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22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**
24 **(San Francisco Division)**

25 DESERT SURVIVORS; CENTER FOR
26 BIOLOGICAL DIVERSITY; WILDEARTH
27 GUARDIANS; and WESTERN
28 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' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANTS'
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

Date: March 16, 2018
Time: 9:30 a.m.
Court: Courtroom G, 15th Floor
Hon. Joseph C. Spero

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INTRODUCTION

1
2 In their opposition brief, Federal Defendants spend 40 pages quoting snippets of Fish and
3 Wildlife Service (“Service”) policy and planning documents and repeatedly urging the Court to
4 defer to the Service’s legal conclusions, but they fail to meaningfully engage the core issues in this
5 case.

6 First, Defendants do not seriously dispute that the “best available science” in the record
7 continues to warrant listing of the Bi-State Sage Grouse under the Endangered Species Act
8 (“ESA”), as the Service concluded in the October 2013 Proposed Listing. They do not do so
9 because the evidence is overwhelming. The record shows clearly – and the Defendants do not
10 debate – that one of the six population management units (“PMUs”) of the Bi-State Sage Grouse
11 was so small as to be at immediate risk of extirpation, and that the other five PMUs were below
12 the minimum population thresholds for long-term viability. The 2015 species report authored by
13 the Service itself – and comments from the Service’s staff – reveal that the PMUs are fragmented,
14 isolated, and mostly shrinking, and that the species as a whole and each of its PMUs are in danger
15 of disappearing. Even the new studies that the Service relied upon – a population study and two
16 genetic studies – suggest that the fate of the species was fragile. All this is not a matter of
17 contention. The Defendants are left with weakly pointing to crumbs in the record and arguing that
18 “[m]ultiple sage-grouse are still observed,” and that some breeding grounds still exist, Defs. Mem.
19 at 39, in a vain attempt to reframe the stark condition of the species, knowing full well that much
20 more is needed for even viability in the short term. Given the imminent, existential threats to the
21 sage grouse (and to each of its significant PMUs), the Service’s repeated conclusory reliance at
22 every turn of the record on unproven conservation efforts to save the day, even though, to-date, a
23 decade of similar conservation efforts had utterly failed, is unsupportable.

24 Second, on the legally separate and independent claim that the Service failed to adequately
25 analyze whether the Bi-State Sage Grouse is threatened in a “significant portion of its range”
26 (“SPR”), as required by the ESA, Defendants spend a fair portion of their discussion arguing –
27 bizarrely and erroneously – that the issue is not ripe for judicial review. But as the record reflects,
28

1 this argument is flatly wrong because the Service clearly made a determination on this issue. 80
2 Fed. Reg. 22,828, 22,853 (Apr. 23, 2015) (stating that “we find that substantial information
3 indicates that: (1) There are no portions of the bi-State DPS that may be significant and (2) the
4 DPS is not likely to become an endangered species in the foreseeable future in the portion of its
5 range that harbors the least number of birds (i.e., the Pine Nut, Mount Grant, and White Mountains
6 PMUs”). Defendants then dodge the merits by rehashing (1) the very same arguments already
7 rejected, for good reason, by the federal court in the District of Arizona, and (2) their ripeness
8 argument erroneously claiming that the Service did not, and need not, reach the SPR question. In
9 the end, as with the Defendants’ arguments regarding the status of the whole of the population,
10 Defendants fall back on the notion that “the law does not require [an agency’s] explanation to be
11 exhaustive.” Defs. Mem. at 39. And as discussed below and in Plaintiffs’ opening brief, the
12 Service provided no intelligible explanation for why or how the agency could possibly find that
13 the species is not in danger of extinction within the four smaller-population PMUs, when the 2015
14 Species Report on which the Withdrawal Decision relies flatly contradicts such a finding and
15 shows these four PMUs may be completely extirpated, especially the struggling Pine Nut PMU.
16 BSSG000579 (Doc. 5508) (concluding that “it appears that preservation of the sage-grouse
17 populations in the northern half of the Bi-State area will be difficult” and that “[w]ithin the next
18 several decades, it is possible that sage-grouse in the Bi-State area will persist in two of the
19 potentially six populations”). Nor does the Service explain how or why it concluded that the loss
20 of these PMUs, and thus the loss of this portion of the range, was not significant. Instead, they
21 state their conclusion baldly in a single sentence, addressing none of the contrary evidence in the
22 record. Here, too, the overwhelming tide of evidence in the record forces the Service to grasp at
23 the thin straw of its unproven and future conservation efforts.

24 While Defendants lard their brief with lots of feel-good quotes from aspirational
25 documents, dodge the scientific facts, and misapply the relevant law, the Bi-State Sage Grouse
26 remains on life support. As the Service itself admits, the available scientific evidence continues to
27 confirm the warranted conclusion of the 2013 Proposed Listing determination. Indeed, after
28

1 completing its review of “new information” and public comment, the Service drafted a proposed
2 Withdrawal Decision in December 2014 which concluded: “Following a thorough evaluation of
3 the previous and new information, we have determined that, given current conditions and trends,
4 the overall status of the [Bi-State Sage-Grouse] (i.e., likely to become endangered in the
5 foreseeable future) remains unchanged.” BSSG062537 (Doc. 5111). Although the Service
6 attempted to more carefully sculpt its words in the final published Withdrawal Decision, the
7 inescapable scientific conclusion did not change: The threats to the Bi-State Sage Grouse “remain
8 at a level that would warrant listing of the DPS as a threatened species.” 80 Fed. at 22,850 (noting
9 that the Service’s changed legal conclusion was “based primarily on information received from the
10 action agencies” promising new funding commitments).

11 Even though line-level scientists at the Service believe that the Bi-State Sage Grouse is in
12 significant trouble and warrants listing, agency managers hope to avoid this path by cobbling
13 together unenforceable funding promises to undertake a variety of insufficient conservation
14 measures including unproven vegetation removal projects that, if successful, might produce new
15 suitable habitat “decades or centuries” from now. BSSG000460 (Doc. 5508). Yet even
16 Defendants appear to recognize that the primary conservation efforts that the Service relies upon
17 in the Bi-State Action Plan – individually and cumulatively – have no track record, and are built
18 on inference and anecdote:

19 The agency also surveyed the scientific literature regarding the efficacy of removal
20 treatments, acknowledging that it was “not aware of any study documenting a direct
21 correlation between these treatments and sage-grouse population response” but finding it
22 could “infer some level of positive response based on Commons et al.’s (1999) Gunnison
23 sage-grouse study and the documented avoidance or reduced use by sage-grouse of areas
24 with pinyon-juniper encroachment.” In addition, FWS examined the effectiveness of “25
25 woodland thinning or removal projects over the past decade . . . completed in the Bi-State
26 area,” finding that it was “still too early to measure a population-level response,” but
27 noting that “anecdotal observations indicate that these actions are resulting in the addition
28 of suitable habitat in some instances.”

24 Defs. Mem. at 22.

25 The agency’s hopes and dreams for the future of the species, unsubstantiated by any
26 credible evidence, are not sufficient to override the clear science, no matter how much good faith
27 lies behind them. The ESA, and the listing process in particular, is driven by science, not a wing
28

1 and a prayer. While the agency’s scientific expertise is entitled to appropriate deference,
 2 conclusions that fly in the face of the record and the text of the law are not, especially where those
 3 conclusions render the statutory language “superfluous.” See, e.g., Ariz. Cattle Growers’ Ass’n v.
 4 U.S. Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001); Pac. Nw. Generating Co-op. v. Dep’t
 5 of Energy, 580 F.3d 792, 806, 812 (9th Cir. 2009). Here, because the Withdrawal Decision is
 6 unsupported by the facts and conclusions contained in the record and is erroneously based on
 7 conservation efforts that lack the requisite indicia of certainty and effectiveness, it is not entitled to
 8 the judicial deference on which Defendants largely rest their arguments. See Motor Vehicle Mfrs.
 9 Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

10 ARGUMENT

11 **I. At the Time of the Withdrawal Decision, the Best Available Science Continued to** 12 **Show that the Bi-State Sage Grouse was Threatened.**

13 Defendants derisively accuse Plaintiffs of “flyspecking” the Withdrawal Decision and
 14 disingenuously argue that Plaintiffs “only” raise “three narrow objections” to the Service’s
 15 “threats analysis.” Defs. Mem. at 24. There is, of course, a reason for that focus. As Plaintiffs
 16 opening brief demonstrates, the science that supported the Proposed Listing did not appreciably
 17 change between October 2013 and April 2015. Pl. Mem. at 10-20, 22-23. That science continues
 18 to support listing of the Bi-State Sage Grouse, as even the Withdrawal Decision concedes. 80 Fed.
 19 Reg. 22,828, 850 (Apr. 23, 2015) (noting that without the conservation promises described in the
 20 Bi-State Action Plan, “the stressors that rise to a level of being a threat as identified in the
 21 proposed rule to the bi-State DPS would remain at a level the would warrant listing of the DPS as
 22 a threatened species”). Plaintiffs focused on the Coates Analysis and the two recent genetic
 23 studies because the Service explicitly relied on them as “new information” relevant to the
 24 Withdrawal Decision. Id. at 22,830. None of these studies, however, support the agency’s about-
 25 face.

1 **A. The Coates Analysis Was Flawed and Improperly Used.**

2 The Coates Analysis is not sufficient to reverse the determination that a “threatened”
3 listing is warranted, or even the predicate determination about the Bi-State Sage Grouse’s
4 population trends, because of its flawed methodology and failure to evaluate two of the six total
5 PMUs. The Secretary cannot rely upon an ambiguous or biased study as the best available
6 science. Tucson Herpetological Soc. v. Salazar, 566 F.3d 870, 879 (9th Cir. 2009); Brower v.
7 Evans, 257 F.3d 1058, 1067 (9th Cir. 2001) (“The presumption of agency expertise can be
8 rebutted when its decisions, while relying on scientific expertise, are not reasoned.”)

9 First, the findings of the Coates Analysis are skewed by sampling issues. Because the
10 analysis looked at six subpopulations in four PMUs, including the two largest, least vulnerable
11 PMUs (Bodie and South Mono), Defs. Mem. at 26, but no subpopulations in two of the smaller,
12 more vulnerable PMUs (Mount Grant and White Mountains), the results are biased towards a
13 greater chance of finding populations to be stable or increasing since population fitness and
14 population size are highly correlated. BSSG000550 (Doc. 5508). The Coates Analysis
15 nevertheless assumes that its calculated population growth rate accurately reflect the overall
16 growth rate and long-term viability of the entire Bi-State DPS. BSSG084329, 84331 (Doc. 4480).
17 Relying on the Coates Analysis, the Service generally made the same assumption, declaring that
18 “new data estimate that population growth has been stable across the bi-State area between 2003
19 and 2012.” 80 Fed. Reg. at 22,865.

20 Defendants argue that such extrapolation is permissible because “the subpopulations
21 analyzed ‘provided a reliable representation of demography’ for the entire DPS, both in terms of
22 the ‘number of subpopulations and their spatial distribution.’” Defs. Mem. at 25–26. That
23 argument fails, however, because each PMU faces different conditions and experiences different
24 rates of population growth. The Coates Analysis did not consider the unexamined subpopulations’
25 lack of connectivity,¹ increased vulnerability to threats, or similarity to extirpated sites elsewhere

26 _____
27 ¹ Defendants-Intervenors inaccurately suggest that the Service did not assert “that individual
28 PMUs are isolated from each other, but rather that the bi-state sage grouse (as all agree) is simply
different from other western sage grouse populations.” Def. Intervenors Mem. at 19. This is

1 – all of which affect the probability that the subpopulations within these PMUs would increase,
 2 decrease, or remain the same – or explain how it could accurately extrapolate its results from the
 3 areas included to those excluded areas. The Service did not perform this analysis either. As a
 4 Service biologist explained in an email: The conclusion that “Results show populations are stable
 5 across the entire Bi-State area” should not have included the word “entire” because Coates did not
 6 examine all of the different subpopulations. BSSG063147 (Doc. 5124) (“Mike2 is right- We
 7 should probably strike the entire bi-state because coates did not look at Mt grant or white
 8 mountains.”).² It was therefore improper for the Service to conclude, based on the Coates
 9 Analysis, that the Bi-State Sage Grouse’s population across the range is stable.

10 Defendants also concede that the use of a ten-year period for the Coates Analysis was
 11 based upon limited data availability, rather than upon appropriate standards or the Bi-State Sage
 12 Grouse’s actual population characteristics. Defs. Mem. at 26. The Coates Analysis ventures that
 13 its conclusions are nonetheless valid, but only relies on one study which shows six- to nine-year
 14 oscillations in population while disregarding three other studies that show “long term (i.e. decadal)
 15 declines in population sizes range-wide,” BSSG084336 (Doc. 4480), including the Garton study
 16 that the Service relied heavily upon in its 2013 Proposed Listing and cites throughout its
 17 Withdrawal Decision. Further, the Coates Analysis warns that its limited-term analysis omits
 18 evaluation of droughts. *Id.* (noting that the study period did not include a drought and “the effects
 19 of drought on sage-grouse population trends are uncertain for the Bi-State” and require further
 20 investigation). Yet the Service’s 2015 Species Report acknowledges that climate change and
 21 drought are likely, with almost certain negative effects on the Bi-State Sage Grouse’s viability.
 22 *E.g.*, BSSG000516 (Doc. 5508) (“increasing frequency of drought is also anticipated”);
 23 BSSG000517 (“current climate change projections for higher summer temperatures, more frequent
 24 or severe drought, or both make more severe [West Nile virus] outbreaks likely...); BSSG000519

25 _____
 26 simply wrong. The record consistently refers to the Bi-State subpopulations as “isolated” with
 27 “poor connectivity” to each other. BSSG000429 (Doc. 5508).

28 ² That the Defendants failed to monitor the subpopulations, Defs. Mem. at 25, or otherwise obtain
 information about those smaller Mount Grant and White Mountain PMUs is a limitation of the
 study, not a justification for relying upon it.

1 (sage-grouse ranked “as the most vulnerable bird species to climate change in comparison to other
2 at-risk California bird species”).

3 Even the assumption of stability among the PMUs included in the Coates Analysis is not
4 clearly correct. As Defendants note, the Coates Analysis found a 42.5 percent chance of increased
5 population and a 41.6 percent chance of decreased population in any given year, with only 15.8
6 percent chance of year-to-year stability. Based on common sense, even accepting these numbers
7 on their face, they are by definition inconclusive – the statistical equivalent of a coin-toss. Defs.
8 Mem. at 25. Rather than show stability, they show that the population numbers widely fluctuate
9 from year to year – a concerning trait for subpopulations below their minimum thresholds for
10 viability. BSSG000550 (Doc. 5508) (“When coupled with [] significant fluctuations in annual
11 population size, long-term persistence of small populations [] is challenging.”) (citations omitted).

12 Defendants actually admit to the data and methodological defects in the Coates Analysis,
13 including omitted subpopulations and PMUs, limited lek and subpopulations data, skewed
14 selection of sample subpopulations, a limited timeframe, and the need for caution in assessing the
15 Pine Nut PMU findings. Defs. Mem. at 25–27. Yet they defend the Service’s reliance on the
16 Coates Analysis by saying that “a court ‘cannot insist on perfection.’” Defs. Mem. at 26. While it
17 is true perfection cannot be required, relying on an analysis filled with defects and uncertainties –
18 if those defects cannot be remedied – to reverse or ignore conclusions based on more reliable data
19 is not a reasonable application of the best available science.

20 Indeed, although Defendants’ lawyers argue that the Coates Analysis is accurate and
21 generally applicable (except as to the Pine Nut PMU), Service biologists expressed doubts as to
22 that proposition, asking themselves if the Coates’ errors revealed a flawed methodology, and
23 whether they could “dissect out what data we like and do not like from one scientific paper.”
24 BSSG058548 (Doc. 4911). The Ninth Circuit rejected an analogous conclusion in a similar
25 situation for just these reasons: “If the science on population size and trends is underdeveloped
26 and unclear, the Secretary cannot reasonably infer that the absence of evidence of population
27 decline equates to evidence of persistence.” Tucson Herpetological Soc’y, 566 F.3d at 879. It
28

1 then rejected the Secretary’s conclusions as “unreasonable” – despite the fact that the agency was
 2 making determinations within its area of expertise – because “[t]he Secretary affirmatively relies
 3 on ambiguous studies as evidence of persistence (i.e., stable and viable populations).” Id. Here,
 4 the Service could not reasonably extrapolate the Coates Analysis’ conclusions for six
 5 subpopulations in four PMUs to all of the subpopulations in all six PMUs.³

6 Regardless, the bottom line is that the Service’s biologists found that the conclusions in the
 7 Coates Analysis’ were not sufficient to change the overall scenario: “The summary punchline for
 8 this is that even with these increases, it is not significant and our perception of historic baseline
 9 was not changed.” BSSG058534 (Doc. 4911). Thus, the Coates Analysis did not support a
 10 departure from the Service’s earlier conclusion that the Bi-State Sage Grouse was threatened, even
 11 if the agency were entitled to deference in relying on a flawed and incomplete analysis.

12 **B. The New Genetic Studies Did Not Resolve Concerns about Genetic Resiliency,**
 13 **Redundancy, and Representation.**

14 Defendants argue that their reversal of findings in the Withdrawal Decision regarding
 15 genetic resiliency, redundancy, and representation was justified based on two new genetic studies
 16 and the Bi-State Action Plan, despite the Service’s concession that Bi-State Sage Grouse PMUs
 17 “‘may be below the theoretical minimum threshold’ for long term persistence.” Defs. Mem. at
 18 28–29. But they ignore that the genetic studies, despite finding moderate genetic diversity within
 19 some subpopulations, explicitly conclude that the small sizes of PMUs and lack of genetic
 20 connectivity between PMUs is a risk to viability. Contrary to Defendants’ assertions, the
 21 Service’s conclusion was not supported by the additional studies or the overall record.

22 The Service cannot disregard its prior determinations that the Bi-State Sage Grouse is
 23 below the theoretical minimum necessary population levels. This determination factored into the
 24 Service’s prior conclusion in 2013 that the Bi-State Sage-Grouse is threatened, and the Service is

25 _____
 26 ³ The Service recognizes six PMUs: Pine Nut, Desert Creek-Fales, Mount Grant, Bodie, South
 27 Mono, and White Mountains. Some of the PMUs have more than one named subpopulation:
 28 Desert Creek-Fales PMU (Desert Creek and Fales subpopulations); South Mono PMU (Parker
 Meadows, Granite Mountain and Long Valley subpopulations)

1 required to provide “a reasoned explanation for [disregarding]” that prior scientific conclusion.
2 Organized Village of Kake v. United States Dep’t of Agric., 795 F.3d 956, 968–69 (9th Cir.
3 2015); Humane Soc. v. Locke, 626 F.3d 1040, 1049 (9th Cir. 2010). Defendants now disavow the
4 agency’s prior conclusion by suggesting that “this theoretical threshold” is “not statistically
5 proven” and that PMUs have continued “to persist.” Defs. Mem. at 28. As an initial matter, mere
6 persistence of a species over a period does not mean it is not threatened – the two are not mutually
7 exclusive. For example, a long-lived, slow-to-reproduce species could persist over some period of
8 time at low numbers but nevertheless be vulnerable to extirpation by a predictable event like fire,
9 disease, or drought. In such a case, the species is rolling the dice for its continued existence each
10 year. And while the precise numeric minimum threshold of 500 breeding birds per PMU is not
11 “proven,” the 2015 Species Report shows that it is consistent with the literature and with
12 determinations by the species’ experts. BSSG000549 (Doc. 5508). The 2015 Species Report
13 determined that the Bi-State Sage Grouse’s small PMU sizes are a “significant threat to the species
14 both currently and in the future,” in part because the “literature shows that thousands of
15 individuals are required for a population to have an acceptable degree of resilience in the face of
16 environmental fluctuations and catastrophic events.” BSSG000550 (Doc. 5508).

17 Indeed, the theoretical minimum levels are the best available scientific estimate of the
18 numbers of birds needed to retain evolutionary potential and therefore directly relate to a PMU’s
19 resiliency, redundancy, and representation. Contrary to Defendants’ insinuations, the theoretical
20 minimum levels are not a “rule-of-thumb” number determined “without consideration of a
21 particular species’ life history and specific population-level stressors.” See Defs. Mem. at 40, n.
22 32. In fact, the theoretical minimum levels are numbers that “species experts” have arrived at after
23 considering the Bi-State Sage-Grouse’s species-specific particularities and the Service erred in
24 ignoring them. BSSG000549 (Doc. 5508). The 2015 Species Report itself cites an effective
25 population size of at least 50 to 100 breeding birds to avoid short-term extinction and 500
26 breeding birds to avoid long-term extinction, with up to 5,000 individual sage grouse needed to
27 maintain an effective population size of 500. BSSG000547 (Doc. 5508). Based on these numbers
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1 and the Service's own calculations, the Pine Nut PMU is at imminent risk of short-term extinction
2 and the Desert Creek-Fales, Mount Grant, Bodie, and South Mono PMUs are squarely at risk of
3 long-term extinction. BSSG000549 (Doc. 5508). Under the ESA, "failure by the agency to utilize
4 the best available science is arbitrary and capricious." Consol. Delta Smelt Cases, 717 F. Supp. 2d
5 1021, 1060 (E.D. Cal. 2010).

6 The Service's own biologists also thought the theoretical minimum population sizes were
7 important in analyzing the Bi-State Sage Grouse's genetic persistence: "[S]ince all pops are below
8 theoretical minimum pop size for long-term persistence, we need to work this factor into the
9 resiliency discussion. . . . [R]esiliency may be insufficient as a result of pop sizes below the
10 theoretical minimum needed for persistence (this will affect not only resiliency within pops, but
11 also persistence of pops which in turn may reduce redundancy)." BSSG062822 (Doc. 5112). The
12 Service biologists' continued belief that the theoretical minimum population levels were important
13 underscores that the agency could not simply dismiss this unfavorable data, but instead was
14 required to consider this factor in its genetic diversity analysis and ultimate listing decision.

15 The Service also improperly concluded that genetic diversity within individual PMUs
16 could support sufficient resiliency, redundancy, and representation for the species as a whole. The
17 record contains multiple statements that the Bi-State Sage Grouse's subpopulations and PMUs are
18 isolated. Thus, genetic diversity is not generally shared across the species' subpopulations. For
19 example, in the 2015 Species Report, the Service stated that there is "isolation among populations
20 contained within the DPS, as inferred from demographic and genetic investigations."
21 BSSG000550 (Doc. 5508). The Service's own map of the subpopulations shows lack of
22 connectivity between the subpopulations. See also BSSG062499 (Doc. 5111) ("[P]ops act
23 independently and areas with extirpated pops tend not to be recolonized.").

24 This fact is especially problematic given the Service's finding that genetic connectivity
25 continues to erode. The Oyler-McCance and Tebbenkamp studies themselves recognize that
26 connectivity may be even more important than genetic diversity. The Oyler-McCance study
27 declares that "[m]anagement actions that promote genetic connectivity... may be critical to the
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1 long-term viability of the Bi-State DPS.” BSSG109821 (Doc. 6538). And the Tebbenkamp study
2 concludes that “[c]onservation and management efforts focused solely at the subarea-scale,
3 however, will fail to conserve the Bi-State DPS as a whole. Grouse species have a tendency to
4 become subdivided, or even isolated.” BSSG112009 (Doc. 6672). The Service itself found that as
5 the connectivity between the Bi-State Sage-Grouse’s subpopulations disintegrates, “genetic
6 challenges will likely influence long-term viability.” BSSG000549-50 (Doc. 5508).

7 Service biologists expressed disapproval of the Withdrawal Decision’s resiliency,
8 redundancy, and representation analysis for precisely this reason. One biologist commented:
9 “This section uses apparent resiliency in the core pops to conclude that the entire DPS exhibits
10 resiliency. Since birds do not appear to move between pops, or recolonize areas, I don’t think
11 resiliency in the core pops translates into resiliency across the entire DPS.” BSSG062820 (Doc.
12 5112). Another biologist agreed, stating that “given that pops operate independently, resiliency at
13 the entire-DPS level seems low.” BSSG062822 (Doc. 5112).

14 The Service’s analysis of long-term persistence also failed to adequately consider how the
15 expected losses in the three most vulnerable PMUs would affect the species’ resiliency,
16 redundancy, and representation. “[I]f we are expecting the loss of peripheral pops in the DPS,
17 [r]epresentation will take a hit.” BSSG062500 (Doc. 5111). This directly discounts the benefit of
18 the two new studies’ findings of additional genetic diversity. For example, the Oyler-McCance
19 study shows that the Pine Nut subpopulation has the highest genetic diversity of any
20 subpopulation in the PMUs – yet it is undisputedly most at risk for extirpation, which would erase
21 any potential contribution to the species’ overall genetic diversity and resiliency. BSSG109826
22 (Doc. 6538). The Tebbenkamp study concurs: “Maintaining as many populations as possible,
23 even the smaller populations, will be also important since each population can act as an important
24 linkage in facilitating gene flow.” BSSG112009 (Doc. 6672). Thus, the Service “[n]eed[ed] to
25 address the relatively high probability of loss of the smaller, more peripheral populations” in its
26 analysis of long-term persistence. BSSG062820 (Doc. 5112).

1 The Service has one response to every threat to resiliency, representation, and redundancy:
2 future conservation efforts under the Bi-State Action Plan. Yet as discussed below, not even the
3 Service scientists had faith in the conservation efforts and the 2015 Species Report remained
4 distinctively pessimistic about the fate of the smaller PMUs: (1) Pine Nut (“Because of the
5 current small population size and potential future magnitude of habitat impacts, loss of the sage-
6 grouse population in this PMU [] seems likely.”), (2) Desert-Creek Fales (“the existing condition
7 is not ideal and is likely to worsen going forward”), (3) Mount Grant (“Long-term preservation of
8 the sage-grouse population in the Mount Grant PMU is uncertain”), (4) White Mountains
9 (“vulnerable to extirpation” because it is small and on the periphery of the species range).
10 BSSG000568 (Doc. 5508).

11 In fact, the record shows that even after considering the new genetic studies and the Bi-
12 State Action Plan, “concern over maintaining long-term genetic and demographic viability
13 remains.” BSSG062498 (Doc. 5112). The biologists’ determination that the Bi-State Sage
14 Grouse was still at risk was summarized in a document analyzing the resiliency, redundancy, and
15 representation of the species:

16 Based on the information above, we find that resiliency, redundancy, and representation in
17 the Bi-State DPS are a concern for the DPS’s long-term persistence given current and
18 future conditions. The best available information indicates resiliency overall is low, with
19 four of six populations being small. Trends for some for [sic] the smaller populations (e.g.,
20 Pine Nut, Fales, and Parker Meadows) remain of concern at the DPS level because
21 fluctuations in these small, less secure populations are likely to result in extirpations and
22 loss of population redundancy within the DPS. Representation is not of concern at this time
but may be in the future if smaller populations become extirpated. When considered
together, the low level of resiliency and redundancy, current and future threats to the Bi-
State populations . . . , 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 the long-term persistence of the Bi-State DPS may be at risk.

23 BSSG064536 (Doc. 5158). This was the Service’s own analysis of the so-called “3Rs.” Since the
24 Service’s ultimate conclusion was therefore contrary to the facts in the record, the Withdrawal
25 Decision should be reversed as arbitrary and capricious.

26 Statements throughout the record demonstrated that the best available science continued to
27 show that the Bi-State Sage Grouse was threatened on the day of the listing decision. The Garton
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1 study relied upon in the Proposed Listing had determined there was a 100 percent probability that
 2 the Bi-State Sage Grouse’s effective population would fall below 500 breeding birds in 30 years
 3 BSSG103566 (Doc. 6148).⁴ In addition, it found more than a one-in-three chance that effective
 4 population would be less than 50 in 100 years. BSSG103563 (Doc. 6148). Based on these
 5 calculations and using an effective population of 500 breeding birds as a threshold, the Garton
 6 study concluded that “[l]ong-term persistence [] is clearly unlikely.” BSSG103581 (Doc. 6148).
 7 In other words, it concluded that the Bi-State Sage Grouse was at least threatened because it was
 8 “likely to become endangered within the foreseeable future.” Thus, if the Service had properly
 9 considered the best available science, it would have continued to find that the Bi-State Sage
 10 Grouse was threatened.⁵

11 Indeed, the record is replete with language demonstrating that the Service continued to
 12 think the Bi-State Sage Grouse still met the definition of a threatened species, even with the new
 13 information and the PECE analysis. After considering the new studies and conservation promises,
 14 12 out of 13 biologists gathered to provide their expert opinion believed that the Bi-State Sage
 15 Grouse continued to be threatened. When the letter recommending the Withdrawal Decision was
 16 written a few days later, the regional office stated:

17 Not surprisingly, little has changed since the 2013 finding. The Bi-State is found in 6
 18 population areas, 2 are robust and believed to be viable, 2 are less than robust but viable at
 19 this time, and 2 are in trouble and may not persist. Information since 2013 generally
 20 supports the conclusions about abundance, trends, and persistence that were used in the
 2013 finding. . . . We find that the threats to the Bi-state have declined since 2013, but not
 in a major way.

21 BSSG085264–68 (Doc. 4916). In an information memorandum to the Director, the Service again
 22 stated that “Given current habitat conditions and factors (e.g., numbers of birds and trends, current
 23 conservation efforts), we find that the Bi-State DPS is likely to become endangered within the
 24 foreseeable future (threatened).” BSSG063654 (Doc. 5137). And similar language appeared in

25 _____
 26 ⁴ In the Garton study, the Bi-State population is listed as the Mono Lake, California-Nevada
 population.

27 ⁵ Even if the Service said it was depending on the Coates Analysis, it continued to rely on the
 28 Garton study in the Withdrawal Decision for population trends and long-term persistence. 80 Fed.
 Reg. 22,831-2, 22,839.

1 drafts of the withdrawal decision: “Following a thorough evaluation of the previous and new
2 information, we have determined that, given current conditions and trends, the overall status of the
3 Bi-State DPS (i.e., likely to become endangered in the foreseeable future) remains unchanged.”
4 BSSG062537 (Doc. 5111).

5 In short, every indication in the record demonstrates that the Bi-State Sage Grouse
6 remained threatened on the day of the Withdrawal Decision, even according to the Service’s own
7 analysis and even giving appropriate weight to “new information.” In their opposition papers,
8 Defendants urge the Court to overlook this fundamental fact and simply defer to the agency’s legal
9 conclusion because the data are incomplete or imperfect, because the Service biologists convened
10 as part of the Recommendation Team “served a limited advisory role in the decision-making
11 process,” (Defs. Mem. at 9, n.3), or because the scientific models on which the Service routinely
12 relies are “theoretical” and “not statistically proven.”⁶ All of these arguments are mere
13 smokescreens. The record clearly shows, and the Withdrawal Decision itself admits, that the best
14 available science mandates listing of the Bi-State Sage Grouse as “threatened” under the ESA.
15 Defendants’ only real argument – and the one on which they spend nearly half their brief – is that
16 changes to the Bi-State Action Plan after the Proposed Listing, in the form of new funding
17 “commitments,” justify the Service’s reversal and its new finding that future conservation
18 promises are sufficiently certain to be both implemented and effective so as to eliminate the
19 species’ current extinction threats. Plaintiffs address this issue below, but turn first to the

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22 ⁶ Defendants argue that the court should not consider comments by the Recommendation Team
23 because the meeting occurred “at an interim step in the decision-making process.” Defs. Mem. at
24 9, n.3, citing Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007).
25 But courts may properly consider pre-decisional comments in reviewing whether an agency action
26 is arbitrary, especially where, as here, those comments were made at a meeting of the expert
27 biologists purportedly convened to evaluate the science used in the decision process. See, e.g.,
28 Barnes v. U.S. Dept. of Transp., 655 F.3d 1124, 1133 (9th Cir. 2011) (distinguishing Nat’l Ass’n
of Home Builders and finding staff comments revealed issues that the agency subsequently “chose
to gloss over” in its final analysis). The record here demonstrates the importance of the
Recommendation Team meeting to the process. Five days after the meeting, a letter was sent from
the western U.S. regional directors recommending withdrawing the proposed listing and citing the
Recommendation Team meeting in its recommendation. Three days later, the Service began
discussing early publication of the rule. BSSG058586 (Doc. 4935).

1 Service’s separate legal error in failing to properly analyze whether the Bi-State Sage Grouse is
2 threatened in a significant portion of its range.

3 **II. The Service Interpreted “Significant” and “Range” Incorrectly in its Policy on**
4 **“Significant Portion of Its Range” and Applied the Policy to the Bi-State Sage Grouse**
5 **Haphazardly and Unlawfully.**

6 While the Ninth Circuit in Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001)
7 (“Defenders”) may have described “significant portion of its range” as “ambiguous,” Defs. Mem.
8 30, it gave clear direction that the Service may not do what it does presently with the statutory
9 language, which is to define it so narrowly as to rob it of function. The District Court in Arizona
10 has recently confirmed that a threat in a “significant portion of its range” must be read to mean
11 something other than a threat “throughout all of its range.” Ctr. for Biological Diversity v. Jewell,
12 248 F. Supp. 3d 946, 955–58 (D. Ariz. Mar. 29, 2017) (“CBD I”).⁷ And the Ninth Circuit has
13 twice found no ambiguity in the term “range” itself, confirming that the Service must examine a
14 species’ lost historical range when analyzing the significant portion of its range – in contrast to the
15 Service’s current position in its SPR policy. Defenders, 258 F.3d at 1145–46; Tucson
Herpetological Soc’y v. Salazar, 566 F.3d at 877.

16 Even if its SPR Policy were consistent with the ESA, the Service applied the policy
17 unlawfully in its Withdrawal Decision, by (1) declaring without any reasoning whatsoever that no
18 portion of the sage-grouse’s range is “significant,” (2) concluding that there are no risks to any
19 portion of the Bi-State sage grouse’s range, including the fragile Pine Nut PMU, despite evidence
20 to the contrary, (3) omitting an assessment of threats to the Desert Creek-Fales PMU, which it
21 elsewhere in the record found to have a “moderate to low probability of persistence,” and (4)
22 setting out only a “quick and dirty” analysis of historical range as an afterthought.

23 **A. Plaintiffs’ Challenges to the Service’s Interpretation and Application of**
24 **“Significant” Are Ripe.**

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26
27 ⁷ The Court reconfirmed its ruling in response to a motion to alter or amend the judgment. See
28 CBD I Order After Reconsideration, Dkt. 163-7 at 2–4, (“CBD I Reconsideration Order”) (Oct.
25, 2017)

1 As a preliminary matter, Defendants bizarrely argue that Plaintiffs' challenges to the SPR
 2 Policy are unripe. Defs. Mem. at 32. Yet the final SPR Policy is being applied in listing decisions
 3 and was applied in this one, and, contrary to the Service's contentions, the Withdrawal Decision
 4 did apply the policy and reached a conclusion that no portions of the Bi-State sage grouse's range
 5 are "significant" or endangered or threatened.

6 Facial challenges like Plaintiffs' are ripe as soon as the agency policy is adopted as final.
 7 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1042 (1992) ("Facial challenges are ripe when
 8 the Act is passed."). The SPR Policy has been in effect and been applied in ESA listing decisions
 9 since it was adopted as final in 2014, just as it was applied to the Bi-State Sage Grouse. Neither
 10 the policy nor its effects are speculative; as Defendants acknowledge, they are facing challenges to
 11 the SPR Policy in other courts as well. Defs. Mem. at 34. See, e.g., Whitman v. Am. Trucking
 12 Ass'ns, 531 U.S. 457, 479 (2001) (finding EPA's implementation policy ripe for review where the
 13 challenge was "purely one of statutory interpretation that would not 'benefit from further factual
 14 development of the issues presented'"); Ctr. for Biological Diversity v. Kempthorne, 588 F.3d
 15 701, 708 (9th Cir. 2009) ("A claim is usually ripe 'if the issues raised are primarily legal, do not
 16 require further factual development, and the challenged action is final.'") Continued application
 17 of the SPR Policy causes Plaintiffs hardship by decreasing the protections afforded to species that
 18 Plaintiffs observe and study, including the Bi-State Sage Grouse. See Spirit of Sage Council v.
 19 Norton, 294 F. Supp. 2d 67, 85 (D.D.C. 2003); Ctr. for Biological Diversity v. U.S. Fish &
 20 Wildlife Serv., 2005 WL 2000928, at *8 (N.D. Cal. August 19, 2005).

21 As to the as-applied challenge, Defendants err when they assert that the Service did not
 22 address whether any portion of the sage grouse's range was "significant." Defs. Mem. at 33. The
 23 question of what makes an as-applied challenge ripe is thus irrelevant.⁸ Here, the Service did
 24 make a determination on significance under the SPR Policy: "In conclusion, we find that
 25 substantial information indicates that: (1) There are no portions of the bi-State DPS that may be
 26 _____

27 ⁸ Defendants cite only one supporting ESA case, WildEarth Guardians v. Jewell, 134 F. Supp. 3d
 28 1182, 1195 (D. Ariz. 2015). That case was not framed in terms of ripeness, and, unlike here, the
 Service did not address significance in its SPR analysis.

1 significant.” 80 Fed. Reg. at 22,853. As a result, the Service applied its interpretation of
 2 “significant” to the sage grouse, framing a concrete legal and factual issue for the court to
 3 resolve.⁹ See Defs. Mem. at 33 (admitting that “Plaintiffs’ challenges may be fit for review in a
 4 case in which FWS has applied its interpretation of ‘significant.’”).

5 **B. The SPR Policy’s Interpretation of “Significant” Is Unlawful.**

6 Indeed, other courts have already spoken on the matter. The District Court in Arizona has
 7 already held that the SPR Policy unlawfully renders the term “significant” meaningless and
 8 violates congressional intent in a case brought by Plaintiff Center for Biological Diversity. CBD I.
 9 As the Service acknowledged there, its discretion to interpret “significant” is limited by the Ninth
 10 Circuit’s finding in Defenders that the term must unambiguously provide an independent basis for
 11 listing. 258 F.3d at 1141–42; Defs. Mem. at 34. The Ninth Circuit held that “significant” could
 12 not be interpreted so that a “significant portion of its range” was only triggered when the entire
 13 species is threatened or endangered “throughout all of its range,” because that would
 14 “unacceptabl[y]” render “significant portion of its range” superfluous. 258 F.3d at 1141–42.
 15 While the Service claims the SPR Policy “‘did not set the threshold as high as it was’ in
 16 [Defenders],” Defs. Mem. at 34, in reality the Service adopted a functionally equivalent threshold.

17 The District Court in Arizona vacated the SPR Policy in CBD I for precisely that reason.
 18 As the court recognized, logic shows that the SPR Policy’s definition necessarily renders
 19 “significant” superfluous in the clear violation of the Ninth Circuit’s precedent. CBD I, 248 F.
 20 Supp. 3d at 956-57. “If a portion of a species’ range is so vital that its loss would render the entire
 21 species endangered or threatened, and the species is endangered or threatened in that portion, then
 22 the entire species is necessarily endangered or threatened.” Id. at 956. In other words, if it is
 23 foreseeable that the entire species could go extinct without the portion (which is necessary under

24 _____
 25 ⁹ The very fact that the Service made this finding indicates that it did not assume it to be
 26 unnecessary or extraneous. If the Service wanted to make the novel argument that the Defendants
 27 raise here for the first time, the time to do so was at the Withdrawal Decision. Defendants may
 28 not substitute a post-hoc rationalization for the Service’s plain reasoning at the time of decision.
Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Service, 524 F.3d 917, 932 n.10 (9th Cir. 2008)
 (courts may not consider post hoc justification or infer “an analysis that is not shown in the
 record”).

1 the Service’s definition), and it is foreseeable that the portion will be extirpated, then it is
2 necessarily foreseeable that the entire species could go extinct. The SPR Policy thus renders the
3 phrase “significant portion of its range” superfluous because “there are no circumstances under
4 which accurate application of the Final SPR Policy would result in a finding that a species is
5 endangered or threatened in a significant portion but not all of its range.” *Id.* at 955, n. 9.

6 The Service acknowledged as much in the administrative record, yet adopted the SPR
7 Policy anyway. In a white paper, the Service noted that the SPR Policy’s definition of significant
8 is “problematic” because if a portion is “significant,” then the species is currently threatened
9 throughout all of its range. SPR000718 (SPR Team White Paper). The SPR Team explained:
10 “With this definition of significance, we are predicting that at some point in the future (and by
11 predicting an outcome, it is by definition ‘foreseeable’) threats acting on the portion will put the
12 species at risk of extinction.” SPR000740.

13 In their brief, Defendants make no attempt to combat this definitional problem. Instead,
14 they argue only that the Service “made every effort” to ensure its interpretation was “conceptually
15 separable” from the interpretation rejected in Defenders and then point to examples they
16 incorrectly allege show that the SPR Policy affords an independent basis for listing. Defs. Mem.
17 at 36–37.

18 The Service’s first example, the proposed listing of the African Coelacanth, Defs. Mem.
19 at 37, was rejected as possible support for the Service’s position in CBD I. 248 F. Supp. 3d at
20 957; see also CBD I Reconsideration Order at 2-4. First, the African Coelacanth proposed listing
21 was based on a “more lenient definition of significance” (would “significantly increase the
22 extinction risk of the species as a whole”) than the SPR Policy’s definition (“without the members
23 in that portion, the species would be in danger of extinction”), and therefore its result has little
24 bearing on whether the SPR Policy, accurately applied, provides an independent basis for listing.
25 See CBD I Reconsideration Order, at 3–4; CBD I, 248 F. Supp. 3d at 957. Second, the CBD I
26 court determined that logically, the finding in the listing decision was that the species was
27 threatened throughout all its range, not just in a significant portion: “If ‘the effect of extinction
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1 throughout' the Tanzanian portion of [its] range 'is the threat of extinction everywhere,' as NMFS
2 found, 'then the threat of extinction throughout' the Tanzanian portion of [its] range 'is equivalent
3 to the threat of extinction throughout all its range.'" CBD I Reconsideration Order, at 4 (quoting
4 Defenders (emphasis in original)). And finally, the African Coelacanth was ultimately listed
5 because it was threatened in a distinct population segment, not because it was threatened in a
6 significant portion of its range. Id.

7 The Service's second example, the proposed listing of the Giant Manta Ray, Defs. Mem. at
8 37, similarly fails to support the Service's position. First, the Giant Manta Ray's proposed listing
9 has not been made final – the agency could still change its analysis prior to listing. Defs. Mem. at
10 37, n. 29. Second, while this time the Service applied the SPR Policy's definition of "significant,"
11 being threatened in a "significant portion" of its range was again the same as being threatened
12 throughout all its range, since the portions the Service deemed significant were actually the core
13 populations of the species; the other populations were in another ocean, "small and sparsely
14 distributed," and unable to sustain themselves. 82 Fed. Reg. 3,694, 3,710–11 (Jan. 12, 2017).

15 The SPR Policy's interpretation of "significant" also is not faithful to the purpose of the
16 legislation. Congress added the "significant portion of its range" language to the ESA "to expand
17 greatly [its] important efforts to protect species threatened with extinction to include those which
18 may become endangered . . . within a part of their habitat only." 119 Cong. Rec. 30,167 (Sept. 18,
19 1973). It later made clear that interpretations of the Act which "might . . . permit[] a lesser
20 standard of protection for threatened and endangered species" would not be tolerated. See 124
21 Cong. Rec. 38,532 (1978).

22 The Service contends that it "gave effect to this 'congressional intent' . . . by 'protecting
23 the entire species when it is endangered or threatened in a significant portion of its range.'" Defs.
24 Mem. at 35–36, n. 27 (emphasis in original) (quoting SPR 000003). Yet that was never the
25 Service's choice to make. The ESA has always mandated that protections be afforded throughout
26 the entire range of any species that is listed as threatened or endangered. See Defs. of Wildlife v.
27 Salazar, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010). In adopting the SPR provision, the
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1 “significant shift” was in the timing and criteria for a species receiving protection, not the scope of
2 the protection afforded. See 119 Cong. Rec. 30,167 (Sept. 18, 1973).

3 Congress did not intend this “significant shift” to make a difference only in very rare cases,
4 for then the shift would not be significant at all. Yet even the SPR Policy itself admits that it will
5 rarely provide an independent basis for listing: Listing a species “based on its status in an SPR
6 will occur only under a limited set of circumstances and will be relatively uncommon.” 79 Fed.
7 Reg. at 37,581.

8 **C. The Service Failed to Explain Why It Found No Portions of the Range**
9 **Significant and to Explain Why Four of the PMUs Were Not Threatened or**
10 **Endangered.**

11 The Service’s most blatant error, of course, is that it concluded that “there are no portions
12 of the bi-State DPS that may be significant” without even a sentence of analysis. Indeed,
13 Defendants admit that the Service did not conduct any analysis to support this conclusion. Defs.
14 Mem. at 39. And the conclusion is contrary to other statements in the record about the importance
15 of each of the smaller subpopulations. BSSG000568 (Doc. 5508). As a result, this conclusion is
16 clearly arbitrary and capricious.

17 The Service also utterly failed to support its determination that no portions of the Bi-State
18 Sage Grouse’s range are threatened. The actual SPR analysis in the Withdrawal Decision is less
19 than one page in length and is comprised of little more than four conclusory statements, none of
20 which seriously support its conclusion that the Bi-State Sage Grouse is not threatened in the most
21 vulnerable portions of its range.

22 First and second, the Service relies on the presence of “multiple” birds and “one to eight
23 active leks [] within each PMU.” 80 Fed. Reg. 22,853. To escape the risk of extirpation, a PMU
24 must be large enough to ensure redundancy, resiliency, and genetic representation. “Multiple”
25 birds (by definition as few as two) is nowhere near the minimum of 5,000 birds or 500 breeding
26 adults needed to maintain long-term viability. Moreover, PMUs with only one (Pine Nut), three
27 (White Mountains), or even six (Mount Grant) breeding grounds are at great risk of succumbing to
28 future threats, including sudden events or habitat loss.

1 Third, the Service states that the “stresors [sic] acting upon these small populations” are
2 the same threats throughout the range. But, as the Service acknowledged, these subpopulations
3 are more vulnerable to these same stressors, so the fact that stressors are of the same kind does not
4 mean that they act upon the PMUs in the same degree. BSSG000549 (Doc. 5508).

5 Fourth, the Service notes that the Coates Analysis found that “several of the populations in
6 the bi-State area (including but not limited to the core populations) are stable (as opposed to
7 declining).” But, as explained above, the Coates Analysis failed entirely to evaluate the Mount
8 Grant and White Mountains PMU, and its evaluation of the Pine Nut PMU is (as the Service
9 admits) unreliable. It therefore cannot support the Service’s conclusions as to these three PMUs.

10 In fact, the Service’s determination that the Pine Nut PMU is neither endangered nor
11 threatened is the exemplar of how egregiously the Service disregarded the record. The 2015
12 Species Report found that recent data “suggest significant cause for concern” for the Pine Nut
13 PMU. BSSG000568 (Doc. 5508). This PMU has the fewest sage-grouse and the greatest
14 reduction of sagebrush habitat of all the PMUs, BSSG000446, and a single lek at which no males
15 were observed in 2013 and only a single male in 2014 “although both years were surveyed
16 intensely,” BSSG000447. Despite the Service’s assertion that “stresors [] are not geographically
17 concentrated,” the record shows that the Pine Nut PMU is far more threatened by wildfires,
18 cheatgrass and pinyon juniper encroachment.¹⁰ Defendants point for support to two references
19 that eight males were documented in the Pine Nut PMU, Defs. Mem. at 39-40, but the same
20 monitoring report shows that on this particular visit, (1) three out of five nests found in the PMU
21 had failed, with unhatched and unsterilized eggs; (2) no females with offspring were spotted; and
22 (3) two birds were found dead of predation. BSSG052573 (Doc. 4549). The threshold for quasi-
23 extinction is 50 breeding adults, and the Pine Nut PMU has less than 20 breeding adults.
24 BSSG000456. The overwhelming evidence in the record is that the Pine Nut PMU will be
25 extirpated in the foreseeable future. As a result, it was arbitrary and capricious for the Service not

26 ¹⁰ BSSG000504 (“the Pine Nut PMU proves to be the greatest restoration challenge because of
27 cheatgrass”); BSSG000507 (“Pine Nut PMU being the most influenced [by pinyon
28 encroachment]”); BSSG000513 (fire occurrence more than twice as frequent in Pine Nut PMU
than other PMUs) (Doc. 5508).

1 to find that at least the Pine Nut PMU – if not also the Mount Grant and White Mountains PMUs,
2 which the Service likewise failed to analyze in applying the SPR Policy – is endangered or
3 threatened.

4 The Service also improperly failed to consider the Desert Creek-Fales PMU as a
5 potentially vulnerable body. Throughout the record, the Service characterizes the Desert Creek-
6 Fales PMU as one of the four PMUs that had “moderate to low probability of persistence” and
7 were “significantly reduced and threatened.” BSSG000429 (Doc. 5508) (emphasis in original).
8 Defendants now argue that the Service did not have to evaluate the Desert-Fales PMU because its
9 population was stable. Defs. Mem. at 38–39. Yet the Service found one of its two subpopulations
10 is in decline and that conditions are “likely to worsen” due to ongoing threats, stating “[t]his PMU
11 has seen episodic sage-grouse population declines in the past, and the indicators of these declines
12 remain.” BSSG000568 (Doc. 5508). Defendants argue that the Service excluded the PMU from
13 its evaluation based on population size and stability, but Desert Creek-Fales PMU is roughly the
14 same size as Mount Grant PMU in population which was included in the SPR evaluation. 80 Fed.
15 Reg. 22,830. These facts demonstrate that the Desert Creek-Fales PMU “warrant[s] further
16 consideration” under the SPR Policy, see 79 Fed. Reg. at 37,585, because it is more at risk of
17 extirpation than the core PMUs.

18 **D. The SPR Policy’s Interpretation of “Range” As Excluding Historical Range**
19 **Misreads the Present Tense Definition, and the Service Did Not Adequately**
20 **Analyze Historical Range.**

21 Defendants do not even attempt to address any of the statutory interpretation arguments
22 previously raised by Plaintiffs about the SPR Policy’s interpretation of “range.” Instead,
23 Defendants unconvincingly argue that the SPR Policy’s interpretation of “range” as the species’
24 currently occupied range must be correct because the definition in which “range” is included is
25 framed in the present tense. Defs. Mem. at 31.

26 Yet courts have found that a species can be “in danger of extinction” in a range that
27 includes both currently occupied and historical, now unoccupied, range. Cf. Defenders of Wildlife
28 v. Norton, 258 F.3d at 1145 (“[A] species can be extinct ‘throughout . . . a significant portion of its

1 range’ if there are major geographical areas in which it is no longer viable but once was.”) (second
2 alteration in original); Humane Soc’y v. Zinke, 865 F.3d 585, 604 (D.C. Cir. 2017). And as the
3 D.C. Circuit Court of Appeals recently explained, “[t]he placement of ‘is’ in the definitions seems
4 most naturally to require that the species currently be endangered or threatened within its range,
5 not to dictate the temporal scope of geographical evidence the Service is to consider.” Humane
6 Soc’y v. Zinke, 865 F.3d at 604.

7 Defendants also assert that courts have “consistently upheld FWS’s interpretation of
8 ‘range,’” Defs. Mem. at 31. But this assertion is misleading. The District Court in D.C. explicitly
9 rejected the Service’s interpretation of range in the SPR Policy, see Humane Soc’y v. Jewell, 76 F.
10 Supp. 3d 69, 122–23 (D.D.C. 2014), and none of the cases Defendants cite address all of the
11 statutory arguments set forth by the Plaintiffs here, see Pl. Mem. at 36-7.¹¹ On the other hand, the
12 Ninth Circuit has twice found no ambiguity in the term “range” itself, while confirming that the
13 Services’ SPR analysis must include analysis of lost historical range. Defenders, 258 F.3d at
14 1145–46; Tucson Herpetological Soc’y, 566 F.3d at 877.

15 Indeed, the Service knew it was required to analyze the significance of lost historical
16 range. BSSG076872–73 (Doc. 5594) (noting that analysis was “need[ed]” because of the Ninth
17 Circuit rulings). The Service is required to “develop some rational explanation” for why lost and
18 threatened portions of a species’ range are not significant. See Tucson Herpetological Soc’y v.
19 Salazar, 566 F.3d at 877; Humane Soc’y v. Zinke, 865 F.3d at 603, 605–06. But the Service did
20 not include any such analysis in the Withdrawal Decision. In fact, the Service did not even begin
21 the required analysis until at least March 11, 2015 – over four months after the decision was made
22 to withdraw the proposed listing. See BSSG076872–73 (March 11, 2015 email stating the
23 analysis was needed); BSSG058540 (Doc. 4907) (“Decision from the Service (via the Executive)
24 is expected by November 12, 2014.”). And even then, the Service only compiled an “informal[,]”
25 “SHORT/SWEET,” “2 pgs or less, double spaced,” analysis. BSSG076872-4 (Doc. 5594);

26
27 ¹¹ In addition, Congress uses the word “current” to qualify the term “range” in another provision
28 of the ESA authorizing release of experimental populations, 16 U.S.C. § 1539(j)(2)(A). Its use of
“current” reflects Congress’ understanding that the use of the word “range” by itself elsewhere in
the ESA has the broader meaning of a species’ current and historical range.

1 BSSG078582 (Doc. 5693). The Service’s post-hoc, “quick and dirty” analysis after the decision
 2 to withdraw the proposed listing was made necessarily had to find that the lost range was not
 3 significant to support the Withdrawal Decision. The cursory historic range analysis also renders
 4 the listing decision arbitrary and capricious because it was “insufficiently reasoned,” Humane
 5 Soc’y v. Zinke, 865 F.3d at 605–06, and “entirely failed to consider an important aspect of the
 6 problem,” State Farm, 463 U.S. at 43.

7 In sum, the Service based its SPR analysis on a legally flawed policy and then
 8 compounded this defect with a haphazard application of the policy to the Bi-State Sage Grouse
 9 population providing conclusions with little or no analysis. On this basis as well as others, the
 10 Withdrawal Decision is arbitrary and capricious, and the Court should invalidate it.

11 **III. The Service Violated PECE and the Endangered Species Act in Withdrawing the**
 12 **Proposed Listing Based on the Conservation Efforts**

13 Ultimately, Defendants’ real response to all of Plaintiffs’ contentions is that the promises
 14 of future action identified in the Bi-State Action Plan are sufficient to avoid listing of the Bi-State
 15 Sage Grouse in all or a portion of its range, despite the clear science showing that listing is
 16 warranted under the ESA.¹² Much as Defendants may wish this statement to be true, the record
 17 does not actually support it. And neither PECE policy nor the cases on which Defendants rely
 18 provide a basis for this Court to defer to agency conclusions that are based, as here, on
 19 unsubstantiated speculation, untested inferences, anecdotes, and aspirations. The ESA requires
 20 listing decisions to be made based on actual scientific data and information, and the science in the

21 ¹² Although the Service’s lawyers defend against the SPR claim on other, unavailing grounds as
 22 discussed above, even a cursory look at the Withdrawal Decision reveals that the SPR analysis,
 23 also relies on the successful implementation and effectiveness of the Bi-State Action Plan. 80
 24 Fed. Reg. at 22, 853 (noting that while “while there is information available that may lead some to
 25 believe that the populations in these three PMUs are at risk of becoming endangered in the
 26 foreseeable future . . . the best available information currently indicates that a substantial amount
 27 of conservation effort is currently being applied (and will be carried out in the future) within the
 28 Pine Nut, Mount Grant, and White Mountains PMUs, as well as throughout the entire range of the
 DPS [citing PECE analysis above] and that “[a]pplication of these conservation efforts across the
 range of the DPS over the next 10 years . . . changes the trajectory from a point where the DPS
 was previously considered to be a threatened species, to a point where the best available
 information related to current and future conservation efforts indicates the entire range of the DPS,
 including the specific portion of the DPS’s range in the Pine Nut, Mount Grant, and White
 Mountains PMUs, does not meet the definition of a threatened species or an endangered species”).

1 record shows that the Service erred in failing to list the Bi-State Sage Grouse as a threatened
2 species.

3 **A. The Service Vastly Overstates the Amount and Significance of the New**
4 **Information Submitted on the Bi-State Action Plan.**

5 Defendants cite a constellation of working groups and teams and “sophisticated new
6 scientific models” to give the (mis)impression that the Bi-State Action Plan was actively evolving
7 since 2013. Defs. Mem. at 5–7, Def. Intervenor’s Mem. at 3. But, as the record makes clear, these
8 were almost all in place at the time of the Proposed Listing, when the Service found that the Plan’s
9 conservation efforts were insufficient to avoid listing. *Id.* Various updates to the Bi-State Action
10 Plan also existed at the time when the Service found it to be insufficient to avoid listing. *See* 78
11 Fed. Reg. 64,358, 64,377 (discussing the 2012 version of the BSAP). There is no evidence in the
12 record that the Plan was “new and improved” at the time of the Withdrawal Decision, beyond the
13 new funding commitments discussed in Plaintiffs’ opening brief.

14 Conservation efforts by state and federal agencies have been underway since 2004.
15 Defendants-Intervenor’s even characterize these efforts as “significant.” Def. Intervenor’s Mem. at
16 3. The 2012 Bi-State Action Plan summarized the past 10 years of conservation efforts, included
17 a Conservation Planning Tool, and put forth a “comprehensive set of strategies, objectives and
18 actions that would provide effective long-term conservation.” BSSG079493 (Doc. 5716). The
19 Conservation Objectives Team, consisting of State agencies and Service representatives, had
20 released a report prioritizing threats. By the time of the Proposed Listing in 2013, the Executive
21 Oversight Committee (“Committee”) had been formed and the Technical Advisory Committee
22 was in place to advise the larger Committee. Yet, despite over a decade of conservation efforts,
23 the Service found the Bi-State Sage Grouse still faced significant threats and warranted listing as a
24 threatened species in 2013.

25 Because the science did not meaningfully change between 2013 and 2015, *see*
26 BSSG057940-45 (Doc. 4835) (summary table showing vast majority of species’ threats as
27 “unchanged”), despite prior conservation commitments, the Service carries a heavy burden to
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1 show real, concrete improvements in conservation measures that could reasonably avoid listing
 2 and justify its dramatic about-face in the Withdrawal Decision. As Plaintiffs explain in their
 3 opening brief, however, the only real change in the Bi-State Action Plan was the paper promise
 4 that federal agencies would prioritize certain vegetation projects in sage grouse habitat and that
 5 state or local governments would work on educating private landowners. The Plan contains no
 6 assurances – nor could it – that funding for these promised efforts will actually materialize.¹³
 7 Moreover, Plaintiffs’ concern that the promised funding may be unilaterally rescinded or
 8 reallocated for political reasons, as politically-appointed agency managers change from one
 9 administration to the next, is a judicially-recognized consideration under the ESA. See Oregon
 10 Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1158 (D. Oregon 1998) (“This court
 11 declines to tie the fate of the [species] to the whim of politics.”).

12 Equally or more concerning, given the lack of actual progress in conserving the species
 13 over the prior decade and the absence of significant changes to the Bi-State Action Plan, it is far
 14 from certain that promised future conservation efforts, even if implemented, will be effective.¹⁴
 15 The Service’s own biologists continued to doubt that the Bi-State Action Plan will be effective,
 16 despite any new information the Service may have received about it. At the Recommendation
 17 Team meeting, biologists stated: “Conservation commitments are hopeful but don’t see a real
 18 change . . . Effectiveness of projects are questionable . . . Conservation commitments are good but
 19 legal liability of those commitments under the PECE policy is not convincing for reasonably

20 _____
 21 ¹³ Defendants first argue that “Plaintiffs identify only one example of this purported risk,” and
 22 then claim that Plaintiffs cannot actually offer any examples because such discussion is beyond the
 23 scope of the administrative record. Defs. Mem. at 17-18. Plaintiffs’ point, as Defendants well
 24 know, is that future government spending and congressional appropriations are fraught with
 25 uncertainty (as every American who turns on the nightly news is well aware) and that the Service,
 26 therefore, cannot rely on speculative future budgets to avoid listing. It is Defendants, not
 27 Plaintiffs, who are being “overly simplistic.” Defs. Mem. at 18.

28 ¹⁴ Future effectiveness is especially doubtful because some of the efforts Defendants and
 Defendants-Intervenors cite as future efforts designed to protect the Bi-State Sage Grouse are not
 actually targeted to protect the species. For example, the closure of Mono County’s landfill and
 its moving costs of \$2.2 million are driven partially or wholly by the expiration of the landfill’s
 lease in 2023, and the owner’s unwillingness to extend it, rather than by sage grouse conservation.
 BSSG000488 (Doc. 5508). Alaska v. Lubchenco suggests that efforts “not specifically directed
 toward the protection of” the species can be viewed as lacking the requisite certainty of
 implementation and effectiveness. 825 F. Supp. 2d 209, 219 (D.D.C. 2011).

1 certain in effectiveness of conservation efforts.” As a result, 12 of 13 biologists still thought that
2 the Bi-State Sage Grouse was presently threatened. BSSG058538-9 (Doc. 4907).

3 The Service admitted in the Withdrawal Decision that the Bi-State Sage Grouse’s
4 condition will continue to worsen without effective future conservation efforts and the record
5 shows significant doubt regarding their effectiveness. For example, Defendants boast that the
6 most threatened subpopulations will be protected by potential translocation of birds from more
7 plentiful PMUs, Defs. Mem. at 29, but their cites to the record actually show that their own staff
8 was doubtful of the strategy and that the studies were discouraging. BSSG060723 (Doc. 5028)
9 (FWS staff discussing the “understanding [] that there is little evidence of successful translocation
10 of sage-grouse”).¹⁵ Even if the future efforts could succeed in “maintain[ing]” the current status
11 of the Bi-State Sage Grouse, see 80 Fed. Reg. 22,831, Def. Intervenor Mem. at 19, that would not
12 provide support for the Withdrawal Decision. Based on the best available science, the current
13 status of the Bi-State Sage Grouse on the day of the decision was “threatened,” which means that
14 listing was required under the ESA, even if that status is maintained in the future due to
15 conservation efforts.

16 The Recommendation Team meeting notes and an informal memorandum to the director
17 suggest that the Withdrawal Decision was really driven by political pressure, not by new
18 information about or new evaluations of the Bi-State Action Plan. In the Recommendation Team
19 meeting notes, one biologist noted that the Plan was given the “[b]enefit of the doubt,” while
20 another noted that his/her not warranted recommendation “may be due to the bias towards our
21 partnerships, roles of EOC into it, integrity of TAC, NRCS sage grouse initiatives.” BSSG058539
22 (Doc. 4907). In a subsequent information memorandum for the director, Service management

23 ¹⁵ One study that the Service specifically cites in support of “translocation” puts it this way: “The
24 continued persistence of populations in low numbers following translocation of sage grouse in
25 Colorado, Idaho, and Utah, and the historical failure of most such translocations, suggests that
26 future translocations of sage grouse be viewed as experimental and not a desirable, viable strategy
27 to restore extirpated populations.” BSSG061153-4 (Doc. 5050). Other studies cited by the
28 Service concur. BSSG060789 (Doc. 5031) (“The success of translocations [] remains
equivocal.”); BSSG060768 (Doc. 5030) (“The majority of translocation attempts yielded little
long-term beneficial results.”); BSSG060726 (Doc. 5029) (“Translocations of greater sage-grouse
[] have been attempted in 7 states and one Canadian province with very little success.”)

1 stated that “[f]ollowing a thorough evaluation of the previous and new information,” it still found
2 that the Bi-State Sage Grouse to warrant threatened status, but nevertheless was recommending
3 against listing. BSSG063654 (Doc. 5137). As part of its explanation for this decision, the Service
4 ran through a laundry list of everyone opposed to the listing, including local governments, state
5 governments, and other federal agencies. BSSG063645–6 (Doc. 5137). This communication
6 plainly suggests the political opposition to listing – rather than the best available science alone, as
7 is required under the ESA – improperly factored into the decision to withdraw the proposed
8 listing.

9 **B. The Conservation Efforts Did Not Have Sufficient Indicia of Effectiveness to**
10 **Be Considered in a Listing Decision Even After PECE.**

11 Defendants attempt to brush aside Plaintiffs’ arguments by noting that some of the cases
12 Plaintiffs cite predate PECE and suggesting that Plaintiffs misinterpret the purpose underlying
13 PECE. Defs. Mem. at 15–16. Because the pre-PECE cases rested on interpretations of the ESA,
14 with which any interpretive policy must comply, the pre-PECE cases remain relevant to
15 interpreting what the ESA requires in making a listing decision. Moreover, both post-PECE
16 decisions and PECE itself echo the requirement that there be sufficient indicia of effectiveness and
17 a change in the best available science’s projections before conservation efforts can serve as a basis
18 for withholding listing. And a close reading of both the administrative record and the carefully
19 crafted language in Defendants’ brief shows that the Service does not, in fact, really disagree with
20 Plaintiffs.

21 PECE recognizes that the ESA requires more than just conservation efforts that aspire to
22 reduce threats to a species. Under PECE, conservation efforts can only be considered if they are
23 “sufficiently certain to be implemented and effective so as to have contributed to the elimination
24 or adequate reduction of one or more threats to the species.” 68 Fed. Reg. 15,100, 15,115 (Mar.
25 28, 2003). Even where conservation efforts meet this bar, PECE still requires the Service to list
26 the species “if the best available scientific and commercial data indicate that the species” is
27 threatened or endangered “on the day of the listing.” Id. Thus, PECE requires that conservation
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1 efforts be sufficiently certain to have reduced the threats to the species both today and going
2 forward in order for them to factor into a listing decision.

3 This interpretation of PECE is shared by the employees of the Service. In comments on
4 the Withdrawal Decision, one biologist commented “pece requires that threats be reduced today
5 due to ongoing work; not in the future.” BSSG072297 (Doc. 5479). Another commented that
6 under PECE, “we need to say why we believe cheatgrass removal will be successful at restoring
7 sage-grouse habitat – not just that it will be effective because it (attempts to) address a significant
8 threat.” BSSG062851 (Doc. 5112).

9 Post-PECE case law confirms that conservation efforts must have sufficient indicia of
10 success to be properly considered in a listing decision. Alaska v. Lubchenco, 825 F. Supp. 2d 209,
11 219 (D.D.C. 2011), for example, held that “it is not enough for the State to identify conservation
12 efforts that may be beneficial to a species’ preservation; those efforts must actually be in place and
13 have achieved some measure of success in order to count under the Service’s policy.” Defenders
14 of Wildlife v. Jewell, 70 F.Supp.3d 183 (D.D.C. 2014) (“Defenders II”), cited extensively in
15 Defendants’ brief, does not disagree. Confirming that Lubchenco was consistent with PECE in
16 requiring conservation efforts to have achieved a “degree of effectiveness sufficient” to withhold
17 listing, the court stated:

18 Consistent with the PECE, Lubchenco permits agencies to consider state programs that are
19 not yet fully implemented or proven. The Lubchenco court understood that agencies may
20 take into account preliminary ‘efforts’ that meet with some early ‘success’ in planning and
preparation, though conservation efforts at issue in that case ‘had not demonstrated a
degree of effectiveness sufficient’ to withhold listing.

21 Id. at 198.

22 Consistent with the statutory requirement, the post-PECE cases cited by the Defendants
23 and Defendants-Intervenors, see Defs. Mem. at 14, Def. Intervenors Mem. at 5 and 11, that have
24 upheld the Services’ consideration of conservation efforts have also consistently done so because
25 of past success of those conservation efforts or their similarity to conservation efforts that have
26 proven effective in the past. See, e.g., Defenders of Wildlife v. Jewell, 815 F.3d 1, 10 (D.C. Cir.
27 2016) (“Defenders III”) (finding reliance on a Texas conservation effort appropriate because of
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1 “the success it had already achieved, and its likely continued success based on the progress under
2 the New Mexico agreements”); Tucson Herpetological Soc’y, 566 F.3d at 881 (relying on the
3 “specific conservation benefits that the agreement has achieved”); Defenders of Wildlife v. Zinke,
4 849 F.3d 1077 (D.C. Cir. 2017) (“Defenders IV”) (considering delisting after conservation efforts
5 had benefited the species); Greater Yellowstone Coalition v. Servheen, 665 F.3d 1015 (9th Cir.
6 2011) (same). Indeed, Defendants have not cited a single case where proposed future conservation
7 efforts were as limited, unproven, and unenforceable as the promises articulated the Bi-State
8 Action Plan.

9 In the dunes sagebrush lizard cases – Defenders II and Defenders III – the Service received
10 far more new information after the proposed listing than the Service did here to support its
11 withdrawal decision. The dunes sagebrush lizard is found in New Mexico and Texas. After
12 proposing to list the lizard as a threatened species, the Service learned that 95 percent of the
13 lizard’s habitat in New Mexico had been removed from oil and gas leasing (the species’ primary
14 and “greatest” threat) and covered by conservation plans. Defenders III, 815 F.3d at 6. The
15 Service also learned of an entirely new Texas conservation plan very similar to the plan that had
16 already proven effective in New Mexico, which would cover an additional 71 percent of the
17 lizard’s habitat in Texas. Id. at 7. In addition to these new conservation efforts, the Service found
18 28 new sites occupied by the lizard and determined that the species already had sufficient habitat
19 for long term persistence. It concluded that “under a reasonable worse-case scenario, there could
20 be development” – the activity threatening the lizard – “in 10% of the lizard’s habitat.” Id. at 15.
21 By contrast, the Service here has not learned of new populations of Bi-State Sage Grouse, the Bi-
22 State Action Plan does not withdraw the primary threat to the species from 75-95 percent of its
23 habitat, no new conservation plans have been developed, and the potential effectiveness of the
24 Plan’s vegetation removal and other proposed measures cannot be inferred from the proven
25 effectiveness of a similar conservation plan for the same species elsewhere.

26 In the horned lizard case, Tucson Herpetological Soc’y, while the court found that the
27 Service did not err in considering a Conservation Agreement between state and federal agencies
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1 despite its “slow and still incomplete information,” it based its conclusion on two factors that do
2 not exist here. First, the court relied on the “specific conservation benefits that the agreement has
3 achieved,” Tucson Herpetological Soc’y, 566 F.3d at 881, which cannot be done here as the record
4 clearly shows that the existing threats to the Bi-State Sage Grouse remain unchanged. Second, the
5 court relied on the fact that the withdrawal decision’s assessment of threats was “not ‘dependent
6 on full implementation’” of the agreement. Id. (emphasis added). Instead, the court explicitly
7 found that By contrast, here the Service has explicitly stated that its new conclusions about the Bi-
8 State Sage Grouse’s threats are based on the conservation efforts alone.

9 The beardtongue wildflowers case, Rocky Mt. Wild v. Walsh, 216 F.Supp.3d 1234 (D.
10 Colo. 2016), is also distinguishable. There, in withdrawing a proposed listing, the Service
11 considered a new Conservation Agreement entered into by federal, state and local agencies that
12 encompassed 64 percent of one of the wildflower’s variations and 76 percent of the other, and
13 would last for fifteen years. The Conservation Agreement would cap surface disturbances at 5
14 percent in one area and 2.5 percent in the other, and provide a 300-foot buffer on any surface-
15 disturbing activities around any wildflowers. And ultimately, the Court vacated the withdrawal
16 decision in Rocky Mt. Wild because, among other flaws, the 300-foot buffer and the limited 15
17 year term were not sufficiently protective and the Service did not show that it would improve the
18 state of the species sufficiently to prevent listing. 216 F.Supp.3d at 1254 (“A conservation
19 agreement may reasonably have a limited duration if FWS can explain, based on the best scientific
20 and commercial data available, why the species should not warrant listing after the agreement’s
21 expiration.”) (emphasis added).

22 The final two cases cited by Defendants and Defendants-Intervenors, Defenders IV and
23 Servheen, both concerned decisions to delist a species after conservation efforts had arguably
24 already successfully recovered the species above threatened status, not decisions to withdraw a
25 proposed listing based on the speculative future effectiveness of conservation efforts. And in both
26 cases, the bar for future effectiveness of the conservation efforts was lower than required for the
27 Bi-State Action Plan because of the different posture of the cases. In considering delisting, the
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1 conservation plans needed only to be sufficiently certain to maintain the status of the now-
2 unthreatened species; they did not, as here, need to improve the condition of a species to such an
3 extent that the species recovers to non-threatened population levels. The Wyoming grey wolf
4 case, Defenders IV, also had two additional facts that demonstrated far more indicia of
5 effectiveness for the conservations efforts at issue than the Plan has here. The future effectiveness
6 of the conservation effort at issue could be inferred from conservation efforts for the same wolf
7 population in Montana and Idaho, which is not possible here. 849 F.3d at 1090. And four out of
8 five peer reviewers agreed that the wolves would be viable based on the Wyoming conservation
9 plan, 849 F.3d at 1081, which starkly contrasts to the pulse check in this case where only one out
10 of thirteen biologists believed the Bi-State Sage Grouse was not threatened at the time of the
11 listing decision.

12 In sum, in every cited case where the Service’s consideration of conservation efforts was
13 upheld, the conservation efforts had far more indicia of effectiveness than the BSAP does here.
14 Sufficient indicia of effectiveness are particularly necessary where, as here, the Withdrawal
15 Decision was based exclusively on future conservation efforts. The Service has consistently stated
16 that the Bi-State Sage Grouse would be threatened without future conservation efforts. That has
17 not changed through the years. It proposed to list the species as threatened in 2013 because it
18 found the Bi-State Action Plan inadequate to avoid listing. Yet a little over a year later, with no
19 real improvement in the Bi-State Action Plan, the Service concluded that the Bi-State Sage Grouse
20 would be adequately protected by that same plan.

21 This Court reversed a withdrawal decision with strikingly similar facts in Fed’n of Fly
22 Fishers v. Daley, 131 F. Supp. 2d 1158 (N.D. Cal. 2000). There, the Court held that where an
23 agency finds throughout the listing process that a species is threatened without successful future
24 conservation efforts, it is arbitrary and capricious to rely “exclusively” on voluntary actions to
25 withdraw the proposed listing. For the agency to reverse course, it must have based its decision on
26 “newly discovered or newly implemented conservation efforts.” Id. at 1169. While the Court
27 found it “appropriate” for the agency to consider conservation efforts, “it was arbitrary and
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1 capricious for [the Service] to rely, in effect, exclusively on voluntary, actions despite its finding
2 in the Proposed Rule that past state conservation efforts were inadequate. To find voluntary and
3 future actions sufficient to ameliorate the threat to the [species] was arbitrary and capricious.” Id.
4 Post-PECE, this ruling received support by the Ninth Circuit in Tucson Herpetological Soc’y v.
5 Salazar, where the court upheld the Service’s consideration of conservation efforts in part because
6 the analysis of the species’ threats was “not dependent on full implementation” of the conservation
7 efforts. 566 F.3d at 881. In contrast here, the record plainly reflects that but for full
8 implementation and full effectiveness of promised future conservation measures – which have not
9 yet been proven effective – in the Bi-State Action Plan, the species must be listed.

10 As discussed above, despite what Defendants themselves characterize as “enhanced,”
11 “appropriately large scale[d],” and “highly targeted” conservation efforts over the past ten years,
12 Defs. Mem. at 6, the Bi-State Action Plan has failed to reduce the threats to the Bi-State Sage
13 Grouse, and expert agency biologists continue to doubt that the Plan will be effective in the future.
14 The Service’s decision to nevertheless rely on similar voluntary actions in the future as the sole
15 basis for overriding the scientific conclusions as to the threatened status of the species, especially
16 when there is virtually no evidence in the record showing how or how well these promised
17 measures might work to improve population numbers, was arbitrary and capricious.

18 Finally, Defendants argue that the ability of the Service to re-evaluate whether the listing is
19 required in the future if the efforts do not prove effective should assuage any concerns about the
20 effectiveness of the BSAP. As the Ninth Circuit explained when considering delisting, the ability
21 to again consider listing in the future is irrelevant to determining the validity of the listing at the
22 time it is made. In Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1029 (9th Cir.
23 2011), the Ninth Circuit held: “[W]e reject out of hand any suggestion that the future possibility of
24 relisting a species can operate as a reasonable justification for delisting. Whatever comfort may be
25 taken in relisting as a safety net, it is no answer to conclude that a species is not threatened simply
26 because it can be relisted if it is threatened.” So too, it is no answer to conclude a species is not
27 threatened now, simply because listing could be considered at a future time.

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1 Defendants-Intervenors’ argument that “[a] victory for Plaintiffs here would undermine
 2 this extraordinary collaborative effort [the BSAP] and, in fact, endanger the very species that all
 3 sides wish to conserve” is unavailing.¹⁶ Def. Intervenors Mem. at 2. To the contrary, failing to
 4 list the Bi-State Sage Grouse when the best available science shows it is threatened could provide
 5 a disincentive for future conservation efforts. See Defenders III, 815 F.3d at 11 (noting that “the
 6 Service was aware that withdrawing the proposed listing could weaken the incentive for operators
 7 to enroll”). The Service cannot withhold protections provided by the ESA that were designed to
 8 enable threatened and endangered species to both survive and recover as a way to reward
 9 voluntary conservation efforts, no matter how collaborative or well-meaning those efforts. Indeed,
 10 listing the Bi-State Sage Grouse may actually increase conservation efforts by providing an
 11 additional incentive – to ensure compliance with the ESA’s take prohibitions – to help the species
 12 recover so it can be delisted. The D.C. Circuit, for example, has found that “[b]ased on the
 13 continued threat of listing, the Service had reason to conclude that incentives for joining the Texas
 14 plan remain and current enrollees would be unlikely” to drop out. Defenders III, 815 F.3d at 10
 15 (emphasis added). The incentives to conserve a species become stronger once listing has
 16 occurred, not weaker.

17 As to the remedy, Plaintiffs requested in their Proposed Order that the SPR Policy be
 18 vacated and remanded; the Withdrawal Decision be vacated and remanded; and the Defendants
 19 ordered to prepare and publish a new final listing decision on the Proposed Rule to list the Bi-State
 20 Sage-Grouse “in accordance with the deadlines set forth in 16 U.S.C. § 1533(b), no later than 12
 21 months from the date of this Order.” Dkt 130-5 at 2. Defendants seem to suggest additional
 22 briefing on the matter is required or perhaps even some sort of bifurcated proceedings, Defs. Mem.
 23 at 40, n. 34, but clearly no such procedures are needed for such an unremarkable remedy. If an
 24 agency action or policy is found to be unlawful or impermissible under the statute, it “shall” be set

25 ¹⁶ This argument is in conflict with the Bi-State EOC’s “reiterated” pledge that they “are
 26 committed to this process regardless of the final listing decision from [the Service].”
 27 BSSG080370 (Doc. 4100). See also BSSG080373 (Nevada Department of Wildlife) (“We look
 28 forward to continuing our work with the Service and all of our partners that are committed to
 successfully conserving the Bi-State [] Sage-Grouse and its habitats no matter what your agency’s
 determination may be.”)

