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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

DESERT SURVIVORS; CENTER FOR BIOLOGICAL DIVERSITY; WILDEARTH GUARDIANS; and WESTERN WATERSHEDS PROJECT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; and UNITED STATES FISH AND WILDLIFE SERVICE,

Defendants.

Case No. 3:16-cv-1165-JCS

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: **March 16, 2018**
Time: **9:30 a.m.**
Court: **Courtroom G, 15th Floor**

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 9:30 a.m. on March 16, 2018, or as soon thereafter as the matter may be heard, in Honorable Judge Joseph C. Spero's department (Courtroom G) of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs Desert Survivors, Center for Biological Diversity, WildEarth Guardians, and Western Watersheds Project will move this Court pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rules 7-2, 7-4 and 56-1 for summary judgment on their Claims for Relief in their Complaint (Dkt.#1). This motion is based on the following Memorandum of Points and Authorities and the attached declarations, as well as the Administrative Record, declarations, pleadings, and files in this action, and other such documentary and oral evidence which may be supplied at the hearing.

For the reasons set forth below, Defendants U.S. Department of Interior and U.S. Fish and Wildlife Service (collectively the "Service") violated the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 et seq. and the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, by withdrawing the proposal to list the Bi-State Sage Grouse Distinct Population Segment ("DPS") as a threatened species under the ESA ("Withdrawal Decision"), 80 Fed. Reg. 22,828 (Apr. 23, 2015), and by adopting the Significant Portion of the Range Policy ("SPR Policy"), 79 Fed. Reg. 37,578-612 (July 1, 2014). To remedy these violations of law, Plaintiffs seek an order vacating and remanding the unlawful Withdrawal Decision and SPR Policy and enjoining Defendants from relying on or applying the SPR Policy.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Endangered Species Act of 1973 is our bedrock national law for the conservation and recovery of imperiled wildlife species. In crafting and enacting the ESA, Congress declared that the "aesthetic, ecological, educational, historical, recreational, and scientific" values of Earth's wild species are "incalculable." 16 U.S.C. § 1531(a)(3); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 177-78 (1978) (noting that "[t]he legislative proceedings in 1973 are, in fact, replete with

expressions of concern over the risk that might lie in the loss of any endangered species"). One species that desperately needs and warrants the protection provided by the ESA is the Bi-State Sage Grouse – a large, ground-dwelling bird with striking plumage and unique, elaborate mating rituals whose remaining habitat straddles the California and Nevada border in the Mono Basin area. The Service concluded precisely that when, after extensive study and evaluation, it proposed to list the species as "threatened" under the ESA in October 2013. Yet just 18 months later, the agency abruptly reversed course and refused to protect the severely depleted Bi-State Sage Grouse under the ESA, despite the fact that its population status had not significantly changed.

The plight of the Bi-State Sage Grouse has long been of concern. Over the last 150 years, the species has lost over half of its population, half of its habitat, and two-thirds of its breeding grounds. The already-fragmented habitat is also subject to severe ongoing degradation from roads and power lines, grazing, wildfires, and invasive plants that eliminate critical sagebrush cover, among other threats. Today, the Bi-State Sage Grouse is limited to only six small, isolated subpopulations, four of which are at risk of disappearing altogether over the next few decades. For this reason, concerned citizens began petitioning the Service to list the Bi-State Sage Grouse (previously known as the Mono Basin area Sage Grouse) more than 15 years ago.

Since then, the Service has been engaged in a long, slow evaluation of these listing petitions, prompted along the way by various court orders and settlement agreements. Based on the science, which confirms the diminished and precarious status of this small, genetically distinct and isolated segment of the greater sage grouse, the Service twice concluded that listing was "warranted." 78 Fed. Reg. 64,358 (Oct. 28, 2013) (describing history of previous federal actions and proposing to list species as "threatened"); 75 Fed. Reg. 13,910 (Mar. 23, 2010) (finding that listing as "threatened" was warranted but precluded by other listing priorities). In proposing to list the species in 2013, the Service considered a third-party strategy to implement various future conservation-oriented actions, but ultimately rejected this strategy as inadequate to avoid listing.

The science has not appreciably changed since the proposed listing determination. What did change was (1) the proffer of paper "commitments" by other federal agencies to prioritize future funding for some of the conservation efforts identified in the previously-rejected plan, and

(2) enormous pressure on the Service not to list the species from politicians and private sector interests. See, e.g., BSSG111227-28 (Doc. 6607); BSSG110701 (Doc. 6571); BSSG107323-24 (Doc. 6106); BSSG106458 (Doc. 6272); BSSG104752 (Doc. 6563); BSSG006598-99 (Doc. 6273); BSSG103699 (Doc. 6173); BSSG101733 (Doc. 6027); BSSG111292 (Doc. 6690); BSSG094523 (Doc. 5973). The proposed future conservation efforts consist largely of promises to seek conservation easements on private property and to undertake vegetation removal projects on a relatively small percentage of the federal public land that primarily supports the species. All of these future "commitments" depend on annual funding appropriations from Congress.

Despite the unfunded and uncertain nature of these promises for future action, the Service ultimately relied on them to reverse course and issue a final decision that listing of the Bi-State Sage Grouse is "not warranted." 80 Fed. Reg. 22,828. The Service did not explain how the implementation and efficacy of future contingent financial funding for proposed future conservation activities were sufficiently certain to halt the species' current trajectory towards extinction. Nor did the Service explain how the anticipated loss of at least some of the species' small, isolated subpopulations does not constitute a threat to a "significant portion of the range" of the fragmented Bi-State Sage Grouse.

The ESA is akin to triage in a hospital emergency room, where the most critically ill patients are stabilized on needed life support and then receive medical intervention, in the hope that they will recover and eventually be able to go home. In the ESA realm, the most critically imperiled species, like the Bi-State Sage Grouse, need the life support of listing, first and foremost. Once a species receives the minimum protections afforded by ESA listing, the law then requires conservation efforts to ensure survival of the species and, ideally, these efforts will also allow the species to recover sufficiently to be delisted. But first the patient must survive. The record here reflects that the present survival prospects for the Bi-State Sage Grouse are bleak. As a first step, therefore, the Service must administer the life support of an ESA listing, as the science dictates and the law mandates. After that, required conservation efforts by the Service and other agencies may allow the Bi-State Sage Grouse to stabilize, recover, and ultimately come off the critical patient list. Until then, however, listing is required.

II. LEGAL BACKGROUND

Congress enacted the ESA in 1973 to provide a program for the conservation of imperiled species and a means whereby the ecosystems on which they depend can be conserved. 16 U.S.C. § 1531(b). The statute defines "conservation" expansively to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which [such] measures . . . are no longer necessary." Id. § 1532(3). As the Supreme Court has concluded, the "plain intent of Congress" in enacting "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" was "to halt and reverse the trend toward species extinction, whatever the cost" and "to afford first priority to the declared national policy of saving endangered species . . . over the 'primary missions' of federal agencies." Tenn. Valley Auth. v. Hill, 437 U.S. at 180, 184-85. To carry out this statutory mission, the Service must, among other things, designate "critical habitat" and prepare a "recovery plan" for each listed species, regularly monitor the status of listed species, undertake a land acquisition program to conserve listed species, engage in biological consultations for federal actions that may affect listed species, and review habitat conservation plans prepared in connection with permits to incidentally take listed species. See 16 U.S.C. §§ 1533(a)(3)(A), 1533(f), 1533(g),1534, 1536(b), 1539(a).

But before an imperiled species can receive any of the protections afforded by the ESA, it must first be listed by the Service as either "endangered" or "threatened." A species is endangered or threatened, respectively, if it "is in danger of extinction" or likely to become so "within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). California State Grange v. Nat'l Marine Fisheries Serv., 620 F. Supp. 2d 1111, 1120 (E.D. Cal. 2008), aff'd in part sub nom. Modesto Irr. Dist. v. Gutierrez, 619 F.3d 1024 (9th Cir. 2010). The ESA defines a "species" to include any "distinct population segment" of a species. 16 U.S.C. §1523(16). While the statute does not define "distinct population segment," the Service has adopted a Policy Regarding the Recognition of Distinct Vertebrate Population Segments that evaluates whether a population of wildlife is discrete and significant in relation to the remainder of the species to which it belongs. 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996) ("DPS Policy"). "If a population is deemed to be a DPS, the inquiry then proceeds to whether it is endangered or

threatened." Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1138 (9th Cir. 2007).

The Ninth Circuit has succinctly summarized the listing process:

> The ESA requires the Service to identify and list species that are "endangered" or "threatened." 16 U.S.C. § 1533. The Service may list a species, on its own initiative, through notice-and-comment rule-making. 16 U.S.C. § 1533(b)(5). Alternatively, a species may become listed through the petition process provided by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e). Any interested person may petition the Service to add or remove a species from the list. Id.; 16 U.S.C. § 1533(b)(3)(A). Upon receiving such a petition, the Service must promptly [within 90 days] determine whether the petition is supported by "substantial scientific or commercial information." 16 U.S.C. §1533(b)(3)(A). If so, the Service is to "commence a review of the status of the species concerned." Id. The Service is required to make a finding on the status of the species within twelve months and publish its finding in the Federal Register. 16 U.S.C. §1533(b)(3)(B). . . . A decision by the Service to deny a petitioned action is subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii).

Northwest Ecosystem Alliance, 475 F.3d at 1137. At the 12-month mark, the Service must determine that listing (1) is warranted, (2) is not warranted, or (3) is "warranted but precluded" at present by the press of other listing work. 16 U.S.C. §1533(b)(3)(B); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1170-71 (9th Cir. 2002).

In making listing determinations, the Service considers: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; [and] (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1). Any one of these five factors, or combination of them, may support a listing determination." Kern Co. Farm Bur. v. Allen, 450 F.3d 1072, 1075 (9th Cir. 2006). If the Service determines that a species is threatened or endangered "throughout all or a significant portion of its range," it must list the species, specify "over what portion of its range it is endangered or threatened," and designate "critical habitat within such range." 16 U.S.C. §1533(c)(1). After considerable litigation over the meaning of this statutory language, the Service in 2014 adopted a new policy which narrowly defines the phrase "significant portion of its range" to mean that portion of a species' current range whose elimination would cause the species to be threatened or endangered throughout all of its range. 79 Fed. Reg. 37,578-01, 37,579. The Arizona District Court recently invalidated and vacated the SPR Policy, along with the Service's

decision not to list the cactus ferruginous pygmy owl, as contrary to the statutory language and intent of the ESA. Ctr. for Biological Diversity v. Jewell, No. CV-14-02506-TUC-RM, 2017 WL 2438327, at *1 (D. Ariz. Mar. 29, 2017) (motion for reconsideration pending).

All listing decisions must be made "solely on the basis of the best scientific and commercial data available" after conducting a status review of the species. 16 U.S.C. § 1533(b)(1)(A) (emphasis added). In evaluating a listing decision, the Service "tak[es] into account those efforts, if any, being made by any State. . . or any political subdivision of a State . . . to protect such species." Id. (emphasis added). Not all conservation efforts, however, may be considered or, if considered, may affect the Service's listing decision. The Service's Policy for Evaluation of Conservation Efforts ("PECE") prohibits the consideration of future conservation efforts in listing decisions unless those efforts are "sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species." 68 Fed. Reg. 15,100, 15,115 (Mar. 28, 2003). Even if conservation efforts for a species satisfy these criteria, the Service is still required to list the species "if the best available scientific and commercial data indicate that the species" is endangered or threatened "on the day of the listing decision." Id.

III. FACTUAL BACKGROUND

A. Natural History of the Bi-State Sage Grouse

The geographically isolated Bi-State Sage Grouse depends on broad expanses of interconnected sagebrush in the Mono Basin region of California and Nevada, where the species has lived for thousands of years. The sagebrush understory provides the birds with insect prey, herb forage, and cover from predators, especially for chicks and hens that are incubating eggs. Long-lived but slow to reproduce, sage grouse are strongly loyal to their breeding, nesting and brood-rearing areas, even when an area may be of degraded ecological value, limiting the species' adaptability to habitat changes. The Bi-State Sage Grouse is genetically distinct from other sage grouse populations to the east and north; its present genetic uniqueness developed over thousands and perhaps tens of thousands of years, far predating Euro-American settlement of the region. BSSG000432 (Doc. 5508). Consistent with the ESA, the Service designated the Bi-State Sage

Grouse as a DPS in March 2010, 75 Fed. Reg. at 13,910, and did not alter that finding in its 2015 Withdrawal Decision.

Unfortunately, the Bi-State Sage-Grouse is no longer thriving. Over the past 150 years, the range of the Bi-State Sage Grouse has been curtailed by nearly 50 percent, with the remaining habitat "reduced in quality." 80 Fed. Reg. at 22,831; see BSGG000443 (map of current range, attached for the court's convenience). The Service has classified the remaining Sage Grouse subpopulations into six separately managed geographic groupings, or population management units ("PMUs"): Pine Nut, Desert Creek-Fales, Mount Grant, Bodie, South Mono, and White Mountains, from north to south. 80 Fed. Reg. at 22,830. Each of the Bi-State Sage Grouse's six PMUs is now largely geographically and genetically isolated. Id. at 22,830. The species is "particularly susceptible to habitat fragmentation and alteration in its environment." 78 Fed. Reg. at 64,361.

The Bi-State Sage grouse's population numbers have declined even more precipitously than available habitat. Its once-thriving population has been reduced to as few as 2,497 birds, while the minimum population size needed to remain viable and avoid extinction risks has been estimated to be 5,000 on the low side, and perhaps two to ten times that number. 80 Fed. Reg. at 22,831; BSSG000547 (Doc. 5508). Over half the population has disappeared in the past 150 years due to conversion of habitat to agricultural and urban uses and habitat changes caused by fire. Id.; BSSG00079480 (Doc. 5714). Close to two-thirds of the species' breeding grounds, known as leks, have been abandoned; only 43 remain active today. BSSG000445-46 (Doc. 5508). While a minimum of 500 breeding birds in each subpopulation is considered necessary to maintain long-term persistence, the Service has estimated that the number of breeding birds in each subpopulation may be 230 or even lower, putting each subpopulation at risk of disappearing in the foreseeable future. BSSG000547-49 (Doc. 5508). While the Pine Nut, Desert Creek-Fales, Mount Grant, and White Mountains PMUs have the lowest sage grouse populations and face the greatest risk of extirpation, each PMU is "below the theoretical minimum threshold [] for long-term persistence, as is the entire [population] on average." 80 Fed. Reg. at 22,838-39.

The Bi-State Sage Grouse continues to face serious, overlapping threats throughout its

habitat, with impacts "imminent in certain portions of the species' range." BSSG000570 (Doc. 5508). The most serious threat is habitat loss. The sage grouse is a habitat specialist that depends throughout its life-cycle on sagebrush for food, for protection, and for breeding and nesting. But sagebrush is "one of the most imperiled ecosystems" in North America. BSSG000433 (Doc. 5508). Fires destroy the sagebrush, which is incapable of sprouting from the rootstock post-fire and takes decades to grow back. BSSG000508 (Doc. 5508). With climate change, fire frequency is expected to accelerate and fire seasons to stretch longer. BSSG000516 (Doc. 5508). At the same time, opportunistic non-native grasses that burn easily, like cheatgrass and medusahead rye, can take hold after fire events and replace the slow-growing sagebrush, creating a relentless trend towards increasingly fire-prone landscapes. BSSG000509 (Doc. 5508).

B. Early Listing Petitions and Evaluations

Compelled by the dismal population numbers and declining prospects for the species' survival, concerned non-profit organizations and individuals petitioned the Service in 2002, and again in 2005, to list the Bi-State Sage Grouse under the ESA. 78 Fed. Reg. at 64,360. Through several rounds of litigation, settlement agreements, and extended deadlines, the Service slowly evaluated the scientific evidence for the Bi-State Sage Grouse. Id. In April 2008, the Service made a 90-day finding that the petitions "present substantial scientific information indicating that listing the Mono Basin area population of greater sage-grouse may be warranted." 73 Fed. Reg. 23,173 (Apr. 29, 2008). That finding triggered a status review for the species. In March 2010, at the conclusion of a comprehensive status review for all sage grouse populations, the Service finally made the requisite 12-month finding on the earlier citizen petitions, concluding that the Bi-State Sage Grouse qualifies as a DPS and that listing was warranted but precluded by higher priority listing actions. 75 Fed. Reg. 13,910 (Mar. 23, 2010).

More specifically, the Service stated:

> We have carefully assessed the best scientific and commercial information available regarding the present and future threats to the Bi-State DPS of the greater sage-grouse. We have reviewed the petitions, information available in our files, and other published and unpublished information, and consulted with recognized greater sage-grouse and sagebrush experts. We have considered and taken into account efforts being made to protect the species. On the basis of the best scientific and commercial information available, we find that listing of the Bi-State DPS of the greater sage-grouse is warranted across its range.

However, listing this DPS is precluded by higher priority listing actions at this time . . . .

Id. at 14,007. The Service explained that its limited annual listing budget from Congress was already fully appropriated for ongoing work pursuant to prior court orders and settlement agreement, but assigned the Bi-State Sage Grouse a "Listing Priority Number" of 3, on a scale of 1 to 12 (highest to lowest), because this DPS "faces threats that are overall of high magnitude and are imminent (i.e. ongoing)." Id. at 14,009.

Following this "warranted but precluded" finding, the Service undertook a further detailed and updated status review of the Bi-State Sage Grouse, which culminated in a Species Status Assessment, published on July 26, 2013. BSSG023827-4028 (Doc. 1671) ("2013 Species Report"). The 2013 Species Report summarized the status of the Bi-State Sage Grouse as follows:

- There has been a reduction from historical range and habitat of greater than 50 percent; the current trend is a slow, continued reduction in range and habitat.
- There has been a reduction from historical abundance of greater than 50 percent. The current trend in abundance is unknown, but it is expected to gradually decrease for at least five of the six Population Management Units (PMUs). This is of critical concern to the species because fluctuations in the four small, less secure PMUs are likely to result in extirpations and loss of population redundancy within the Bi-State DPS.
- All six PMUs of the Bi-State DPS include poor connectivity within and among PMUs; the current trend in connectivity is slowly deteriorating, and this of critical concern to the species because it increases the risk of loss of individual PMUs via stochastic events.
- Remaining habitat is increasingly fragmented within all six PMUs; the current trend in habitat fragmentation is a slow increase.
- Well known leks in the center of the species' range that have remained protected over time have long-term monitoring data suggesting stable population trends.
- Trends for most leks are unknown, especially on periphery of the species' range. This is of critical concern to the species because there is a pattern of historical extirpations of peripheral leks and populations for the Bi-State DPS.
- Recent extensive and intensive surveys for the Bi-State DPS rangewide did not significantly increase the known number of leks or individuals.
- The size of the Bi-State population is generally below theoretical minimums for long-term persistence reported in scientific literature; populations are especially small and increasingly isolated outside the two largest (core) PMUs of South Mono and Bodie.

BSSG023831 (Doc. 1671). The 2013 Species Report also identified multiple interacting threats to the species and its habitat, as well as various ongoing and planned conservation efforts which include the 2012 Bi-State Action Plan (sometimes referred to as "BSAP") – essentially a roadmap for future species conservation – prepared by a group of third-party stakeholders. BSSG023832-

33 (Doc. 1671). The report explained, however, that restoration of sagebrush is difficult, limited by financial and logistic resources, meaningful only at the landscape, watershed, or eco-region scale (rather than individual project level), and not likely to produce suitable habitat for decades or centuries. BSSG023953 (Doc. 1671). In short, while long-term restoration planning is a necessary component of future species recovery, in the near term it will not stop the slide towards extinction.

C. Proposed Listing of the Bi-State Sage Grouse in 2013

Based on this extensive species review and the available scientific information, it was hardly surprising when, three months later, the Service formally concluded that the Bi-State Sage Grouse "is likely to become endangered throughout all of its range in the foreseeable future" and proposed to list it as a "threatened" species and to designate appropriate critical habitat. 78 Fed. Reg. at 64,373-74. The Federal Register notice announcing the proposed listing explained that "[e]ach sage-grouse population in the Bi-State area is relatively small and below theoretical minimum criteria for long-term persistence, as is the entire DPS on average." Id. at 64,362. Historic habitat loss is pegged at greater than 50 percent, with losses greatest on the periphery, and the remaining habitat is of reduced quality and thus reduced carrying capacity for the species. Id. The Service concluded that approximately 70 percent of the total remaining Bi-State Sage Grouse population resides in just two PMUs – Bodie and South Mono – while the other four PMUs have declining population trends and are similar to other sites where sage grouse have been extirpated. Id. Combined with the limited and eroding connectivity of subpopulations and habitats within and among the PMUs, this severely degraded and fragmented habitat lacks the redundancy necessary to support long-term species persistence; when localized fluctuations or perturbations occur, small, isolated local subpopulations are more susceptible to extinction. Id. And the Service noted that even the two most robust PMUs in the central core of the species' range are expected to fall below the biological minimum of 500 breeding adults within the next 30 years, further jeopardizing population viability. Id. at 64,363.

In assessing impacts affecting population numbers over time, the Service explained that the Bi-State Sage Grouse faces a multitude of significant interacting threats, including infrastructure

(fences, power lines, and roads), grazing and rangeland management, invasive plants and woodland encroachment, wildfires and altered fire regime, and the small population size; the resulting impacts are thus of "high current or future scope and severity." 78 Fed. Reg. at 64,364. Moreover, lesser threats, such as urbanization and habitat conversion, mining, renewable energy development, climate, overutilization, recreation, disease, and predation "could be exacerbated and magnified in the future due to the small number, size and isolation of the populations." Id. The Service anticipated that "[d]ue to the scope of the impacts occurring throughout the range of the DPS, current and anticipated future habitat degradation, fragmentation and loss, and isolation of already small populations, the potential severity of impacts to the entire Bi-State Sage-DPS is considered high." Id. Indeed, the Service anticipated the loss of subpopulations in some PMUs and the contraction of ranges in others, leaving much of the Bi-State Sage Grouse population "susceptible to extirpation from stochastic events such as wildfire, drought, and disease." Id.

The proposed listing decision also assessed whether existing regulatory mechanisms and local conservation efforts were adequate to avoid listing and concluded they were not. In evaluating the main regulatory tools available – federal, state, and local land use plans – the Service focused largely on federal plans because the vast majority of Bi-State Sage Grouse habitat – roughly 92 percent – exists on federally-managed land. The Service first noted that many of these plans "are many years old and have not been updated, calling into question their consistency with our current understanding of the DPS's life-history requirements, reaction to disturbances, and the DPS's conservation needs." 78 Fed. Reg. 64,372. Moreover, "[t]he degree to which these existing regulatory mechanisms conserve the DPS is largely dependent on current and future implementation, which can vary depending on factors such as availability of staff and funding." Id. In particular, the existing federal land use plans are "general in nature and afford relatively broad latitude to land managers," which means that implementation is "prone to change based on managerial discretion." Id. Thus, these plans are of limited certainty and effectiveness in addressing threats to the species. Id. The Service explained that local land use and state regulations are even less useful in protecting species and habitat, since they generally do not preclude development or require monitoring of habitat loss. Id.

While ongoing and proposed conservation efforts – including measures identified in the 2012 Bi-State Action Plan – were not sufficient to avoid listing, the Service did acknowledge these efforts and attempted to incentivize their implementation by proposing a special rule that would exempt certain restoration and research activities from regulatory requirements otherwise applicable under the ESA for a listed species. 78 Fed. Reg. at 64,377-82. The Service also noted that listing of the Bi-State Sage Grouse would make new funding available for recovery actions, including cost share grants to non-federal landowners, the academic community, and non-governmental organizations, and ESA section 6 funding for California and Nevada to implement management actions that promote protection and recovery of the species. Id. at 64,376.

D. Response to the Proposed Listing Decision and Updated Science

In response to the proposed listing decision, the Service received a barrage of opposition from the energy, ranching, mining, and development sectors, among others. See BSSG040305-459 (Doc. 3042). Various public entities such as Mono County and others sought an extension of the deadline for comments and submissions and requested a public hearing – an idea that local Service staff discouraged in favor of private "one-on-one format" meetings that would provide for "more robust dialogue" with the requesting stakeholders. E.g., BSSG036554 (Doc. 2488), BSSG036558 (Doc. 2490), BSSG036677 (Doc. 2506), BSSG037079 (Doc. 2540). The Service granted the requested extension of the comment period until February 10, 2014, and then later reopened the comment and delayed a final listing decision "based on substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing." 80 Fed. Reg. at 22,829.

The primary advocate behind extending and reopening the comment period and delaying the listing was the Bi-State Executive Oversight Committee for Conservation of Greater Sage-Grouse ("Committee"), the entity that drafted the 2012 Bi-State Action Plan and whose members include several public agencies. On June 8, 2014, the Committee submitted additional comments and documentation in a play to convince the Service to withdraw its listing proposal and instead rely on the implementation of conservation measures contained in the Bi-State Action Plan – the same plan that the Service had already considered in the 2013 proposed listing. BSSG080368-422

(Doc. 4100). To sweeten its proposal, the Committee's package included a brightly-colored "conservation strategy flowchart," a memorandum of understanding facilitating interagency cooperation, and letters from various agencies committing to cooperate in carrying out conservation efforts. Id. This package was slapped on top of the Committee's existing (and otherwise unchanged) 2012 Bi-State Action Plan in the hope of pressuring the Service to reverse its proposed listing decision.

Only three of the "commitment" letters attached to the Committee packet provided any details or specifics about actual conservation efforts. The Natural Resource Conservation Service ("NRCS") within the Department of Agriculture focused its commitments on two priorities: "(1) establishing conservation easements on private lands to ensure critical brood habitats persist and (2) removing encroaching conifers that degrade habitats and increase predation, primarily on public lands." BSSG080378 (Doc. 4100). Part of NRCS's "committed" funding would actually come from the Forest Service's annual management budgets over the next ten years. These efforts were assigned a priority ranking of high, medium, or low (all of which are used in the ten-year "workplan"), with a significant portion of this hoped-for Forest Service funding slated for mandatory environmental review, and much of the actual on-the-ground implementation (in the form of proposed invasive vegetation removal or other restoration actions) slated to happen slowly over the next decade. BSSG080385-387 (Doc. 4100). The document did not address the uncertainty or contingencies associated with the annual congressional appropriations process. Most of NRCS's own "committed" funding would go toward buying easements on private property, with a much smaller amount slated for pinyon- juniper removal on public grazing allotments. BSSG080382-83 (Doc. 4100). As the agency itself notes, "it is important to recognize that our programs are voluntary and it is hard to predict precise parcels or projects that will be enrolled each fiscal year." BSSG080379 (Doc. 4100).

The Bureau of Land Management ("BLM") submitted a similar ten-year implementation plan. Like the NRCS/Forest Service implementation plan, the Bureau's plan proposes future funding for environmental review and planning, science advising, monitoring, and vegetative removal to improve sagebrush habitat, again without any discussion of how changes in annual

congressional budget allocations or executive branch policy might affect this plan or what contingencies the agency proposes if annual funding does not materialize. BSSG080392-397 (Doc. 4100). Mono County's "commitment" is even weaker, consisting of comparatively small proposed expenditures over the next several years on landowner education, workshops, and generalized efforts by the County to "maintain private lands and associated sage grouse values, minimize risk of future development." BSSG080403-405 (Doc. 4100).

During the lengthy public comment period, the Service simultaneously updated the Species Report. The final updated report, dated March 1, 2015 ("2015 Species Report"), incorporated some new data about population status, but ultimately reached the same conclusion on the best available science as had the 2013 Species Report: The Bi-State Sage Grouse is severely depleted, individual subpopulations are especially small and isolated, critical sagebrush habitat is significantly fragmented and degraded, and multiple, interacting threats to species persistence will continue. BSSG000429-30 (Doc. 5508). Indeed, but for some nuanced language changes designed to focus on the collaborative partnership among members of the Committee, the 2015 Species Report is nearly identical to the 2013 Species Report that the Service relied on for the proposed listing decision. Compare BSSG000425-636 (Doc. 5508) with BSSG023827-4028 (Doc. 1671).

E. Reversal and Withdrawal of the Proposed Listing in 2015

Despite the strong and continued scientific evidence showing that the Bi-State Sage Grouse remains in existential peril due to small, isolated population numbers, fragmented and degraded habitat, and ongoing and increasing threats, the Service turned its attention in the fall of 2014 to things other than the science. In particular, as the Service approached a final decision in late 2014, it focused on: (1) the expressed intent of certain federal land management agencies to update their governing land use plans, and (2) the "commitment" of Committee members to fund future conservation activities.

To inform a final listing decision, the Service convened a "Recommendation Team" of agency scientists, managers, and lawyers in late October 2014. In advance of this meeting, team members received a briefing packet consisting of (1) a briefing paper summarizing the

forthcoming revised Species Report; (2) a "Delta Table" that compared the science available at the time of the October 2010 "warranted but precluded" finding, at the time of the March 2013 proposed listing, and at the time of the upcoming October 2014 team meeting; and (3) a new paper that applied a different "integrated population modeling" approach to the available Bi-State Sage Grouse population monitoring data ("Coates Analysis"). BSSG057657-68 (Doc. 4828). While the newest information suggested slightly different population estimates and trends, the Service recognized that these differences were largely "due to a change in methodology" and, from a biological perspective, did not constitute a "significant" change in our understanding of the Bi-State Sage Grouse population status. BSSG058535 (Doc. 4907) ("Take-Away Message: There is not a big change between years" [2013 and 2014]); see also BSSG057940-44 (Doc. 4835) (Delta Table showing only minor differences in the science). Indeed, lek size "is the most reliable number" and "did not change at all" between 2013 and 2014. Id.

At the conclusion of the Recommendation Team meeting, the project managers requested input from each of the 13 agency biologists present. This "Pulse Check" discussion was preceded by a summary of the science and the task facing the team: "General Comment: The Population and persistence comparison between 2013 vs. 2014 make no significant difference for the species. The difference we should consider is focused on conservation efforts implemented between 2013 and 2014." BSSG058551 (Doc. 4907). Thus, the biologists were asked to "provide the group with their overall thoughts" and to state their recommendation on two points:

a. The proposed status that should be applied today (threatened/endangered/not warranted)
b. Given the information provided since 2013 and the anticipated future conservation efforts, what is the proposed status for the future (threatened/endangered/not warranted).

Id.

In response, each of the 13 biologists provided a recommendation about "Present" status and "Future" status, along with some overarching comments. Twelve of the biologists recommended a "Present" status of "threatened" and one recommended "not warranted." The recommendations regarding "Future" status with implementation of "anticipated future conservation efforts" were more varied, with three recommending "threatened," one "uncertain but leaning toward threatened," one "uncertain," and eight "not warranted." BSSG058538-39

(Doc. 4907). Several of the "not warranted" recommendations for "Future" status were explicitly premised on all of the proposed future conservation efforts actually being funded, implemented, and successful. For instance, one biologist indicated that "budgets are uncertain among partners" but "[b]enefit of the doubt provided." Another indicated that his/her "not warranted" vote "may be due to the bias toward our partnerships." Others voted for Future "not warranted" status "because of the future conservation commitments" and indicated that "the conservation commitment shows 10-15% increase in habitat conditions which lead to positive population results. Concern over the 10 year period is shared but it gets the bird ahead." Id. In short, the overwhelming scientific consensus in the room (12 of 13 biologists) was that the Bi-State Sage Grouse currently meets the criteria for, and should be listed as, a "threatened" species under the ESA, while two-thirds of these scientists believed that future conservation efforts, if successful, might move the species toward a "not warranted" status.

Inexplicably, in transmitting the results of this discussion and recommending a final "not warranted" finding to the Pacific Southwest Region Director, the regional managers – just two days after the Recommendation Team meeting – erroneously summarized the view of the scientists as follows: "Following the briefing the 13 biologists were polled for their opinion on whether or not the Bi-state met the definition of a threatened species under the ESA. One person abstained. Of the 12 that responded, four believed ESA listing as threatened was warranted, 8 believed ESA protection was not needed at this time." BSSG058596 (Doc. 4932).

On December 10, 2014, the Pacific Southwest Region Director transmitted an information memorandum to the Service Director confirming the Service's reversal of course. BSSG065299-312 (Doc. 5185). In it, he summarized the process and explained the politics of the issue in considerable detail, noting the particularly vocal opposition of certain state agencies and industry interests. The Regional Director also stated that "[g]iven current habitat conditions and factors (e.g., numbers of birds and trends, current conservation efforts), we find that the Bi-State DPS is likely to become endangered within the foreseeable future (threatened)," but that implementation of partially completed and future conservation measures would avoid this result. BSSG065299, BSSG065311 (Doc. 5185). The Regional Director stated, without explanation, that the Service

had a "high level" of certainty that agency funding commitments, continued agency participation in working groups, and "future conservation efforts" would be implemented and effective. BSSG065309 (Doc. 5185).

From that point forward, the Service's efforts focused on adjusting the language in its decision documents to reflect this new "not warranted" determination.[1] Initially, the draft decision documents relied on both the anticipated revision of existing Forest Service and BLM land use plans and the "commitment" package from the Committee and its members. But as the court-imposed final decision deadline drew closer, project team members realized that the federal land use plan revisions would not be completed and in place. At that point, the team began to downplay the significance of such federal regulatory actions – despite the fact that 92 percent of the Bi-State Sage Grouse habitat is on federal public lands – and instead tethered the impending decision entirely to promised future voluntary conversation efforts, such as the purchase of private land conservation easements and vegetative removal projects. BSSG078588 (Doc. 5696); BSSG078873-81 (Doc. 5702); BSSG0789123-26 (Doc. 5710).

The April 2015 Withdrawal Decision reflects the Service's near-total reliance on promises of voluntary action and future funding to reverse its biologically-based proposed listing decision. The decision notice explicitly based the "not warranted" finding on the previously-rejected Bi-State Action Plan and subsequent "commitment" letters. E.g., 80 Fed. Reg. at 22,829 ("Specifically, we have determined that conservation efforts (as outlined in the BSAP, Agency

[1] While a more detailed discussion of the myriad language changes is not possible here, an example may suffice. In a December 3, 2014 draft of the Withdrawal Decision, after the Service's management team recommended reversing course and making a "not warranted" finding, the proposed "Determination" section explained: "Following a thorough evaluation of the previous and new information, we have determined that, given current conditions and trends, the overall status of the Bi-State DPS (i.e., likely to become endangered in the foreseeable future) remains unchanged." BSSG062537 (Doc. 5111). In the final Withdrawal Decision, the Service deleted this sentence and substituted a paragraph explaining that while species stressors remain at a level that would warrant listing, "based primarily on information received from the action agencies implementing the BSAP, . . . we were able to utilize the PECE policy to evaluate conservation actions that are either implemented and not yet shown to be effective and those proposed for the future." 80 Fed. Reg. at 22,850. Thus, the carefully wordsmithed final document substituted vague, general language about the PECE evaluation for clear language about the threatened status of the species.

commitment letters, and our detailed PECE analysis . . .) will continue to be implemented because (to date) we have a documented track record of active participation and implementation by the signatory agencies, and commitments to continue implementation into the future. . . . As a result of these actions, this document withdraws the proposed rule as published on October 28, 2013."); 22,834-35 ("The bi-State DPS is experiencing multiple impacts to individual populations and sagebrush habitats that are ongoing (and expected to continue into the future) in many areas throughout the DPS's range. . . . We believe the future impacts of these threats are significantly reduced due to the expected implementation and effectiveness of the partially completed and future conservation efforts associated with the BSAP."); 22,849 ("In our proposed listing rule we determined that the bi-State DPS is likely to become endangered within the foreseeable future (threatened). However, after consideration of new information regarding partially completed and ongoing conservation measures and planned future conservation that we conclude will be implemented and effective, . . . we now conclude that the bi-State DPS is not likely to become endangered within the foreseeable future (threatened).").

While the Service acknowledged other factors that could affect the change in the listing decision, it ultimately dismissed them as the basis for the "not warranted" finding. Most significantly, the Withdrawal Decision conceded that Bi-State Sage Grouse habitat "is largely composed of federally management lands," that federal "land use plans, as they pertain to sage grouse, have been general in nature and afforded relatively broad latitude to land managers," and that proposed plan amendments which "identify goals for desired habitat condition" were not yet in place. 80 Fed. Reg. at 22,845. The fact that updated regulatory mechanisms governing 92 percent of Bi-State Sage Grouse habitat were not in place was no cause for concern, however, because by proposing to update goals in their land management plans, the federal agencies "have taken steps" to make the plan language "consistent with" the proposed conservation measures in the Bi-State Action Plan, and the existence of that voluntary plan "lessen[s] the need for regulatory mechanisms to manage stressors." Id. For that reason, the Service stated that "the currently existing regulatory mechanisms are adequate" and that "we are not relying on [draft federal land use plans] as part of this review because they are not finalized and would require speculation on

the Service's part as to the final outcome of the plans." Id.

Having explicitly yoked the Withdrawal Decision entirely to the implementation of the third-party Bi-State Action Plan previously rejected as inadequate to avoid listing, the Service then turned to an evaluation of the Plan's conservation promises under the PECE approach. For conservation efforts that have not yet been implemented or not yet been determined to be effective – including almost all of the measures in the Bi-State Action Plan and supplemental Committee package – the PECE analysis focuses on the "certainty" that the promised efforts will be both implemented and effective. BSSG079491-92 (Doc. 5716). The Withdrawal Decision concludes that:

> Without the conservation measures being implemented now and planned for the future as described in the BSAP, the stressors that rise to a level of being a threat as identified in the proposed rule to the bi-State DPS would remain at a level that would warrant listing of the DPS as a threatened species. However, based primarily on information received from the action agencies implementing the BSAP, including commitments of funding and other resources, we were able to utilize the PECE policy to evaluate conservation actions that are either implemented and not yet shown to be effective and those proposed for the future.

80 Fed. Reg. at 22,850. That is, the final "not warranted" finding is not based primarily on conservation efforts that have occurred and were successful in the 18 months between the proposed and final listing decisions, but rather, on a handful of intervening efforts that had not yet proved effective (e.g., changed the trajectory of the species) and promised future voluntary efforts.

Even though almost all of the funding for the promised future conservation efforts would come from various federal agency budgets, none of the decision documents addressed the fact that such budgets require annual congressional appropriations and reflect executive branch policy priorities. Neither the decision documents nor the Bi-State Action Plan articulated any contingency should Congress – or a new Executive branch administration with different policy priorities – decide not to fund public land conservation over the coming decade. Likewise, although relying heavily on a list of presently-unfunded, individual federal vegetation removal projects, the Withdrawal Decision does not account for, or discuss in any way, the fact that sagebrush habitat restoration is only effective at the landscape scale and, even then, may take "decades or centuries" to be successful. BSSG023953 (Doc. 1671). Nevertheless, the Service was "confident" that the promised measures would be implemented and effective because "we have a

documented track record of active participation and implementation by the signatory agencies, and commitments to continue implementation into the future." 80 Fed. Reg. at 22,847.

In the Withdrawal Decision, the Service also applied its new SPR Policy to conclude that the Bi-State Sage-Grouse was neither threatened nor endangered in a "significant portion of its range." The Service identified the Pine Nut, Mount Grant, and White Mountains areas as at-risk PMUs because they "comprise the fewest numbers of birds and leks within the range" and "continue to be most at risk from the various stressors acting upon the birds and their habitat." 80 Fed. Reg. at 22,853. These areas include 60 percent of the Bi-State Sage Grouse's remaining habitat and approximately 38 percent of the bird's remaining population. BSSG000567, BSSG000444 (Doc. 5508). The Service found that the viability of these smaller populations is uncertain, and should these populations be lost, the entire DPS could be at risk of extinction. 80 Fed. Reg. at 22,839. Nevertheless, with little explanation, the Service concluded that: "(1) There are no portions of the bi-State DPS that may be significant, and (2) the DPS is not likely to become an endangered species in the foreseeable future in the portion of its range that harbors the least number of birds (i.e., the Pine Nut, Mount Grant, and White Mountains PMUs)." Id. at 22,853. The Withdrawal Decision's discussion of "significant portion of the range" did not discuss lost historic range or the at-risk Desert Creek-Fales PMU.

IV. STANDARD OF REVIEW

Judicial review of the Service's listing decisions under, and interpretations of, the ESA are governed by the Administrative Procedure Act ("APA."), 5 U.S.C. §§ 701 et seq. Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002). Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Such judicial review must be "thorough, probing, [and] in-depth." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

Although judicial review of agency actions is deferential, the court "must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" Ariz. Cattle Growers' Ass'n v. U.S. Fish

& Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting NLRB v. Brown, 380 U.S. 278 (1965)). Courts must reverse an agency action 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 Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Moreover, agency action should be remanded where the agency fails to "articulat[e] a rational connection between the facts found and the choice made." See Balt. Gas & Elec. v. Nat'l Res. Def. Council, Inc., 462 U.S. 87, 105 (1983).

Even where an agency with "technical expertise" acts "within its area of competence," a reviewing court "need not defer to the agency when the agency's decision is without substantial basis in fact, and there must be a rational connection between the facts found and the determinations made." Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010). In particular, under the ESA, "failure by the agency to utilize the best available science is arbitrary and capricious." Consol. Delta Smelt Cases, 717 F. Supp. 2d 1021, 1060 (E.D. Cal. 2010). In addition, where an agency decision is based on a change in its interpretation of the facts, it must provide "a reasoned explanation [for] disregarding" its prior position. FCC v. Fox Television Stations, 556 U.S. 502, 515–16 (2009); Organized Village of Kake v. United States Dep't of Agric., 795 F.3d 956, 968-969 (9th Cir. 2015); Humane Soc. v. Locke, 626 F.3d 1040, 1049 (9th Cir. 2010).

Finally, an agency's interpretation of the law must be overturned if it is not "based on a permissible construction of the statute." Chevron, U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). An agency's interpretation is unreasonable if it "ignores the plain language of the statute," renders statutory language "superfluous," or frustrates the statute's purpose. Pac. Nw. Generating Co-op. v. Dep't of Energy, 580 F.3d 792, 806, 812 (9th Cir. 2009).[2]

[2] As set forth in the accompanying standing declarations, Plaintiffs have standing to bring this action. Mass. v. EPA, 549 U.S. 497, 517 (2007); Friends of the Earth v. Laidlaw Envtl. Servs, 528 U.S. 167, 180-81 (2000). Plaintiffs are conservation membership organizations with longstanding recreational, aesthetic, scientific, and organizational interests in the Bi-State sage grouse and other

V. ARGUMENT

A. The Withdrawal Decision Is Inconsistent with the Best Available Science on Bi-State Sage Grouse Population Abundance and Habitat Availability.

Listing decisions under the ESA are fundamentally based on science. The statute requires the Service to make listing decisions "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A) (emphasis added); 50 C.F.R. § 424.11(c). The ESA's "best available science" requirement prohibits the Service from making listing decisions on the basis of unsupported opinions and conclusions, Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 878 (9th Cir. 2009), or speculation and surmise. Bldg. Indus. Ass'n of Superior California v. Norton, 247 F.3d 1241, 1247 (D.C. Cir. 2001).

Although the Withdrawal Decision engaged in some discussion regarding new biological evaluations, the record plainly demonstrated – and the Service never actually disputed – that the best available science on population numbers and habitat acreage warranted listing of the Bi-State Sage Grouse in October 2013 and continued to warrant listing in 2015. See, e.g., BSSG058535, 38 (Doc. 4907), BSSG065299 (Doc. 5185). The Service's own comparisons over time (in its "Delta Table") show that relevant habitat acreage, lek numbers, and population abundance across all six PMUs varied little between 2013 to 2014, with some numbers showing minor improvement based on changed methodologies or additional data and others showing worsened status. BSSG057940-44 (Doc. 4835). If anything, the overall change from 2010 to 2014 revealed a steadily deteriorating situation, with total habitat declining from 1,562,893 acres to 1,300,238 acres and the all-important total lek count falling by half, from 89 to 43. BSSG057941 (Doc. 4835). The Pine Nut PMU had only one remaining lek and usually fewer than 100 birds. Id.; 80 Fed. Reg. at 22,838. Indeed, while lek numbers appear stable for the two central core PMUs, they have declined dramatically for the four other PMUs. Id. Within individual PMUs, subpopulations appear to be increasing in one area and decreasing in another, and most of these abundance

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imperiled species adversely affected by the agency actions under review. See Declaration of Deirdre Cerkanowicz, Declaration of Ileene Anderson, Declaration of Erik Molvar, and Second Declaration of Bethany Cotton filed concurrently; see also Dkt #16-1 (Goss Declaration); Dkt #16-3 (Galvin Declaration); Dkt #16-4 (Connor Declaration); Dkt #16-5 (Cotton Declaration).

numbers remain quite uncertain. BSSG057941-42 (Doc. 4835); 80 Fed. Reg. at 22,830-34. But one thing is certain – each of the subpopulations is small (potentially below minimum breeding adult requirements and/or minimum persistence numbers), isolated, and subject to the same continuing threats that created the current dire situation. For this reason, the Service itself concluded, with regard to the present state of the species, that "the existing condition (without intervention) would likely worsen in the future . . . if conservation efforts were not conducted." Id. at 22,834.

Notwithstanding this ultimate conclusion, the Withdrawal Decision included a number of misleading statements about new scientific information, three of which we briefly address here.

1. The Coates Analysis Is Problematic and Does Not Support a Reversal.

The Service cited to the new Coates Analysis (which employed a different methodology than earlier population studies and only evaluated four PMUs) to conclude that the "evaluated populations are, in their entirety, stable (both growing and declining) between 2003 and 2012," even while it conceded that "the trend in population growth was variable among subpopulations." 80 Fed. Reg. at 22,831. The integrated population model used by the Coates Analysis modeled population growth rates based on analysis of six subpopulations in four PMUs. Due to lack of data, the Coates Analysis omitted the Mount Grant and White Mountains PMUs – two of the most vulnerable PMUs with the least sage grouse. Id. The modeling estimated the probability that each subpopulation and the overall population is increasing, stable, or decreasing. Over the ten-year period examined, the model predicted that two of six subpopulations were declining (Parker Meadows and Fales), and that the overall population had an almost even likelihood of having declined or increased between 2003 and 2012. BSSG84331-33 (Doc. 4480).

The conclusion that the Service drew from the Coates Analysis – that the overall population is "stable" – is problematic for several reasons: (1) a stable population was the least probable outcome (16 percent) and the probability that the population had decreased over the ten-year period was almost as likely as an increase, meaning the modelers could not rule out a strong probability (41.6 percent) that the overall population declined (BSSG084331) (Doc. 4480); (2) the Pine Nut population that the modeling indicated had increased over the 2003-2012 period had no

males strutting in the active lek the following year (2013) and only one male in 2014, a fact that led the Service itself to view the results of the Coates Analysis "with caution" (80 Fed. Reg. at 22,831);[3] (3) the study time framework of ten years was too short to draw robust, reliable conclusions given the longer cycles of population variation in sage grouse populations (BSSG062497) ((Doc. 5111)[4]; and (4) because the Coates Analysis looked only at six subpopulations within four PMUs, leaving unassessed the two largest PMUs by geographical size and several other subpopulations, the results should not and cannot be extrapolated to the entire Bi-State population. BSSG058535 (Doc. 4907) ("Conclusion based on one study's model (USGS-Coates) is a concern. Are we confident in putting so much weight on one study's results?").

For these reasons, the members of the Recommendation Team reviewing the status of the species did not view the projections of the Coates Analysis as reliable evidence that the Bi-State Sage Grouse would be less likely to become extinct, in light of other scientific evidence that all of the populations are below the minimum size for long-term persistence. Id. (estimated increase in suitable habitat due to "change in mapping methodology and not considered significant"). A species with population counts below those necessary for long-term persistence remains threatened even if some of its populations stabilize temporarily, because its low numbers make it vulnerable to sudden, random events. 78 Fed. Reg. 64,368; 80 Fed. Reg. 22,838. Thus, reliance on slight changes in trend numbers for some subpopulations, based on a new modeling methodology, does not support a conclusion that listing is unwarranted. See Tucson Herpetological Soc'y, 566 F.3d at 879 (holding population viability study on two discrete populations could not support FWS's conclusion that species was stable); Defenders of Wildlife v.

[3] Indeed, in various draft documents scattered throughout the record, staff repeatedly raised questions such as "How do we dissect out what data we like and do not like from one scientific paper (i.e. Pine Nut)?" (BSSG058535) (Doc. 4907) that were not answered in the final decision.

[4] This December 2014 draft version of the Withdrawal Decision stated that the conclusion of the Coates Analysis that the Pine Nut population is stable "should be considered cautiously as it is likely substantially influenced by the time period of the analysis." Id. Staff aptly noted that, "This raises the question as to why the other population trend estimates would not also have been influenced by the period of the analysis. We need to explain why this is not (or is) the case." Id. As with much else, the Withdrawal Decision does not answer this question or address the issue, but instead merely arbitrarily deletes the draft language. See also BSSG101698-99 (Doc. 6013) (noting that Withdrawal Decision cites one favorable study on the length of Bi-State sage grouse population cycles but not others less favorable).

Jewell, 176 F. Supp. 3d 975, 1005-06 (D. Mont. 2016) (remanding for Service to consider "threat to the wolverine posed by population size and genetic diversity"). As in Defenders, the Service here failed to explain how it could conclude that there is no cause for alarm despite overwhelming evidence of small, isolated, and declining subpopulations.

2. The Service's Conclusions Regarding Genetic Resiliency, Redundancy, and Representation Are Contrary to the Best Available Science.

The language of the Withdrawal Decision is similarly misleading with regard to the implications of new genetic information on the Service's analysis and conclusions about species resiliency, redundancy, and representation – three fundamental concepts that affect a population's projected survival over time. As the decision explained, "resiliency" refers to a population's capacity to recover quickly from disturbances by tolerating or adapting to changes or effects caused by disturbances; it is influenced by genetic diversity across the species and the number of individuals, with more of either increasing its resiliency. 80 Fed. Reg. at 22,839. "Redundancy" refers to the ability of a species to tolerate fluctuations or loss of population across its range; multiple interacting subpopulations across a broad range decrease the risk of extinction from a species by catastrophic events (drought, fire, disease, etc.) or stochastic variation by providing insurance that some individuals will survive and repopulate. Id. "Representation" refers to the conservation of the diversity in a species; the greater the aggregate number of individuals across multiple populations, the larger the genetic reservoir and the greater the probability of demographic persistence and preservation of the species. Id.

In drafts of the Withdrawal Decision, the Service stated that resiliency, redundancy, and representation "are a concern" and "indicate the long-term persistence of the [Bi-State Sage-Grouse] may be at risk." BSSG064536 (Doc. 5158). This conclusion was based on the fact that the Bi-State's six PMUs are all "below the theoretical minimum [size] needed for persistence" and that the birds tend not to move between the PMUs or recolonize extirpated areas. BSSG062499-500 (Doc. 5111). In the final Withdrawal Decision, the Service confirmed that species' resiliency is "low" and that species' ability to withstand threats, as well as its genetic redundancy, will likely

diminish in the future because at least three populations remain at risk for permanent extirpation. 80 Fed. Reg. at 22,839-40.

Nevertheless, the Service erroneously suggested that two recent genetic reports may lessen concerns about persistence over time because they indicate that moderate to high genetic diversity across the DPS range. 80 Fed. Reg. at 22,839. But genetic diversity cannot substitute for healthy population sizes and functioning connectivity habitat between PMUs. "Multiple, interacting populations across a broad geographic area provide insurance against the risk of extinction," id. at 22,839, but the Bi-State Sage grouse has none of these protections. Instead, it has only six increasingly isolated PMUs within a single basin region. Id. at 22,831, 22,839. Strong site fidelity limits gene-sharing between PMUs and the species' ability to adapt to environmental stressors. BSSG000435; BSSG000546 (Doc. 5508). As the connectivity between the Bi-State Sage Grouse's PMUs continues to erode, the fragmentation and isolation will increase and "genetic challenges will likely influence long-term viability." See BSSG000549-50 (Doc. 5508). Indeed, there are indications that the lack of genetic diversity within the isolated PMUs is already having effects: Leks in both the South Mono and Pine Nut areas have begun producing nonviable eggs. Id. BSSG000549 (Doc. 5508). Because "concern over maintaining long-term genetic and demographic viability remains," BSSG062498 (Doc. 5111), the Service was wrong to suggest that the two new genetic reports could significantly change the analysis of species resiliency, redundancy and representation, or the Bi-State Sage Grouse's chances for survival.[5]

3. The Withdrawal Decision Failed to Address Cumulative Impacts.

Moreover, the Withdrawal Decision, which included a threat-by-threat discussion, failed to address the effect of cumulative threats to the species in the context of small population size and historic declines. The decision notice discusses individual threats only in isolation, without analyzing the total combined impact and without addressing or correctly interpreting the best

[5] Once again, staff comments during the decision review and drafting process tell the fuller story. Biologist comments on this portion of the December 2014 draft decision correctly point out that, because four of the six isolated PMUs are so small (below minimum persistence size) as to be at risk of disappearing and because birds do not appear to move between PMUs or recolonize areas, it is not correct to conclude that resiliency is high across the entire DPS range. BSSG062498-500 (Doc. 5111).

available science on the collective threat. For example, the Withdrawal Decision mentions that there may be "synergistic interactions," such as those between "fire, people and infrastructure, invasive species, and climate change," 80 Fed. Reg. 22,844, but does not discuss their potential impact on loss of sagebrush habitat and/or loss of sage grouse population. It also does not treat cumulative or synergistic threats in the context of the species' small population sizes. 80 Fed. Reg. 22,840. This incomplete analysis plainly violates the ESA. 50 C.F.R. § 424.11(c); WildEarth Guardians v. Salazar, 741 F.Supp.2d 89 (D.D.C. 2010) (Service violated ESA by failing to consider cumulative impact of listing factors).

B. The Service Cannot Rely on Existing Regulatory Mechanisms to Support Reversal and Withdrawal of the Proposed Listing Decision.

The ESA directs the Service to consider five factors in reviewing a listing petition, including "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). In undertaking this evaluation, the Service may only consider existing regulatory requirements, not proposed or hoped-for future regulations. Rocky Mtn. Wild v. Walsh, 216 F.Supp. 3d 1234, 1248, 1152 (D. Co. 2016) (conservation agreement containing a mix of future and present tense "apparently in an awkward attempt to fit yet-to-be-enacted ordinances or regulations into the framework of 'existing regulatory mechanisms'" could not be considered in listing because "existing" means that they are "on the books" and "in force"); Tucson Herpetological Society v. Norton, No. CV-04-0075-PHX-NVW, Order at 13 (D. Ariz. Aug. 30, 2005) ("Section 1533(a)(1)(D) standing alone precludes 'future or voluntary conservation efforts which, by definition, are not 'existing' or 'regulatory.'"); Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (section 1533(a)(1) "plainly do[es] not allow the Secretary to consider a nonexistent plan or speculate about future events"); Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23, 26 (D.D.C. 1996) (possible future action of the Forest Service to protect species cannot be used as an excuse for not making a listing determination based on the existing record); Sw. Ctr. for Biological Diversity v. Babbitt, 939 F. Supp. 49, 52 (D.D.C. 1996) (same).

Here, the Service concluded unequivocally in the proposed listing decision that federal land management plans, which cover the vast majority of Bi-State Sage Grouse habitat, were

inadequate regulatory mechanisms to protect the species from listing because they were dated, non-specific, and discretionary and because funding and staffing were uncertain. 78 Fed. Reg. 64,372. While the Service's PECE analysis was premised to some extent on the assumption that various land use plans would be updated and adopted to reflect sagebrush and sage grouse protections, those updates were not in place, at the time of the Withdrawal Decision, and thus were not "existing." 80 Fed. Reg. at 22,845. For that reason, the Service could not rationally and lawfully rely upon them to support a reversal of the proposed listing, as the decision notice itself recognized. See Rocky Mountain Wild v. U.S. Fish & Wildlife Serv., No. CV 13-42-M-DWM, 2014 WL 7176384, at *11 (D. Mont. Sept. 29, 2014).

C. The Service's Reliance on Future Conservation Efforts Proposed in the Bi-State Action Plan Was Arbitrary and Capricious.

Recognizing that the best available science warranted listing and that existing regulatory mechanisms were inadequate to avoid listing, the Service ultimately turned to and relied on the 2012 Bi-State Action Plan as the basis for its abrupt reversal. This is the very same plan it had previously rejected as insufficient to avoid listing, except with the addition of a packet of "commitment" letters attached. See, supra, at pp. 13-15. To reach its result, the Service prepared a PECE analysis and concluded that the future conservation measures identified in the Bi-State Action Plan were sufficiently certain to be implemented and effective. BSSG079486-550. This conclusion was arbitrary and capricious for the following reasons.

1. The PECE Analysis Is Legally Flawed and Inconsistent with the ESA.

First, the Service arbitrarily applied its PECE approach. PECE implements section 1533(b)(1)(A) of the ESA, which directs that the Service make listing determinations based solely on the best available science after conducting a species status review and "taking into account efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species." The policy applies to "formalized conservation efforts" – defined as "conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document" – that have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective at the time of a listing

decision. 68 Fed Reg. at 15,113. But PECE is clear that the Service "may not rely on speculative promises of future action when making listing decisions." Id. at 15,106 (emphasis added).

The PECE evaluation is based on the certainty of implementing the formalized conservation effort and the certainty that the conservation effort will be effective. 68 Fed. Reg. at 15,113. To avoid an otherwise warranted listing, the Service must find that the formalized conservation effort provides "a high level of certainty that the effort will be implemented and/or effective and results in the elimination or adequate reduction of the threats." Id. at 15,113. Although PECE allows the Service to make an assessment of future conservation efforts that have not yet been implemented or proven effective, in order to rely on those efforts, the policy requires them to be in place and sufficiently certain "so as to have contributed to the elimination or adequate reduction of one or more threats to the species." Id. at 15,115. That is, the Service must "determine at the time of the listing decision that the conservation effort has improved the status of the species." Id. at 15,114 (emphasis added). "Regardless of the adoption of a conservation agreement or plan, however, if the best available scientific and commercial data indicate that the species meets the definition of 'endangered species' or 'threatened species' on the day of the listing decision, then [the Service] must proceed with appropriate rule-making activity under section 4 of the Act." Id. at 15,115 (emphasis added). Thus, like the statutory section 1533(b)(1)(A) that it implements, PECE speaks in the "present tense." Oregon Nat. Res. Council v. Daley, 6 F. Supp. 2d 1139, 1153 (D. Or. 1998) ("Even the broad language of § 1533(b)(1)(B) cannot reasonably be interpreted to include future efforts, whether regulatory or non-regulatory. It speaks only in the present tense in terms of 'efforts, if any, being made,' and not future efforts which have yet to be made.").

For this reason, the courts have repeatedly found, both before PECE was adopted and after, that the mere anticipation or promise of future efforts – as opposed to actions that are already "in place," but will play out in the future – is not sufficient to avoid listing. E.g., Alaska v. Lubchenco, 825 F. Supp. 2d 209, 219 (D.D.C. 2011) (conservation efforts "must actually be in place and have achieved some measure of success in order to count under the Service's [PECE]"); In re Polar Bear Endangered Species Act Listing, 794 F. Supp. 2d 65, 113 n.56 (D.D.C. 2011)

(ESA does not allow Service to consider "speculative future conservation actions" and under the PECE, Service "may only consider formalized conservation efforts that have been implemented and have been shown to be effective"); Western Watersheds Project v. U.S. Forest Service, 535 F. Supp. 2d 1173, 1187 (D. Idaho 2007) ("assumptions about future conservation efforts 'cannot be relied upon in an agency's decision not to list,'" quoting Trout Unlimited v. Lohn, 645 F.Supp. 2d 929, 956 (D. Or. 2007)); Ctr. For Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004) (Service cannot rely on future promises of conservation action by states in evaluating listing petition). As Judge Illston explained in Fed'n of Fly Fishers, the ESA "cannot be administered on the basis of speculation or surmise." 131 F. Supp. 2d at 1165. "Reliance on future action is inconsistent with the aggressive preventive posture of the ESA because '[t]here are no assurances that the measures will be carried out, when they will be carried out, nor whether they will be effective in eliminating the threats to the species.'" Id. at 1169 (quoting Save Our Springs v. Babbitt, 27 F.Supp.2d 739, 744 (W.D. Tex. 1997)).

Under pressure from the Committee and an array of local and state politicians, the Service erroneously applied PECE to the facts here. The Service did not find that conservation efforts undertaken by the decision date had sufficiently improved species survival prospects to reverse its listing determination. Rather, the Withdrawal Decision relied on a voluntary strategy put together by interested entities – previously rejected as not sufficient – and a new "commitment" that various Committee members will seek to negotiate future conservation easements on private property (for a small but unknown percentage of the habitat) or will seek to fund, design, and carry out public land restoration projects. Despite these promises, at the time of the Withdrawal decision there remained no formalized enforceable agreement or management plan in place for Bi-State Sage Grouse recovery. These are the very kind of "speculative promises of future action" that PECE rejects. Moreover, the Service stated that it was "confident" these actions would be put in place and implemented in the future, not because there is a proven track record of biological efficacy, but because member agencies had actively collaborated to produce the packet. 80 Fed. Reg. at 22,847. The Service never demonstrated or explained, as PECE and the ESA require, how this package of promised future voluntary actions "has improved" the status of the Bi-State Sage

Grouse on "the day of the listing decision" – April 23, 2015.

2. The Service's Conclusion of a High Level of Certainty that Future Conservation Efforts Will Be Implemented Is Arbitrary, Capricious, and Unsupported by the Record.

The only difference between the Bi-State Action Plan rejected by the Service in 2013 and the Bi-State Action Plan accepted by the Service in 2015 is a packet consisting of a "conceptual framework flowchart," agency "commitment" letters to fund future easements and vegetation removal projects, and the Committee claim that the packet "represent[s] a unified and collaborative approach that creatively and constructively addresses the conservation needs of the [Bi-State Sage Grouse]." BSSG080368 (Doc. 4100). In accepting this packet as providing sufficient certainty of implementation, the Service cited (1) "agency commitments to staffing and significant funding" and (2) "continued participation" by those who produced the Bi-State Action Plan. 80 Fed. Reg. 22,847. The Withdrawal Decision failed to explain how federal public agency funding commitments for individual actions proposed to occur over the next ten years could be certain, let alone highly certain, when agency budgets are subject to annual congressional appropriations and executive branch policy prerogatives.[6]

No matter how well-intentioned, current agency employees cannot bind future decisionmakers or Congress through mere promises. Indeed, this is precisely why the ESA itself, and the courts interpreting it, insist that federal agency regulatory mechanisms be "existing" at the time of the decision and not merely aspirational; species protections embedded in regulatory mechanisms obligate federal officials, regardless of the political winds or whims in Washington. Even duly-executed contracts, in the form of ESA "Candidate Conservation Agreements" that have undergone public review and comment, may not be sufficient to support reversal of a

[6] For instance, the new administration's 2018 budget proposes drastic cuts to the Environmental Quality Incentives Program ("EQIP"), which NRCS stated it would rely on to fund its Bi-State Action Plan commitments, as well as elimination of field staff and conservation stewardship programs. See http://sustainableagriculture.net/blog/trump-budget-proposal-disaster/ (noting that President Trump's proposed budget seeks to "decimate the [Farm Bill's] conservation program" and "is in line with the President's recommendation that conservation planning be privatized"). It is, of course, unclear whether any of these budget cuts will come to pass – or will affect NRCS's "commitments" – either next year or in the years that follow. But that's the point: Neither the PECE analysis nor the Withdrawal Decision addresses this contingency in any way. That is, the Service does not provide a "backup plan" or even an explanation for the nontrivial possibility that some or all of the "committed" federal agency funding does not materialize.

proposed listing. E.g., Western Watersheds Project v. Foss, No. CV-04-168-MHW, 2005 WL 2002473 (D. Idaho Aug. 19, 2005). Given the vagaries of executive branch priorities and legislative branch annual appropriations, it was arbitrary and capricious for the Service to conclude that public agency funding "commitments" for the next ten years were sufficiently certain on April 23, 2015 to leave the imperiled Bi-State Sage Grouse unprotected by the ESA.

3. The Service's Conclusion of a High Level of Certainty that Future Conservation Efforts Will Be Effective Is Arbitrary, Capricious and Unsupported by the Record.

The Service likewise erred in concluding that the effectiveness of proposed future conservation efforts was highly certain. In its Withdrawal Decision, the Service made conclusory assertions that the various conservation efforts, if implemented, would be effective, but did not provide any actual analysis of effectiveness. Its conclusions on effectiveness were based on "past project effectiveness within the bi-state area or within sagebrush habitat areas across the range of the greater sage grouse and documented effective methodologies for addressing threats identified as impacting the bi-State DPS." 80 Fed. Reg. at 22,847. As examples of effective methodologies, the Service listed: (1) targeting brood-rearing habitats for conservation easements and land exchanges, (2) six federal agency projects, "either partially completed or planned for the future," that "target invasive, nonnative plants" on 634 acres across the 1.3 million acres of documented sagebrush habitat and "adjustments to grazing and upland habitats, when necessary" to "reduce the risk of cheatgrass dominance," (3) road closures and power line and fence removal within some PMUs, (4) use of a conservation planning tool to target the "best candidates" for restoring sagebrush habitat destroyed by wildfire, although such efforts "vary in success" and recovery of functional habitat takes decades, and (5) "identifying potential sage-grouse populations augmentation and reintroduction sites, developing translocation guidelines, and potentially implementing augmentation and reintroduction efforts." 80 Fed. Reg. at 22,847-48.

This laundry list of proposed future actions did not, however, explain why such efforts, either individually or collectively, would be effective in sufficiently reducing the threats to Bi-State Sage Grouse to avoid listing. For instance, much of the promised conservation activity on federal lands involves the removal of pinyon-juniper woodlands, even though the Withdrawal

Decision record does not provide science to support a conclusion that such measures are or will be effective in enhancing sage grouse survival. But even if removing woodlands were an effective conservation tool, the Service did not articulate how many acres of remaining habitat would actually be addressed by these measures or whether that amount of effort would be sufficient to actually improve the status of the Bi-State sage grouse populations. The PECE analysis suggested that up to 203,329 acres would be examined for potential removal of encroaching pinyon-juniper. BSSG079525 (Doc. 5716). The Forest Service implementation plan identified environmental review it would undertake for eight pinyon-juniper removal projects covering roughly 95,000 acres over the next ten years, again without explanation of how these projects would enhance long-term sage grouse survival. BSSG080385-87 (Doc. 4100). The proposed BLM's ten-year implementation plan was even less comprehensible, showing a single project pinyon-juniper removal project – 301 acres in Mill Canyon for a cost of $65,000 – repeated over and over for each fiscal year from 2015 through 2022. BSSG080392-95 (Doc. 4100). NRCS listed $2,000,000 in EQIP funding over the next five fiscal years to finance "PJ Removal" on private property, but did not identify any particular project(s) or provide acreage numbers and conceded that it is "difficult to precisely predict the specific projects landowners will offer for enrollment each [fiscal year]." BSSG080384 (Doc. 4100).

Much the same can be said for virtually every proposed conservation effort – whether it is grazing allotment adjustments or cheatgrass invasion projects or wildfire restoration work or population augmentation.[7] Even the most diligent reader of the record cannot possibly understand which of these proposed or promised future conservation measures actually support the Service's "not warranted" finding and why. The record not only lacks basic supporting quantification and explanation, it also fails to articulate how any of these future efforts, even if fully funded and carried out, will improve the fate of the small, isolated, and highly imperiled Bi-State Sage Grouse species sufficient to serve as a substitute for the statutory protections that ESA listing provides.

[7] Likewise, the Service fails to explain why cheatgrass removal efforts at such a low rate – a bare 1,634 acres over the next ten years out of 1.3 million acres of suitable habitat, or 0.1 percent (BSSG079539) (Doc. 5716) – would be effective, given that the Service identifies the spread of cheatgrass of "greatest concern" and has indicated that "44 percent of existing sagebrush habitat in Nevada is at moderate or high risk of displacement by cheatgrass." BSG000503 (Doc. 5508).

4. The Service's Reliance on Speculative Future Federal Agency Actions to Avoid Listing Is Inconsistent with the ESA and Unlawful.

The Service made one more fundamental legal error. As discussed above, the ESA provides two ways the Service might justify a "not warranted" determination. First, the Service could find that there are adequate existing regulatory mechanisms to protect the species, which could include regulations at the federal, state, or local level. 16 U.S.C. § 1533(a)(1)(D). If such mechanisms are not in place, the Service could still find that listing is "not warranted" because sufficient efforts are "being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect" the species. Id. § 1533(b)(1)(A) (emphasis added). Here, the Service determined that existing regulatory mechanisms were not adequate to avoid listing, but then proposed voluntary future projects by federal agencies as the primary basis for its decision reversal. Notably, however, section 1533(b)(1)(A), by its plain language, does not allow the Service to rely on federal efforts to avoid listing. Friends of Wild Swan, Inc. v. U.S. Fish and Wildlife Serv., 945 F. Supp. 1388, 1399 (D. Or. 1996); 50 C.F.R. § 424.11(f) (regulations implementing section 1533(b)(1)(A) for any state or political subdivision).

This result makes good policy sense. As Friends of Wild Swan explained, the ESA imposes conservation duties on all federal agencies once a species is listed; thus, federal agency species protection begins with the listing process and it would be contrary to the statute to allow non-regulatory promises by a few federal agencies to deprive a species of protection that would be required by all federal agencies if the species is listed. 945 F. Supp. at 1399 (citing 16 U.S.C. § 1536(a)). The Court should not sanction the Service's sleight-of-hand, which magically transformed inadequate federal regulatory mechanisms under section 1533(a)(1)(D) into sufficient voluntary conservation efforts under section 1533(b)(1)(A).

D. The Service's Conclusion with Respect to "Significant Portion of the Range" Is Legally Flawed.

Finally, in evaluating a listing petition, the Service must determine if a species is endangered or threatened "throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). After concluding that the Bi-State Sage Grouse was not threatened or endangered throughout its entire range, based on promised future conservation actions, the Service turned

briefly to the question of whether the species is threatened in "a significant portion of its range." The Withdrawal Decision devoted less than two pages of discussion to this issue, half of which was devoted to describing the 2014 SPR Policy issued shortly before the decision. 80 Fed. Reg. 22,852-53. As another federal court has already held, the new SPR Policy is legally flawed on its face and thus the Service's application of it here was in error. In any event, given the scientific information that four of the six PMUs are at risk of extirpation, the Service's conclusory statement on this issue is insufficient to support its decision.

1. The SPR Policy Is Inconsistent with the Plain Language and Purpose of the ESA and Facially Invalid.

The SPR Policy's narrow interpretation of "significant portion of its range" defies the purpose, history and plain language of the ESA and prior directly-related Ninth Circuit precedent. In particular, the policy's definition of the terms "significant" and "range" are both legally flawed. Because the Service relied on this erroneous policy in the Withdrawal Decision, the Court should remand that decision for further reconsideration consistent with the ESA.

Under the SPR Policy, a portion of the range is "significant" only if the portion's contribution to the viability of the species is so important that without the members of that portion, the species would be endangered or threatened throughout all of its range. 79 Fed. Reg. at 37,579. Yet that definition would give "significant portion" no independent meaning, since there could be no finding that a species is endangered or threatened in a significant portion but not all of its range.[8] The court in Ctr. for Biological Diversity recently vacated the SPR Policy on precisely these grounds. 2017 WL 2438327 at *11. The district court noted that in an earlier case, Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001), the Ninth Circuit declared "unacceptable" a previous Service policy because it rendered the phrase "significant portion of its range" superfluous by defining such portions in terms of the viability of the entire species. 2017 WL 2438327, at *3. Although the Service purported to differentiate its 2014 SPR Policy from the policy invalidated by Bldg. Indus. Ass'n v. Norton, the district court found that those attempts

[8] The Service itself recognized this problem. "With this definition of significance, we are predicting that at some point in the future (and by predicting an outcome, it is by definition 'foreseeable') threats acting on the portion will put the species at risk of extinction," SPR000740.

were "illusory." Id. at *6. As the Service's Pacific Southwest Regional Office -- the office responsible for the Bi-State sage grouse determination – commented on the draft SPR Policy: "[I]t is hard to imagine a real-world situation in which a 'species' could be in danger of extinction throughout a significant portion of its range and not be – simultaneously – in danger of extinction or likely to become so within the foreseeable future throughout all of its range. Without real-world applicability, the SPR phrase, as interpreted by the Services' policy, will not have independent meaning." NAW10124 (PRIV000287) (emphasis in original).

The SPR Policy also violates express congressional intent by setting too high a threshold for significance. Congress expressed its intent on this issue in 1978, when it rejected an amendment that, similar to the SPR Policy, would have replaced "significant" with "essential," where "essential" was defined as "that portion of the range necessary for the continued survival and recovery of the species." See 124 Cong. Rec. 21,582-83 (1978). In adopting a definition of "significant" analogous to one rejected by Congress, the SPR Policy contradicts legislative intent.

Finally, the Service's goal in adopting the SPR Policy directly clashes with the purpose of the ESA. The ESA was the third development in a series of laws intended to provide protection for endangered species, and the first to offer protections to a species within "a significant portion of its range." The House Report accompanying the ESA affirmed this departure, noting that the expanded protections beyond existential danger to a species represent a "significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction." H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973). The SPR Policy ignores this important feature of the law and returns focus only to a species' range-wide status.

The SPR Policy's interpretation of range also violates principles of statutory construction in interpreting "range" to mean "current range." SPR Policy, 79 Fed. Reg. at 37,583. In 1978, Congress stated that "the term 'range' is used in the general sense, and refers to the historical range of the species," when it amended the ESA's listing requirements. See H.R. Rep. 95-1625, 18 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9468. Other references to "range" in the ESA also make clear that "range" refers to historical range. For example, the ESA requires the Service to consider the "curtailment of [the species'] habitat or range" when making a listing

determination. 16 U.S.C. § 1533(a)(1)(A). The SPR Policy's interpretation of range unreasonably renders this requirement meaningless, "since it is impossible to determine the 'present . . . curtailment of [a species'] habitat or range' without knowing what the species' historical range was prior to being curtailed." Humane Soc'y of the United States v. Jewell, 76 F. Supp. 3d 69, 130 (D.D.C. 2014) (finding the Service's interpretation of "range" as "current range" to be arbitrary and capricious). Moreover, if a species is threatened or endangered "throughout all or a significant portion of its range," the ESA requires the Service to list the species, specify "over what portion of its range it is endangered or threatened," and "designate critical habitat within such range." 16 U.S.C. § 1533(c)(1) (emphasis added). "Critical habitat" includes "areas outside the geographical area occupied by the species at the time it is listed." 16 U.S.C. § 1532(5)(A)(ii). These listing requirements confirm that "range" as used in the ESA is not limited to a species' current range, but must include lost historical range.

In sum, the Service's SPR Policy should be overturned because neither its interpretation of "significant" nor its interpretation of "range" is "based on a permissible construction of the" ESA. See Chevron, 467 U.S. at 843. Because the Withdrawal Decision relied on a facially invalid policy, it too should be reversed as arbitrary and capricious.

2. The Service Failed to Adequately and Properly Analyze Whether the Bi-State Sage Grouse Is Threatened in a Significant Portion of Its Range.

The record demonstrates that more than 50 percent of the Bi-State Sage Grouse's historic habitat has already been lost, with the two most robust PMUs (Bodie and South Mono) representing less than 20 percent of the species' historical range. 80 Fed. Reg. 22,831. And even these comparatively more robust PMUs have "experienced prior habitat losses, population declines, and internal habitat fragmentation." Id. The three PMUs to the north (Pine Nut, Desert Creek-Fales, and Mount Grant) support small, isolated populations subject to a comparatively higher risk of extirpation; the sixth PMU to the south (White Mountains), about which little is known, faces similar risks and, like the three northernmost PMUs, its condition is likely to worsen in the future without intervention. Id. at 22,832-34. Moreover, "[h]istorical extirpations outside the existing boundaries of the six PMUs present a similar pattern of lost peripheral populations";

and "PMUs on the northern and southern extents of the Bi-State DPS . . . are more similar to extirpated sites elsewhere within the range of greater sage-grouse." 80 Fed. Reg. at 22,832.

The 2015 Species Report summarized the science on these at-risk subpopulations:

> When historical, existing, and future impacts such as predation, disease, recreation, and climate change (vegetation changes, drought) are considered in conjunction with other habitat stressors, it appears that preservation of sage-grouse populations in the northern half of the Bi-State area will be difficult without substantial management attention. Given the Bi-State DPS's relatively low current rate of growth and strong site fidelity, recovery and repopulation of extirpated areas may be slow and infrequent, making future recovery of extirpated populations within the Bi-State area challenging. Translocation of sage-grouse is difficult, and given the limited number of source individuals within the range of the Bi-State DPS, translocation efforts, if needed, will be logistically complicated. Within the next several decades, it is possible that sage-grouse in the Bi-State area will persist in two of the potentially six populations in the Bi-State area, specifically the two populations located in the South Mono PMU (Long Valley) and the Bodie PMU (Bodie Hills). These two populations currently appear largely demographically isolated from one another.

BSSG000579 (Doc. 5508) (emphasis added).

The Service concluded that "[t]hese trends are of critical concern at the DPS level because fluctuations in these small, less secure populations are likely to result in extirpations and loss of population redundancy within the DPS." BSSG000568 (Doc. 5508); 80 Fed. Reg. at 22,832 (fluctuating subpopulations "could result in extirpation of one or more of these populations"). This is so because "each population in the bi-State DPS is relatively small and may be below the theoretical minimum thresholds . . . for long-term persistence, as is the entire DPS on average." 80 Fed. Reg. at 22,839. The Withdrawal Decision explains that "[o]verall, small population size and a discontinuous population structure occurs throughout the bi-State DPS's range, which could make the bi-State DPS more susceptible to threats described herein both currently and likely in the future if offsetting conservation measures are not implemented." Id. The decision continues: "In summary, the Service anticipates challenges to sage-grouse populations in four of the six PMUs in the Bi-State DPS (i.e., Pine Nut, Desert Creek-Fales, Mount Grant, and White Mountains)." BSSG000568 (Doc. 5508). As one of the Recommendation Team biologists stated, "all Bi-state area is needed for conservation so loss of habitat is concern. Likely to lose non-core PMUs. How SPR will be applied in this context is concerning." BSSG058539 (Doc. 4907).[9]

[9] Consistent with these and similar concerns expressed by Recommendation Team biologists, as late as February 2015, the draft Withdrawal Decision made clear that loss of some PMUs could

Despite the precariousness of four of the six PMUs, the Service summarily concluded that "substantial information indicates that (1) There are no portions of the bi-State DPS that may be significant, and (2) the DPS is not likely to become an endangered species in the foreseeable future in the portion of its range that harbors the least numbers of birds (i.e., the Pine Nut, Mount Grant, and White Mountains PMUs." 80 Fed. Reg. at 22,853. It provided no analysis or meaningful explanation for these findings. The Service never explained why the loss of non-core PMUs and contraction of the species' range was not significant. Instead, the Withdrawal Decision merely stated "the combination of the bi-State DPS small population size, isolation due to fragmented habitat, peripheral locations, and the presence of several stressors to the sage grouse in the Pine Nut, Mount Grant, and White Mountains PMUs makes these PMUs more vulnerable than the Bodie, Desert Creek-Fales, and South Mono PMUs, but not to the degree that sage grouse are in danger of extinction or likely to become so in the foreseeable future in these PMUs." 80 Fed. Reg. at 22,853. The Withdrawal Decision offers a single conclusory sentence to justify the Service's conclusion, stating that: (1) "multiple" birds are observed in each of the PMUs; (2) each PMU has at least one breeding lek; (3) the "stresors [sic] acting upon these small populations" are threats throughout the range; and (4) the Coates Analysis found that several of the PMUs are stable. Id. Other record documents, such as the 2015 Species Report and the PECE evaluation, did not analyze this issue.

The Service's summary justifications are facile and, in light of the scientific record, legally inadequate. Merely noting that "multiple" individual birds or a few leks still exist in an isolated PMU – when conservation biologists believe that 5,000 birds and 500 breeding adults are necessary for a resilient and persistent population – does not constitute "a rational connection

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jeopardize the viability of the entire DPS: "Based on the information above, we find that resiliency, redundancy, and representation in the bi-State DPS are a concern for the DPS's long-term persistence given current and future conditions. The best available information indicates resiliency overall is low, with four of six PMUs containing small populations. …. When considered together, the low level of resiliency and redundancy, current and future threats to the bi-State populations (in particular, see Drought (Factor E discussion below)), the potential loss of one or more small populations outside of the two core populations, the overall reduction of range, and future risk to representation indicate that the long-term persistence of the bi-State DPS may be at risk." BSSG072149 (Doc. 5762). Service managers ultimately deleted or substantially rewrote these scientific conclusions. E.g., BSSG074286-87 (Doc. 5543).

between the facts found and the choice made." See Balt. Gas & Elec., 462 U.S. at 105. The fact that similar threats face all PMUs does not explain why the smaller PMUs are not a significant portion of the species' range or why loss of those PMUs do not threaten the entire DPS with extirpation. Finally, the Coates Analysis (which the Service itself considered "with caution," for the reasons discussed above) does not and cannot support the Service's conclusion because it did not analyze the Mount Grant and White Mountains PMUs at all, and its evaluation of the Pine Nut PMU is (as the Service admits) potentially unreliable. 80 Fed. Reg. at 22,831. Especially where, as here, the Service has acknowledged that "there is information available" suggesting that "the PMUs in these three [areas] are at risk of becoming endangered in the foreseeable future," id. at 22,853, it must "develop some rational explanation" for why lost and at-risk portions of a species' range are not significant. Tucson Herpetological Soc., 566 F.3d at 877; see also WildEarth Guardians, 741 F. Supp. 2d at 100-01 (finding listing decision arbitrary and capricious because the Service failed to explain how a 50 percent reduction in the species' range is not significant). Its failure to do so was legal error.

The Service also erred in failing to consider threats to the Desert Creek-Fales PMU in its "significant portion of its range" analysis. Like the other three PMUs, the Desert Creek-Fales PMU has been identified by the Service as one of the populations that "are now and will continue to be most at risk." BSSG000570 (Doc. 5508). Indeed, at it had with the Pine Nut and Mount Grant areas, the Service "anticipate[d] loss of some populations and contraction of the ranges of others" within the Desert Creek-Fales area, "which will leave [it] susceptible to extirpation." BSSG000579 (Doc. 5508); 80 Fed. Reg. at 22,834. However, in its "significant portion of its range" analysis, the Service reclassified Desert Creek-Fales as a robust PMU, without explanation. This conclusion was arbitrary and capricious because it "entirely failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment.

Dated: August 18, 2017

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: */s/*
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