to give due consideration to the Path of the Pronghorn. The EIS squarely confronted the "displacement" and "disrupt[ion]" of pronghorn "migration patterns" and discussed the "[d]egradation" of "migratory routes" that "connect crucial winter range and other pronghorn habitats in the analysis area and the region." App-III-674. The Groups ask for that same analysis—but with a refined vocabulary. We defer to technical choices like this, however, unless there is good reason to suspect that the agency made that choice for improper reasons. *See Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (explaining that the "determination of the extent and effect of [cumulative environmental impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies"). After all, "[t]he NEPA process involves an almost endless series of judgment calls," and "[t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987).

The Groups resist this conclusion by highlighting a past case wherein we took a more probing stance. In *Utahns for Better Transportation. v. U.S. Department of Transportation*, 305 F.3d 1152 (10th Cir. 2002), we took a closer look at an agency's analytical framework. There, an agency tasked with analyzing the environmental effects of a railroad limited its analysis to 1,000 feet from the tracks. The challengers argued this decision constituted an arbitrary limitation, and the agency rebutted that it

could fairly extrapolate from that data to understand the environmental impacts outside the 1,000-foot range. We rejected the agency's explanation because clear evidence demonstrated that the limit could not capture the development's impact on certain birds. We concluded, "while we recognize that the failure to employ a particular method of analysis in an EIS does not render it inadequate, here the FEIS simply is inadequate to address the impact on migratory birds." *Id.* at 1180 (internal citations and quotation marks omitted).

This case is different in kind. In *Utahns for Better Transportation*, "[t]he record repeatedly and without contradiction indicate[d] that the 1000-foot limit used in the FEIS [did] not allow for consideration of impacts on migratory birds." *Id.* This was in spite of the development's impact on "migratory birds" being a "primary concern of many public and private entities." *Id.* But here the Bureau's scope did not exclude migratory paths like the Path of the Pronghorn, nor did it exclude the Grand Teton Herd. It just analyzed them in different language and in what it considered a proper geographical context.[6]

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[6] The Groups emphasize that during the scoping process, the Park Service raised concerns about the Path of the Pronghorn specifically, App-I-261, and argue that the Bureau needed to consider those comments to satisfy our review, *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002) (Observing that "NEPA requires agencies preparing environmental impact statements to consider and respond to the comments of other agencies," but not necessarily "to agree with [those comments]" (internal citations and quotation marks omitted)). Notably, the Park Service voiced its concern *before* the Bureau issued its draft EIS, and apparently did not submit similar concerns after the draft's publication. We think the Bureau adequately considered the Park Service's concerns for the same reasons provided in the preceding analysis.

We are satisfied that the Bureau's challenged method "had a rational basis and took into consideration the relevant factors." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 782 (10th Cir. 2006) (internal quotation marks omitted).

D. *Grand Teton National Park*

Finally, the Groups contend that the Bureau failed to take a hard look at how the Project would indirectly impact Grand Teton National Park itself even though it is nearly 90 miles from the Project Area. They claim that should the Teton Herd dwindle in size or otherwise go extinct, the Park's ecological integrity, biodiversity, and aesthetic appeal would suffer, harming tourists and nature alike. And NEPA required consideration of even those indirect effects occurring "later in time" or "farther removed in distance." 40 C.F.R. § 1508.8(b) (2018).[7] The Groups again falter on exhaustion grounds.

The Bureau and the Groups were required to comport with established exhaustion requirements. The regulations required the Bureau to "affirmatively solicit[] comments" "[a]fter preparing a draft [EIS] and before preparing a final [EIS]." § 1503.1(a)(2)(4) (2018). The Bureau solicited comments accordingly. *See* Notice of Availability of the Draft Environmental Impact Statement for the Normally Pressured Lance Natural Gas Project, 82 Fed. Reg. 129 (July 7, 2017). The regulations clarified that the Bureau "may," but need not, "request comments on a

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[7] We again cite to the regulation's location at the time of the agency decision. This provision has since been amended and is now located at 40 C.F.R. § 1508.1(g)(2).

final [EIS] before the final decision." § 1503.1(b). The Bureau did not request public comments on the final EIS. *See* Notice of Availability of the Final Environmental Impact Statement for the Normally Pressured Lance (NPL) Gas Development Project, 88 Fed. Reg. 121 (June 22, 2018). Crucially, "[p]arties challenging an agency's compliance with NEPA must ordinarily raise relevant objections during the public comment period." *Bostick*, 787 F.3d at 1048

The Groups did not raise the Grand Teton National Park issue during the open comment period that followed the draft EIS's publication. They avoid conceding that they forfeited the issue by cobbling together a series of comments that address general threats to the Teton Herd's population and wellbeing, App-II-413, 424, and a general interest in tourism and wildlife viewing in Wyoming, App-I-264. To be clear, the Bureau did ultimately discuss the Project's indirect interference with "recreation experiences outside the Project Area." SA-IV-824. But the Groups' comments did not raise the Grand Teton National Park issue pressed here with the specificity required to allow the Bureau to "correct its own mistakes with respect to the programs it administers before it is haled into federal court." *McCarthy*, 503 U.S. 140, 145.

The Groups eventually raised the issue with appropriate specificity—but not during the public comment period. *See* App-II-504. Our precedent makes clear that failure to raise an objection during the public comment period constitutes a failure to exhaust. *Bostick*, 787 F.3d at 1048. Plaintiffs cannot defeat this requirement by

submitting comments outside a comment period and immediately before the Record of Decision's publication.

Because the Groups again failed to exhaust administrative remedies, we again affirm the district court's rejection of their hard look challenge.

III. Conclusion

We affirm the district court.