

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS STATE OF OREGON
for the
OREGON ENERGY FACILITY SITING COUNCIL

IN THE MATTER OF THE
APPLICATION FOR SITE
CERTIFICATE FOR THE YELLOW ROSEBUSH
ENERGY CENTER

**INTERVENOR ALEXANDERSON'S EXCEPTIONS
TO PROPOSED ORDER ON MOTIONS FOR
SUMMARY DETERMINATION**

OAH Case No. 2024-ABC-06692

I. INTRODUCTION:

"It is the policy of the State of Oregon that wildlife shall be managed to prevent serious depletion of any indigenous species." and **"To make decisions that affect wildlife resources of the state for the benefit of the wildlife resources.."** ORS 496.012 (7)

Intervenor states these exceptions in opposition to hundreds of miles of big game fencing in the wrong place, a landscape level maze that is fragmenting and closing vast tracts of big game winter range (BGWR). Economics and a perception that the rules intended to protect the animals are just a negotiated tax have lured developers to the worst possible places, ones wildlife use the most.

This case presents a confluence of solar siting and design choices that seriously threaten big game and other large mammals, especially mule deer: huge site, disregard of nearby suitable outside of big game winter range (BGWR) , offering no replacement range, leaving only a public highway to pass through 8 square miles of arrays, right next to several square miles of other solar fences, a non migratory local herd that stays in a small area year round and a mitigation site occupied by a different herd too far away to ever be seen by the affected animals.

The Council is aware that there is a lineup of large solar projects proposing hundreds of miles of 7 or 8 ft high fencing that will prevent passage by all animals unable to fly, climb over or slip under a 6 or 8 inch gap¹. Intervenor contends that legally binding administrative rules purposefully and for good reason were written to discourage the choice of BGWR through enforcement of an obligation to

¹ So far a 6 or 8 inch gap is only being "considered".

“recreate”² or “replace”³ closed winter range. For mule deer the reason is embedded in state law, and rule OAR 635-415-0005(15) they and other big game cannot survive without adequate winter range already declared insufficient or barely sufficient to sustain them.

The mitigation Rule⁴ that applies can be summarized simply: **Developers may only take what they can put back or recreate nearby.** Wildlife must not suffer a net loss in winter range. Mule deer cannot be expected to just make do with a maze of barrier fencing in their designated winter range. If allowed at all, they must obtain a real net benefit.

This ideal of creating a benefit for big game seems disconnected from reality. Is it just a pretense, a feel good recital that there will be no net loss of either habitat quantity or quality of habitat and a net benefit of habitat quantity or quality? Lawyers write this over and over. No one has said it here in testimony or affidavits.

Intervenor is a limited party on the issue of compliance with ODFW rules on mitigation. The Rule, and its definitions prescribe an ethical code governing our treatment of animals starting with their right to exist, to keep the means to do so, to be free of needless suffering and to remain wild and independent.

EXCEPTION 1. Summary. The MSDPO asks the Council to dismantle the long standing and carefully crafted rules against BGWR damage and destruction by:

- **Eliminating “quantity” of habitat from the no-net-loss equation, allowing net closure,**
- **Holding that the developer’s choice of site is untestable, leaving the Council to “micro-siting” the arrangement of facilities,**
- **Blinding itself to the state’s expert findings of mule deer conditions and needs, specifically the statutory Mule Deer Management Plan (MDMP) and the supporting Delineation of Mule Deer Herd Ranges data on how mule deer use their habitat, and what is causing their population collapse,**
- **Holding that changing the plants on existing winter range can offset a 50 mile maze of fence-out area twice the size of Portland International Airport,**

² OAR 635-415-0005(12)

³ OAR 635-415-0005 (16)(e)

⁴ “Rule” herein refers to the ODFW mitigation rules in general.

- Redefining “in-proximity” (meaning close) as anywhere on the Columbia Plateau stretching from Mt Hood to beyond Pendleton,
- Disregarding previously approved abutting fences leaving a public highway as the only way for animals to go through the combined projects,
- Dismissing the common sense increased risk of vehicle collisions,
- Requiring no compensatory mitigation for deleterious effects of the fence occurring outside the fence,
- Holding that a Proposed Order is presumed correct and complete and that Intervenor must provide evidence on standards the applicant must satisfy,
- Deciding fact disputes on summary determination as if a hearing had already been held,
- Holding that a substation picked by a developer justifies obliteration of BGWR at the site, no alternatives need be considered.

Taken together, the Council is being asked to dismantle the substantive and procedural habitat protections for Oregon’s big game while pretending that the animals will gain a net benefit from hundreds of miles of barrier fencing and some new shrubbery.⁵

EXCEPTION 2: The MSDPO holds that the facts and causes of mule deer population decline are not relevant. It specifically rejects the Mule Deer Management Plan (MDMP) and the included study “Delineating Mule Deer Herd Ranges. MSDPO p 32. The information there is the best and only available evidence. Without it there is little to inform the Council on any aspect of mule deer habitat use, change or compensatory mitigation.

The State mandated MDMP establishes that mule deer populations are in a severe multi-decade decline due largely to insufficient winter range, and explains how habitat changes such as barrier fences add risks and threats. *“In 1990 the first Mule Deer Management Plan was adopted by the Commission (ODFW 1990A) due to concerns over declining mule deer populations and increasing hunting pressure. The extensive public process identified habitat loss and degradation as the number one issue affecting mule deer in Oregon Population index*

⁵ Previous examples of landscape level change are discouraging. Salmon are not better off having their eggs squeezed out by humans, fingerlings hatched and raised by humans and barged out to sea. The bears are not better off or the forests they used to fertilize for free.

*information (deer per mile) suggests high populations, declining winter range conditions, and a series of severe winter conditions led to minor population fluctuations through the 1970s but ultimately the population peaked at an estimated **306,000 mule deer in 1981**. Oregon's mule deer population has declined since population estimation began during the 1981 population peak. The **2022 population estimate was 162,600 animals** “ MDMP p.4. These are important predicates to a defensible assessment of habitat current conditions and what is needed for compensatory mitigation.*

Although the MSDPO rejects these facts, the MDMP is binding on the Council as an administrative rule and can be cited as applicable law in this proceeding. OAR 635-190-0000 et seq. (The Wildlife Management Plan rules incorporate the Oregon Mule Deer Management Plan). Applicant also cited the Plan and provided a link. [Oregon's Mule Deer Management Plan, 14 June 2024](#).⁶

The MDMP is cited but little discussed in Applicant's Fish and Wildlife Exhibit P at p 44. Presumably this was to satisfy the applicant's duty to disclose and consider all habitat impacts per Council rules; but there is nothing in the ASC or the PO that considers how mule deer use their habitat now, how the project will change conditions for the deer, how closing 4992 acres with 50 miles of fence can be compensated and deliver an overall net benefit. (Does this mean more likely to prosper and have many generations of healthy fawns?)

The answer offered for this hole in the analysis is that the applicant “worked with ODFW” and comments were received from an ODFW biologist who liked the mitigation site 20 miles away.

The ODFW does not act as a fact and law finding body in place of the Council. It doesn't act at all in EFSC cases. It assigns staff to consult by email comments and meetings. Where there is no evidence on a required condition or test, the Council may not just say the ODFW staff member knew about the fence and concurred in a mitigation plan. The Rule has standards and definitions to be followed. One important example: Mitigation must occur within the affected population's “home range.” This requirement was disregarded. The PO plus attachments include over 1000 pages and the term “home range” appears once, only to quote the Rule. It does not mention the “affected population.”. Applicant's ASC Exhibit P has a few observations

⁶ The Secretary of State link:

<https://records.sos.state.or.us/ORSOSCMSearch/Search/RecordViewer.aspx?uri=10370156>

about about but not how they use the project site and will be affected by 50 miles of fence. P 22.

If the ODFW had conducted a proceeding to make a decision about compliance, parties would be able to present and test evidence there. It is insufficient as a matter of law and due process to just say “the ODFW biologist liked it”, thereby kicking the issue to unofficial and unreviewable comment and meetings. ORS 183.470 requires this Council (not ODFW) to make findings of fact on “each contested issue of fact and each ultimate fact required to support the agency’s order.” The MSDPO, the PO and the ASC together give the Council nothing to go on, no way to understand whether the deer will be better off. Specifically, the MSDPO fails to evaluate:

- Non migrating herds must meet all their needs all year in a small area. *“For mule deer, habitat is more complex than the vegetation type or landcover the species occupies, but rather includes the collective resources needed by the species to meet all life history requirements (Hall et al. 1997)”* MDMP p. 40. Local deer need to obtain cover, forage, favorable fawning conditions, escape from predators and fire, solitude, less snow or wind. If a large hole is placed in their habitat and it is not “recreated” or “replaced” nearby they have a net loss. New shrubbery adds forage. However, it doesn’t substitute for the other conditions and function of winter range.
- Predator Traps, escape: How project fencing assists coyotes and other predators hunting mule deer, especially fawns. *“Oregon’s mule deer populations have experienced significant declines over the past several decades (Chapter 2) and predation from cougars (for adult mule deer) and coyotes (for newborn and juvenile mule deer) have been documented as the principal source of mortality.”* MDMP p.133. *“Inappropriately sited development, and associated infrastructure such as roads and fences, can result in individual and cumulative impacts to mule deer and their habitat.”* MDMP p.142. Currently deer can freely go into and out of canyons and side draws. Fencing along them limits this access, and blocks escape from predators and fire.
- Nutritional Deficits: Forcing resident deer to detour around miles of continuous barrier fencing uses up fat reserves leading to fawn absorption and newborn mortality. *“Large herbivores, including mule deer, have a similar, sequential response to lack of nutritional*

*resources, where survival and recruitment of young is first reduced, followed by increased age at first reproduction, decreased pregnancy rates and litter sizes, and finally reduced survival of adults (Gaillard et al. 2000)” MDMP p. 51. “Observed population parameters during the reporting periods declined or showed no significant improvement and suggest mule deer are suffering from **chronic nutritional stress** in response to long term declines in carrying capacity. Overall nutritional value on the landscape is likely lower than needed to support historic mule deer populations (Merems et al. 2020, Monteith et al. 2014, Schuyler 2021)” MDMP p.13*

- Risk of Vehicle Collisions. The only throughway to avoid the project and its adjacent solar installations and fences is Bakeoven Road. *“Vehicle collisions and illegal take combined accounted for 53% of all known mortalities of adult female mule deer in this area (Schuyler et al. 2019).” MDMP p.29*
- ODFW explains how a local herd uses the draws and ridges for thermal and forage reasons and how they move daily not just along canyons but between them. The deer use elevation changes as weather changes and to follow the greenup in the spring for forage. *“ . big game may be required to make daily up/down slope movement between draws providing essential thermal cover and wind-blown ridges which provide the only accessible forage during deeper snow periods.”*

<https://www.dfw.state.or.us/habitat/mitigation/Final%202013%20ODFW%20Big%20Game%20Winter%20Habitat%20Map%20Rationale%20-%202013.pdf> p4. (Also linked by applicant in YRMSD p 4.)

EXCEPTION 3: The MSDPO and PO excuse the developer from efforts to avoid installing 50 miles of big game barrier fence in BGWR. MSDPO 3.2.1 p 39. Although some fencing will be needed around high voltage grid connections, the array fencing can go outside of BGWR.

Category 2 first requires “**avoidance of impacts through alternatives**” OAR

635-415-0025(2)(b)(A) The Council is obliged to minimize unavoidable impacts by “limiting the degree, or magnitude of the action”. OAR 635-415-0005(16)

The MSDPO accepts the applicant’s contention that the site is location-dependent on a substation. Developers say they may select sites anywhere there are high voltage substations regardless of the habitat to be destroyed. The MSDPO says because some damage to BGWR would have to occur by an unfenced transmission line from the arrays, then 50 miles of

fencing in BGWR is considered unavoidable. The Council must not permit a developer to disregard alternatives and just pick a site on Google Earth near a 500kv substation. The applicant's own alternative design puts the fence in Wasco County and a transmission line several miles into Sherman County to the Buckley substation. It is undeniable that fenced arrays do not have to be near substations and array fences do not have to close Category 2 habitat at all.

EXCEPTION 4: The MSDPO limits the role of the Council to on site "micro siting" design issues such as where equipment should be placed inside the site boundary. 3.2.1 p 39. This abdicates the Council's statutory siting authority.

The MSDPO correctly recites: "For essential, Category 2 habitat, **this means avoidance of impacts through alternatives** or, if impacts are unavoidable, a no net loss of either habitat quantity or quality and a net benefit of habitat quantity or quality." p.34. But it goes on to say: "The evidence in the record is persuasive that ODFW, like the Council, considers only the impacts to habitat within the site boundary as proposed by the Applicant." p.40 The MSDPO then asks the Council to adopt the following rule: "When assessing whether the design, construction, and operation of a project are consistent with ODFW's general fish and wildlife habitat mitigation goals and standards, **Council may consider the impacts to habitat only within the site boundary as proposed by the Applicant.**" p. 39. This is incorrect:

- There is no evidence in the record, persuasive or otherwise. The pronouncement adopts arguments of counsel, not evidence.
- Unless the question of Council authority was actually present in some unidentified prior cases, then nothing was decided and there is no precedent.
- It is factually wrong. The Council frequently requires developers to evaluate alternative sites. In the Northwest Natural Pipeline case the applicant proposed 4 corridors. The Council required the applicant to "develop and study three additional alternatives." *Friend of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or.93, 79 P.3d 869 (2003). Similarly, the Council recently required Idaho Power to consider several alternative routes.

<https://www.oregon.gov/energy/facilities/Facilities%20library/2024-08-23-B2HAMD2-Final-Order>.

- A rule self-confining an agency's jurisdiction within the boundaries of a proposed project is a major constraint on the Council's ability to carry out the Rule of avoiding habitat destruction. An unwritten rule that does away with the single most important issue entrusted to the Energy Facility Siting Council (siting) cannot be made up and applied ad hoc. Doing so violates the Oregon Administrative Procedures Act.
- The Rule defines "impact" (adverse effect of a development) OAR 635-415-0005(10) avoidance through consideration of "alternatives to the proposed development action." OAR 635-415-0025(1)(B)(A) "Development action" is defined as "any activity . . . that could result in the loss of fish and wildlife habitat." OAR 635-415-0005(2) and includes "planning, construction and operational activities." OAR 635-415-0005(1) It follows that project siting is a development action that has an "impact" such as closing BGWR. The Council **must** consider alternatives such as locating the 50 miles of array fence a bit east so as to take it out of Category 2 "essential and limited" winter range.

EXCEPTION 5: Alternatively, the fact of avoidability is disputed. The MSDPO finds that impacts are unavoidable p. 39 3.2.1. The MDSPO may not weigh evidence or pick a winner on a motion for summary disposition. A hearing is required.

Intervenor presented undisputed evidence that a hundred square miles of similar plateaus and canyons start one mile east from the project site. Also presented was evidence, undisputed, that 500 kv substations exist outside the Mule Deer Big Game Range. Intervenor's Response to MSDs Exhibits R-1, R-2.

Under OAR 345-015-0085, summary determination is strictly limited to identifying whether a genuine dispute of material fact exists. The ALJ is forbidden to weigh evidence, assess credibility, or rule whose evidence is preponderant at this stage.

Unless the Council holds as a matter of law that a developer's choice of a substation ends the duty of avoidance, compliance remains a disputed fact issue that may not be decided on summary determination, Granting a MSD would deprive Intervenor of due process being his right to present his case that the 50 mile fence does not need to go in BGWR and that the destruction and fracturing of

essential and limited habitat does not need to occur at all.

EXCEPTION 6: The MSDPO fails to evaluate habitat degradation that will occur outside the fence. The mitigation plan provides no compensation for these effects. This violates the explicit text of the EFSC Fish and Wildlife Standard (OAR 345-022-0060). Exception is taken to the MSDPO determination not to consider the issue based upon these statements: "These are facts that, had the case proceeded to a hearing, Mr. Alexanderson would have had a burden of persuasion to present evidence on. Thus, under OAR 137-003-0580(8), he has the burden of producing evidence in this motion for summary determination on any such issue. He has failed to provide such evidence." p.39"ODFW was made aware of the fence and the impact the fence and Proposed Facility would have on the habitat in the area. The Applicant worked with ODFW to develop the draft HMP."p.39.

An applicant cannot prevail on MSD if it failed to account for habitat damage. Simply presuming such issues were all taken care of in closed door unidentified, untranscribed meetings with a staff persons is not enough even if Intervenor had not pointed to evidence of outside the fence degradation. There is no evidence the ODFW biologist was made aware of facts not submitted in the application or other writings. Intervenor has the procedural right to challenge an incomplete or inaccurate accounting.. Moreover, it is indisputable that the mitigation acreage does not include any acres outside the fence.

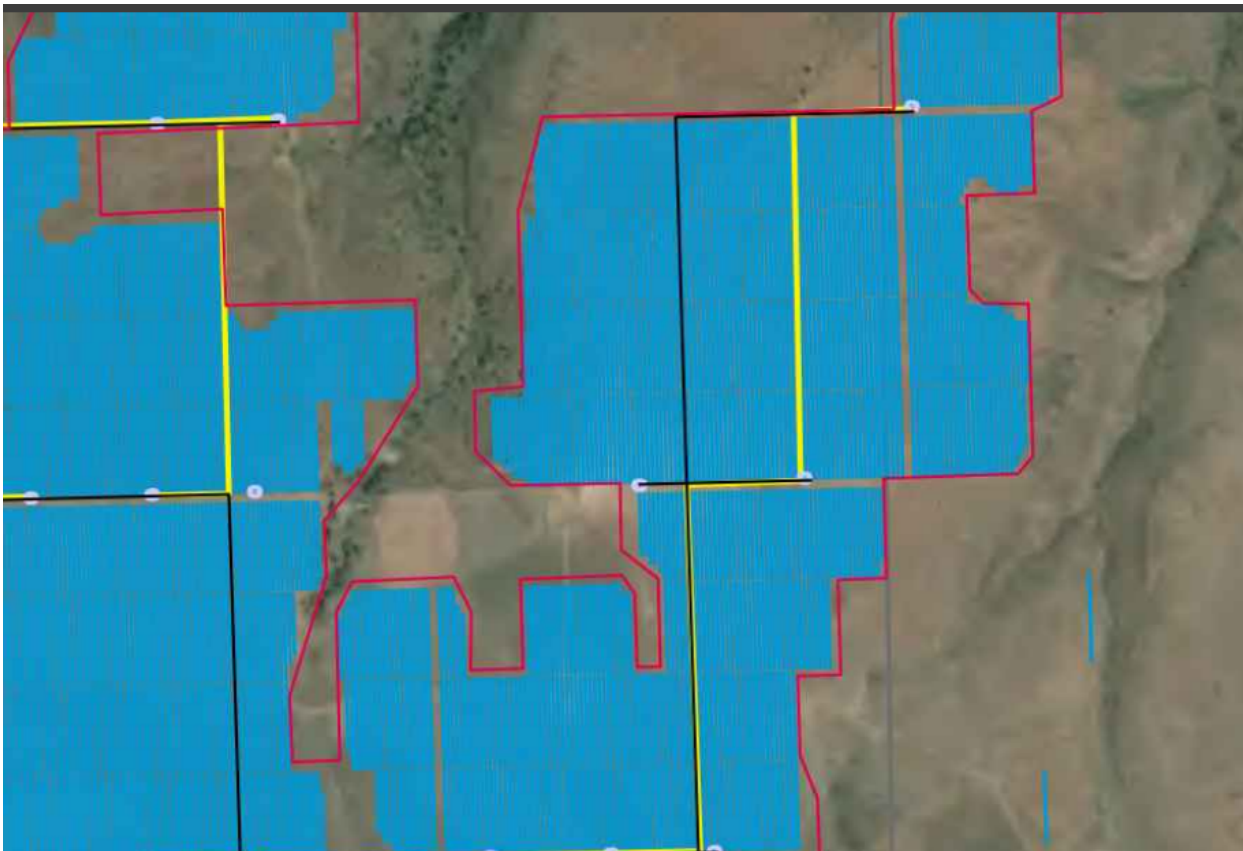
The Council determines whether the energy facility can be designed, constructed, and operated consistent with ODFW mitigation rules. To meet this standard, the rules require the applicant to conduct site-specific studies to characterize the fish and wildlife habitat **"at the site and nearby,"** i.e. explicitly requiring an inventory of off-site habitat degradation.

It is indisputable that the fence will have deleterious effects on both sides, even if it was open on both ends and didn't enclose land. Common sense and Intervenor's Affidavit and Response to MSDs posit that the combined fences of the three Bakeoven projects and proposed abutting Yellow Rosebush fencing leave only the Bakeoven road as a throughway. Going around is a large detour. See Exception 7.

The record of decision provides substantial evidence that harms from the fence affect outside the fence acreage and conditions. Consider land inside the project boundary, but outside the

fence, 8,075 (PO p.1) assuming 4,992 acres to be fenced out, there are 1655 acres proposed for mitigation and a remaining 1,428 to be outside the fence, inside the project boundary, not used for anything and not counted for mitigation. For purposes of this exception as an illustration see Figure 11 of the PO p. 144, partly reproduced below. It shows a side draw, leading to Buck Hollow Canyon. The red line is the fence and the blue area shows solar panels. Apparently the intention was to leave this draw open from the north so deer could come in from the canyon and use it. But fencing it on three sides with a bottleneck and three dead ends turns it into traps. Suppose some deer and their fawns are in there and a cougar or wolf follows them. What if a windblown wildfire is racing up the canyons?

Absent the fence the deer can use the land and escape in all directions. After the fence they will only have due North and a few degrees either side. Before the fence they could escape tall flames in the brushy canyons by running for the short grass or already burned areas of the plateaus. One hopes their instincts will keep them out of such situations. If so, the canyon habitat has been degraded. If not, their risk goes up of being eaten or burned, hence a different degradation.



This is not the only trap in the proposed fence. But anyone can see uncounted habitat damage outside the fence and left out of the net benefits analysis. The fact of such damage to wildlife, particularly mule deer, is a matter of law established by ODFW administrative rule supported by peer reviewed studies. *"The primary renewable energy developments are photovoltaic solar and wind energy. . . .Direct impacts include habitat loss from the development footprint or exclusion by project fencing. Indirect impacts include increased disturbance during construction and maintenance activities within facilities, habitat fragmentation from roads and fences associated with project development, and mule deer avoidance of project areas (Sawyer et al. 2017)" MDMP p. 106.*

It is common knowledge that fencing aids predators, blocks escape routes, requires stressful detours to access other habitat and creates risks of vehicle collisions and illegal take if highways are the only way through. Intervenor provided an affidavit on personal knowledge and cited established science. Movants provided no affidavits and no rebuttal evidence.

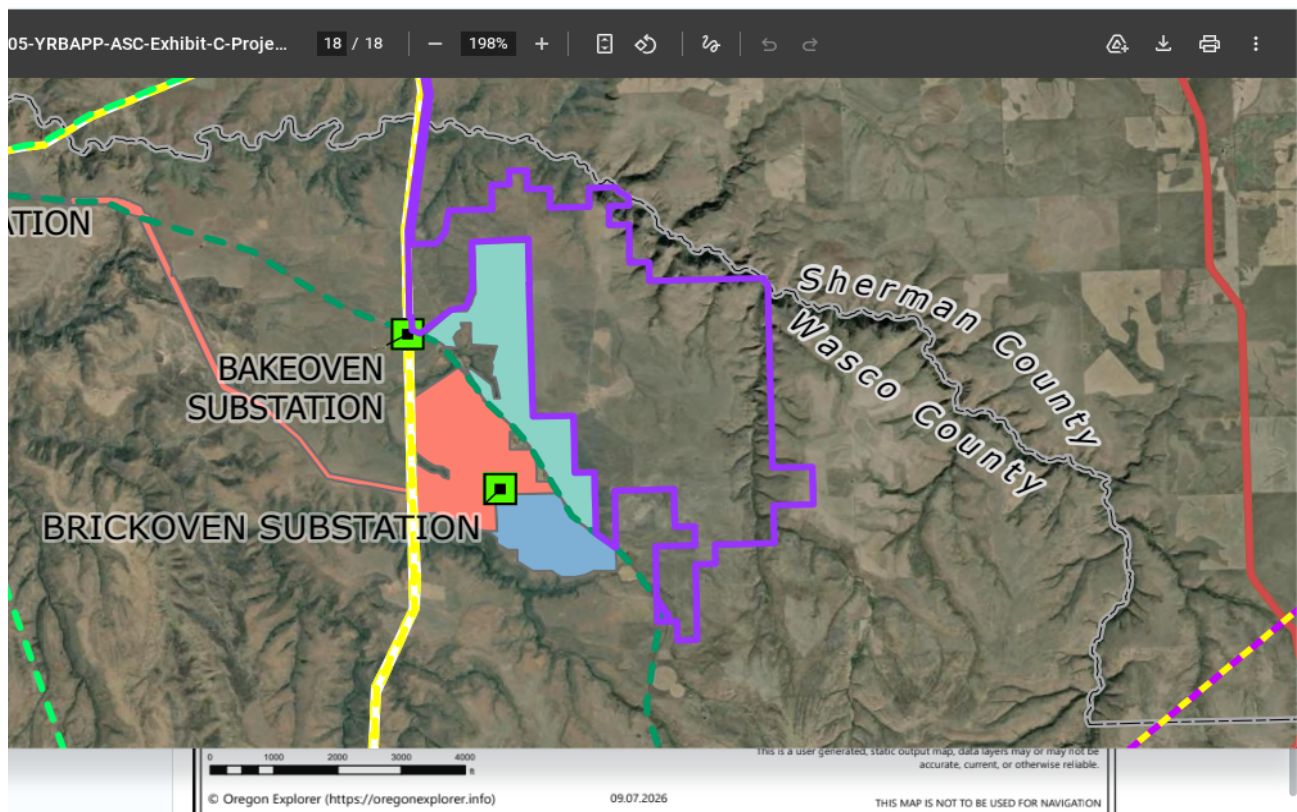
Another omitted key consideration is that local non-migratory populations will use the project area year round including fawning and raising juveniles outside the fence. Fawns have all the needs of adults and are especially vulnerable to coyotes. The small home range of local deer, typically much smaller than the area to be fenced, means predator advantage in finding newborns is enhanced.

Fawns are only mentioned twice in the PO at p 731 of the PO, being Intervenor's comment that: "The harm is not limited to the square miles inside the fence. Fawns have no inherited knowledge of fences. They crash into them and are eaten." If the deer move away from the fences they are crowding the remaining area already in use by an inescapable biological carrying capacity problem where the deer numbers are constant and the habitat is shrinking.⁷ "Just-go-around" means "move-in-with-your-neighbors."

EXCEPTION 7: The MSDPO refuses consideration of cumulative effects of abutting fencing based on an incorrect claim that Intervenor did not timely raise the issue. P 43 Section 3.2.6.

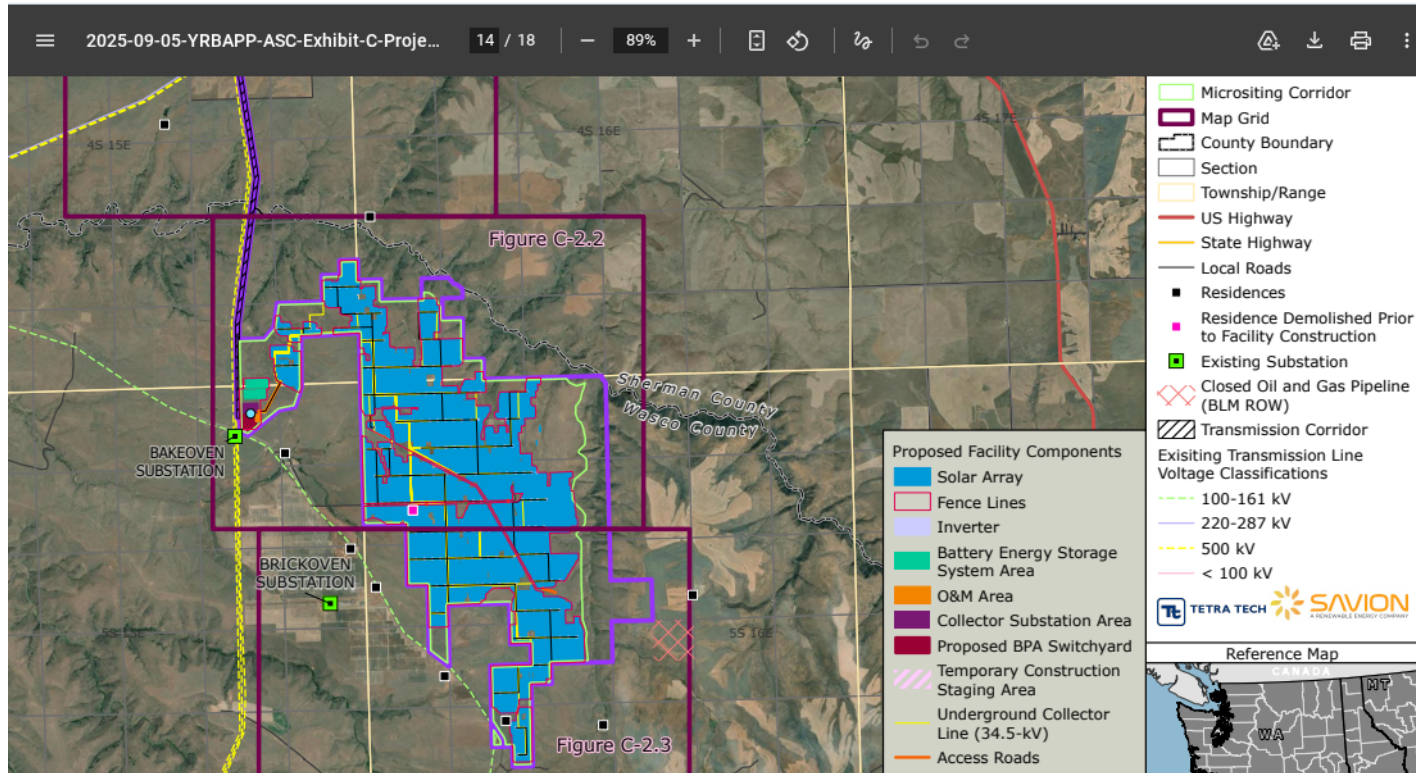
⁷ Incremental loss of critical habitat mirrors the fictional crisis in Michael Ende's *The NeverEnding Story*. "The Nothing" is coming and obliterates parts of the world, leaving it smaller with each passing day.

Intervenor raised the issue: “What are the cumulative effects considering the adjacent Bakeoven projects are already evicting the deer?” Alexanderson Comments last page, second to last paragraph. This issue is material because the project was sited to tightly wrap around the three approved Bakeoven projects, leaving no path between or through any of four projects except along Bakeoven Road.⁸ Common sense recognizes increased risk to deer if they are given only a public right of way to pass through. Vehicle collisions are a significant cause of deer mortality identified in the MDMP and Exhibit P. This hole in the case is an uninventoried uncompensated outside-the-fence habitat spoliation that precludes summary determination..



This shows the wrap leaving Bakeoven Road as the only throughway. The project boundary is purple. The YR fence line can be seen in the next image:

⁸ Possibly this was a competitive choice to block expansion of the Bakeoven projects and control substation access for future expansion of the YR. No reason has been revealed for this site choice.



This view omits the Bakeoven projects and shows the fence line. For deer to go around they will have to circumnavigate all four projects. To go through they will only have Bakeoven Road.

EXCEPTION 8: Movant YR seeks summary determination that the mitigation site qualifies and satisfies the mitigation Rule. Intervenor objects to the finding at p 42, 3.2.4. that the Tygh Ridge selected for the HMP is in-proximity to the project.

“In-proximity Habitat Mitigation” means habitat mitigation measures undertaken within or in-proximity to areas affected by a development action. For the purposes of this policy, “in proximity to” means within the same home range, or watershed (depending on the species or population being considered) whichever will have the highest likelihood of benefiting fish and wildlife populations directly affected by the development.” OAR 635-415-0005(13).

MSD must be denied on this issue because YR did not present any evidence describing the home range of project mule deer. YR did offer an email comment from Ms. Wilkes, an ODFW staff biologist supporting the selection of the Tygh Ridge Ranch. There is no statement in her

comment that the author had personal knowledge or that the comment was prepared for use as evidence. The author did not mention any mule deer herds or home ranges. The only consideration of the project site was that it was within 20 miles and had similar habitat, nothing about the affected population of deer there. She wrote that Tygh Ridge Ranch was already a “high density winter range location for mule deer” and in a connectivity corridor located in the Columbia Plateau. Of course there was no opportunity to ask how habitat was being “recreated” if it exists already at Tygh Ridge or if the project herd would likely become migratory, cross the Deschutes, and compete for new shrubs at Tygh Ridge. If anything the comment suggests that the site was an ODFW off-budget project waiting for a sponsor.⁹

The MSDPO finding of “in-proximity” relies on co-location in the Columbia Plateau¹⁰ and co-location within BGWR. Neither point addresses the home range of the affected population. As such there is no evidence to support that the site will ever be visited by project area mule deer. Additionally, co-location within the Columbia Plateau would only support **off-proximity** mitigation defined in OAR 635-415-0025(24). Category 2 requires **in-proximity** measures. Under OAR 345-022-0060 and ODFW standards, Category [1 or 2] habitat mitigation must directly benefit the population being impacted. Under OAR 635-415-0005(8) and (13), the applicant bears the burden of proving that the mitigation actually protects or restores the “welfare” of the **sub-population directly affected**. OAR 635-415-0005(5) The MSDPO incorrectly relies on benefits to the “species.”

EXCEPTION 9: The MSDPO rejects the only evidence presented on the home range of the affected sub-population. The MSDPO states “The identified land is within the same home range as the affected wildlife populations reside.” p. 39. The evidence is contrary. This issue is central to the “in-proximity” standard. Arguments regarding Exceptions 8 and 9 apply to both.

Intervenor cited the best available evidence readily located on the ODFW website giving the extensive and only mule deer GPS tracking studies cited by and relied upon to publish the MDMP update in 2024.

⁹ So far no one has suggested catching and trucking them to Tygh Ridge.

¹⁰ The Columbia Plateau extends from Mt. Hood to beyond Pendleton. [Columbia Plateau – State Wildlife Action Plan](#)

https://www.dfw.state.or.us/wildlife/management_plans/mule_deer/Delineation_of_Mule_Deer_Herd_ranges_in_Eastern_Oregon_Draft_Final_11Jan23.pdf

A principal purpose of this multi year and expensive study was to discover where deer travel and live. It is the authoritative document by the expert agency. The Council cannot remain intentionally blind to the only science on proximity.

- The Tygh Ridge Ranch is approximately 15 miles north of the proposed site, well beyond the typical travel distance found for the Biggs herd living around the site. ODFW Delineating Mule Deer Herd Ranges in Oregon 2023.¹¹
- The mean winter home range seen in radio collar study for the Biggs herd non migratory deer is 6.64 square kilometers (2.56 square miles.) Table A-5 The summer range is smaller. The record does not contain any study or other evidence that displaced herds are more likely to move than stay or that moving even 5 miles is likely.
- Mule deer stick to home on to their established ranges and trails after learning from their mothers. *“Mule deer exhibit remarkable fidelity to seasonal ranges and migration routes (Sawyer et al 2019, Wheat and Whittaker 2023). Rarely do they deviate from their route, even when encountering disturbance or when alternative routes exist (Wycoff et al. 2018, Sawyer et al. 2019).”* MDMP p.33

EXCEPTION 10: The MSDPO improperly shifts the burden of disproving “in-proximity” to Intervenor saying he would have to prove the mitigation site is not in-proximity. MSDPO p 43.

“Mr. Alexanderson has not shown that the location of the proposed mitigation area is not in proximity to the Project or that it is not consistent with the general fish and wildlife habitat mitigation goals and standards of OAR 635-415-0025(1) through (6).” MSDPO p 43. Intervenor only has to show that the applicant has not established proximity or that a factual dispute is present. Intervenor’s evidence interpreted most favorably to him offers a genuine issue of fact for hearing.

This is a fundamental procedural error. By rule the ultimate burden of meeting all aspects of the

¹¹ Oregon Department of Fish and Wildlife. 2023a. Delineating Mule Deer Herd Ranges in Oregon: Internal Technical Report of Methods and Results. [Oregon Department of Fish and Wildlife.https://www.dfw.state.or.us/wildlife/management_plans/mule_deer/Delineation_of_Mule_Deer_Herd_ranges_in_Eastern_Oregon_Draft_Final_11Jan23.pdf](https://www.dfw.state.or.us/wildlife/management_plans/mule_deer/Delineation_of_Mule_Deer_Herd_ranges_in_Eastern_Oregon_Draft_Final_11Jan23.pdf)

mitigation Rule remains with the applicant. OAR 345-021-0100(2).

EXCEPTION 11: The MSDPO incorrectly states that a proposed order creates a presumption that the applicant has satisfied all requirements and standards. P. 41 No such presumption exists under Oregon Administrative Rules or the Oregon Administrative Procedures Act.

The MSDPO cites no authority for the presumption. Apparently the reference is to the rebuttable presumption of regularity that attaches to an administrative act or order such as a building permit. This presumption does not apply to a proposed order because:

- The PO is not agency action. Staff has no authority to act, only to propose.
- The process of becoming agency action is not complete; the agency may change or refuse the action. It is not final by definition.
- If a presumption attached the agency would have to overcome the presumption in order to change or refuse the proposed order.
- The purpose of a proposed order and contested case is to test its conclusions and sufficiency and the PO, itself, gives rise to the procedural right to do so.
- The presumption that a proposed order meets all requirements is contrary to common sense where an order is silent on a topic. Incomplete findings show a failure to meet omitted standards.
- There is only one presumption in Council Rules dealing with ISO certification.. Applicants have the full burden in a contested case. OAR 345-021-0100(2)
- The presumption would as stated in the MSDPO substitute for a movant/applicant's initial burden. Doing so allows the applicant to hide its evidence or lack of evidence from the very contested case intended to test it.
- A party may successfully oppose summary determination by showing that there is no evidence on an essential fact or standard required by the certificate, or that there is substantial doubt about the sufficiency of the movant's evidence. As one example there was no evidence from movants on the permanent habitat degradation outside the fence. Another is no evidence on the home range of the affected sub-population.

EXCEPTION 12: The MSDPO misinterprets the no-net-loss Rule. It effectively eliminates the term "quantity" and allows unreplaced closure of BGWR. P. 41 Both quantity and quality must be

preserved (Council's words). The MSDPO states Mitigation by the Applicant does not require physically replacing lost acres of range land. Applicant's HMP results in a no net loss of habitat quantity or quality and provides a net benefit of habitat quantity or quality." 3.2.2.

As elsewhere the MSDPO makes or would make a finding on disputed questions of fact.

The Rule is misinterpreted. One does not have to be a lawyer to interpret the Rule. Its purpose is to make wildlife habitat whole in Categories 3,4 and 5 and better off in Category 2. The term "quantity" must be given effect. The Rule was written for non-experts. Courts always start with the text and common understanding. The central and repeated phrase is:

no net loss of either habitat quantity or quality

For common understanding, compare to:

don't lose either your car keys or your phone

No skateboarding either on sidewalks or stairs,

Do not bring either knives or firearms to court

No smoking pipes or cigars

No driving, walking or biking on the tracks

These are commonly interpreted to ban all prohibited conditions.

Allowing a loss of quantity is contrary to common understanding, common sense and the Council's own established interpretation that the prohibition on net loss of quality and net loss of quantity are separately binding:

"The Council interprets this to mean that **both habitat quantity and quality must be preserved** i.e. not lost.

<https://www.oregon.gov/energy/facilities/Facilities%20library/2024-08-23-B2HAMD2-Final-Order>. P.188 Emphasis added

Scholars on grammar cite a canon that supports the separate ban. They refer to the combination of a

negative such as no, or don't or not with a list of acts or conditions separated by the "or" word as a "negative disjunctive". The canon of interpretation is found in Reading Law: The Interpretation of legal Texts by Antonin Scalia and Bryan A Gardner 2012 Ch 12: 2:

"With the disjunctive list, none of the listed things is allowed. After a negative, the conjunctive and is still conjunctive: Don't drink and drive. You can do either one, but you can't do them both. But with Don't drink or drive, you cannot do either one: Each possibility is negated. This singular negation effect, forbidding doing anything listed, occurs when the disjunctive or is used after a word such as not or without. (The disjunctive prohibition includes the conjunctive prohibition: Since you may not do any of the prohibited things, you necessarily must not do them all.) The principle that "not A, B, or C" means "not A, not B, and not C" is part of what is called DeMorgan's theorem."

Applicant may contend this doesn't rule out a habitat quantity loss being offset by a quality gain. This idea is explained in the PO at 731.

"As the HMAs are largely within ODFW-mapped Mule Deer Winter Range, acquisition of these areas **constitutes acquisition** of primarily Category 2 habitat regardless of the habitat condition (excluding Category 6 habitat, such as cultivated cropland and developed land), and thus meets the ODFW goal of no net loss of habitat **quantity**."

This accounting cannot survive an honest look. It depends on substituting "acquisition" of existing habitat for replacing destroyed habitat.

Consider a developer who wants to close 1000 acres of BGWR. He rents 3000 acres, all in BGWR. 1000 are flat and have good soil for solar footings and roads. The other 2000 are steep, and rocky. He won't fence the slopes, will cut some junipers and add some shrubs. The developer says deer will thrive because they only lost 1000 acres and gained 2000.

Intervenor says the deer lost 1000 acres and gained only plants. Plants for space do not satisfy the "in-kind" requirement to take "measures that **recreate habitat structure and function** to that existing prior to the development action." OAR 635-415-0005(12). Shrubs are not in-kind to acreage. The 1000 acres are still missing. Mitigation is defined as "Compensating for the impact by **replacing or providing comparable substitute resources**. 635-415-0005(16)(e) (the other 5 definitions

not being applicable in the case of total destruction i.e. (avoid, minimize, rectify, reduce or eliminate.)

EXCEPTION 13: The MSDPO incorrectly states; “Applicant’s mitigation plan accounts for the loss of quantity and/or quality habitat and is consistent with ODFW’s general fish and wildlife habitat mitigation goals and standards”. 3.2.3 The proposed mitigation plan does not meet the goals and applicable goals and standards.

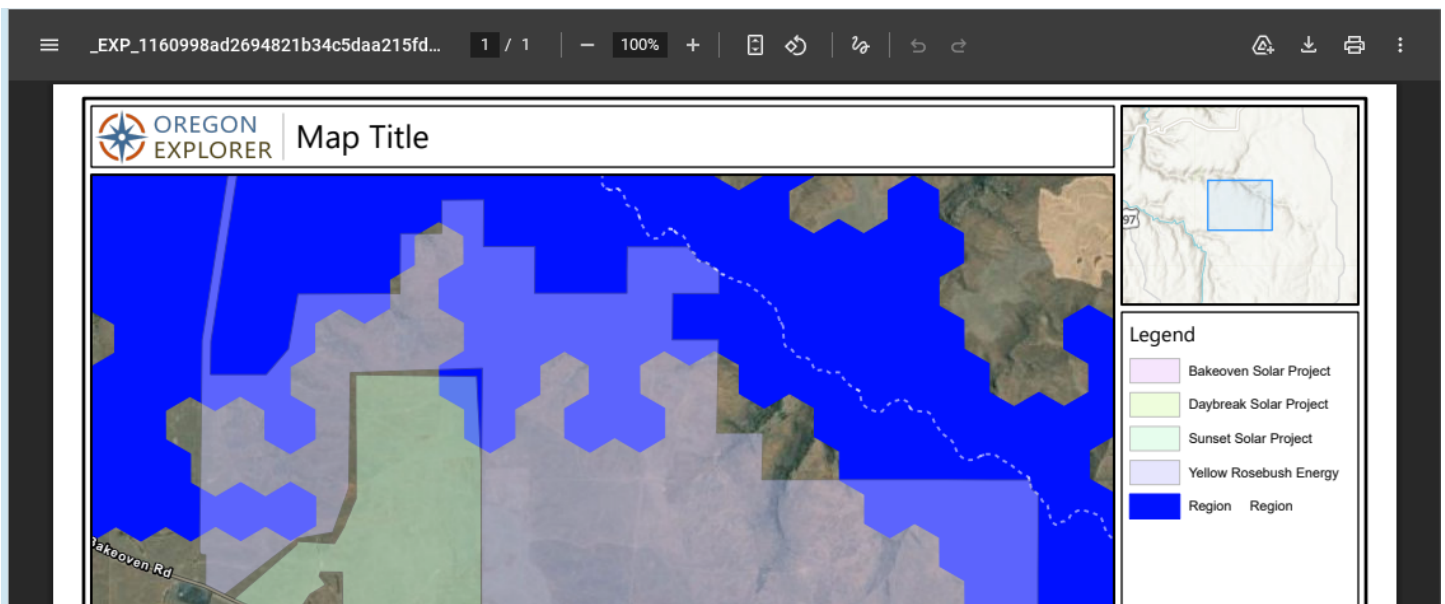
The language improperly states the prohibition on net loss in the alternative as to quantity and quality. There is no choice. A determination of no-net-loss cannot be made on the record absent a hearing because factual predicates are either missing or disputed as set out in other Exceptions herein. Intervenor would be denied due process in a contested case hearing with respect to disputed facts prematurely decided in a summary disposition proceeding.

EXCEPTION 14: The PO, the ASC and the HMP all fail to show where and how much Priority Wildlife Connectivity Area will be crossed or blocked by the project. The applicant’s required inventory of habitat degradation and closure is incomplete, preventing a finding of unavailability, net loss or benefit. Intervenor takes this Exception 14 as to any determination of those standards without an accounting of fencing and/or arrays located in or blocking PWCA’s.

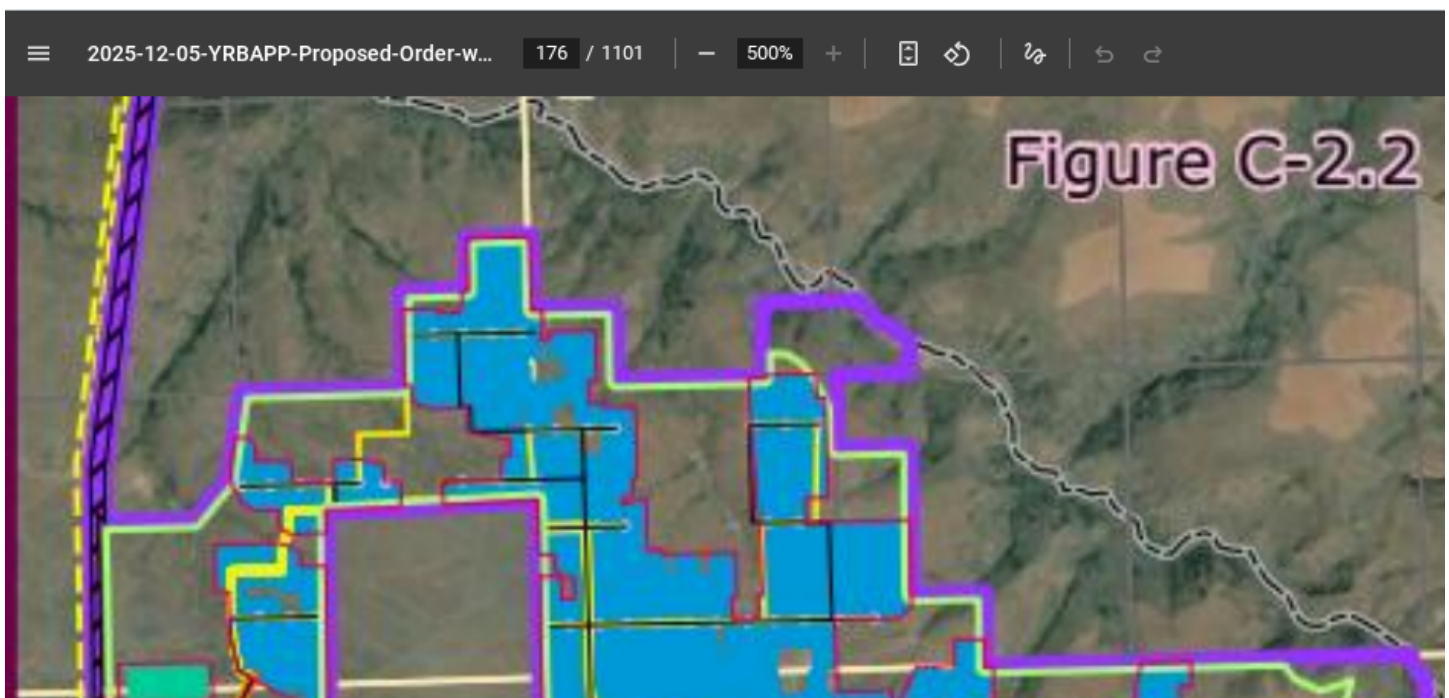
The applicant has the burden of inventorying habitat degradation and has admitted intercepting or interfering with PWCA’s: “In response to ODFW’s concerns about wildlife habitat connectivity, the Applicant has modified the Facility layout to set back from the canyons to the north and south where feasible.” MSDPO p.16. Not mapped or disclosed is the amount and location of interference still planned.

The ALJ considered this issue relevant and properly explored the official Action Plan as footnoted on p .8 of the MSDPO. The MSDPO is correct to say the project details are not there. That mapping tool does not include project boundaries. However, ODOE publishes a mapping tool that does show PWCA polygons and project boundaries together.¹²

¹² The PWCA hexagons are OAR rule data filed with the Secretary of State. The project boundaries are from ODOE. Neither is new evidence.



Dark blue is PWCA outside the project boundaries. Green is the Sunset (Bakeoven) approved project. The light blue is where the project boundaries include PWCA hexagons. For illustration only notice the NE corner of the green project and the light blue hexagons in the YR project adjacent to the east and north. Compare to the solar arrays below.



Here, the green project is shown as an empty square with YR's red fences. Blue denotes the YR arrays. Plainly some arrays and fences are planned to be installed in PWCA. No avoidance consideration is in the record of alternatives required by the Rule including "not taking a certain development action or parts of that action." OAR 635-417-0005(16)(a). Note also the dead end predator and fire trap just to the east.

DATED this 10th day of July, 2026.
Respectfully submitted,

s/ Alvin Alexanderson

Alvin Alexanderson, pro se 503 705 8040