ADAM PAUL LAXALT
Attorney General
JOSEPH TARTAKOVSKY
Deputy Solicitor General (Cal. Bar No. 282223)
Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
Tel: (775) 684-1100 / Fax: (775) 684-1108
jtartakovsky@ag.nv.gov
Attorney for Defendant-Intervenor State of Nevada

TORI N. SUNDHEIM (Cal. Bar No. 294559)
Nevada Association of Counties
304 S. Minnesota St.
Carson City, NV 89701
Tel: (775) 548-6081 / Fax: (775) 887-2057
tsundheim@nvnaco.org
Attorney for Defendant-Intervenor Nevada Association of Counties

STACEY SIMON
Mono County Counsel
CHRISTIAN E. MILOVICH
Assistant County Counsel (Cal. Bar No. 291337)
County of Mono, California
P.O. Box 2415
Mammoth Lakes, CA 93546
cmilovich@mono.ca.gov
Tel: (760) 924-1706 / Fax: (760) 924-1701
Attorney for Defendant-Intervenor County of Mono

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

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

Defendants.

and

STATE OF NEVADA, et al.,

Defendant-Intervenors.

No. 3:16-cv-01165-JCS

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

REGULATIONS

I. INTRODUCTION

The Defendant-Intervenors have shown that the Service made the right decision. The supporting evidence is robust. But that's far more than we need to show. The law is that, even if the evidence results in a draw or (as Plaintiffs put it) a "coin toss," the Service gets to make the call. [1] The record establishes, at a minimum, that Plaintiffs' alarmism about "imminent, existential" threats to the species is simply untrue. In making such assertions, Plaintiffs offer citations that are lifted out of context; that are outdated by a matter of years; or that merely take one side in what was an internal difference of opinion. This is to be expected. The Service's decision, like most such decisions, was preceded by conflicting evidence, good faith debate, and a measure of prediction. But that, after all, is the Service's job. This Court's responsibility, in turn, is to ensure that the decision was rational. It clearly was.

II. ARGUMENT

Plaintiffs decry the Bi-State Action Plan as practically a conspiracy and demand, in effect, that the Service make decisions in a vacuum. But that would violate the Endangered Species Act. It would also betray the basic principles of effective conservation, which the Service evaluates using its Policy for the Evaluation of Conservation Efforts ("PECE").[2] The snippets of evidence Plaintiffs point to—an easy exercise with a record as vast as this—only confirms *why* the Bi-State Action Plan is so momentous.[3] The multiple agencies tasked with protecting the bi-state sage grouse and its habitat rose to an unprecedented challenge, by open forthright collaboration, advancing the goal of the ESA and protecting the bi-state sage grouse.[4]

---

[1] Pltfs. Opp. at 7.

[2] 16 U.S.C. §1533(a)(1); 68 Fed. Reg. 15,100 (Mar. 28, 2003); *Permian Basin Petroleum Ass'n v. Department of the Interior*, 127 F.Supp.3d 700, at 706, 708 & 710 n.7 (W.D. Tex. 2015); BSSG079491 (Doc. 5716). Of independent but related significance is Plaintiffs' failure to address Defendant Intervenor's argument that Listing Factor D's "regulatory mechanisms" and PECE's "conservation efforts" are described by courts as interchangeable "nonbinding measures" that "'if sufficiently certain and effective to alleviate a threat [of endangerment] may render a [legally binding] regulatory mechanism unnecessary." Def.-Intervenors Mem. at 5-6. This failure to respond suggests an abandonment of Plaintiffs' arguments on regulatory certainty. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005).

[3] BSSG023953 (Doc. 1671) ("Meaningful... landscape-scale restoration for sage-grouse requires a broad range of partnerships (private, State, and Federal) due to landownership patterns.").

[4] 16 U.S.C. §1531(a)(5); 16 U.S.C. §1533(a)(1).

Plaintiffs say the bi-state sage-grouse is threatened by "overwhelming" evidence. But they omit the far more extensive evidence that shows otherwise. For instance, there is the Service's finding that the bird's population is stable and fit "to recover from disturbance, or adapt to changes."[5] There is the conclusion that the species' decline has "lessen[ed] in the past 22 years" and indeed that the greatest number of bi-state sage-grouse ever documented was in 2012.[6] There are the notes from the Recommendation Team Meeting—one of Plaintiffs' favorite documents, oddly—that has Service biologists affirming that the health of the sage grouse population is "better than we thought in 2013"; that there is an "apparent improvement in trend and persistence"; and that there has been a "reduction in [the] degree of threats."[7]

Most importantly, Plaintiffs ignore the Service's most critical question: "Given the information provided since 2013 and the anticipated future conservation efforts," the Service asked its experts, "what is the proposed status for the future?"[8] The majority of Service biologists answered: "not threatened."[9] This is because the best available science shows that future conservation efforts will (and already have begun to) "increase habitat quantity, quality, and connectivity"; this, in turn, will "*increase* the number of sage-grouse and resilience of the bi-State DPS overall."[10] The Service properly weighed the best available science, developed by bi-state partners over two decades. "When examining a scientific determination," the Ninth Circuit explained recently, "as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[11]

A. Future conservation efforts alone provided sufficient justification for the Service's decision to withdraw its proposed listing decision.

Plaintiffs mask what they truly seek—to force the Service to ignore proposed conservation efforts—by raising scattershot objections to the Service's PECE analysis (and moreover without

---

[5] 80 Fed. Reg. 22,839 (Apr. 23, 2015); BSSG000447 (Doc. 5508).
[6] 75 Fed. Reg. 13,923 (Mar. 23, 2010); BSSG023846 (Doc. 1671); BSSG000447 (Doc. 5508).
[7] BSSG058549-50 (Doc. 4911).
[8] BSSG058551 (Doc. 4911).
[9] BSSG058551-4 (Doc. 4911); 16 U.S.C. § 1532(20).
[10] 80 Fed. Reg. 22,849 (emphasis added).
[11] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014).

challenging its application of a single one of the fifteen nonexclusive PECE criteria).[12] The Service, through the PECE, determines whether *future* conservation efforts will "eliminate or adequately reduce" threats such that, *at present*, the "species does not meet the definition of threatened."[13] The Service may only decide that a species is threatened "on the day of the listing decision" if those future efforts are not likely to "eliminate or adequately reduce" foreseeable threats.[14] Plaintiffs do not even *try* to address the Service's PECE analysis to support their key claim that this analysis was inadequate.

Plaintiffs instead resort to a misleading reading of recent PECE cases to deny that the Service may rely, exclusively, on proposed future conservation efforts as its basis for a withdrawal-of-listing decision. In *DoW II* and *III*—where the Service relied exclusively on proposed conservation efforts—the *same* Plaintiffs made the *exact* same arguments, and lost. [15] Plaintiffs try to distinguish *DoW II* and *III*, ignoring the facts that show that, by contrast to the facts here, the Bi-State Action Plan far exceeds the legal threshold for measuring certainty of effectiveness and implementation. The *DoW II* and *III* courts found that the Service adequately explained its decision to rely on two agreements, a 2008 New Mexico Plan, and a 2012 Texas Plan, finalized only four months before the Withdrawal Decision.[16] For the species at issue there, a lizard, the Service had no role in the development or enforcement of the Agreements; the number of landowners enrolled was unknown; the measures were discretionary; and only $773,000 was obtained to address over a million acres of habitat.[17] Plaintiffs argued that neither Agreement could ameliorate the immediate and significant threats from oil and gas development and

---

[12] 68 Fed. Reg. 15,115; BSSG079491-2 (Doc. 5716).

[13] 68 Fed. Reg. 15,100; 80 Fed. Reg. 22,846; BSSG079492 (Doc. 5716). A listing decision may be triggered in this instance only if there is "a failure to achieve objectives," not as an excuse, but to ensure that future conservation efforts promised or agreed on actually occur. 68 Fed. Reg. 15,114.

[14] 68 Fed. Reg. 15,115; BSSG062454 (Doc. 5111) ("...implementation of those future conservation efforts reduces the threats to a level such that listing is not warranted").

[15] There, as here, Plaintiffs Defenders of Wildlife and Center for Biological Diversity argued the withdrawal decision was driven by political pressure; the Service failed to apply the best available science or address cumulative impacts; and that the conservation agreements were voluntary, vague, unproven and speculative in nature. *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 191-199, n. 25, n.26 (D.D.C. 2014)(*DoW II*); *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 10-15 (D.C. Cir. 2016) ("*DoW III*").

[16] *DoW II* 70 F. Supp. 3d at 189.

[17] *DoW II* 70 F. Supp. 3d at 191-199, n.26; *DoW III* 815 F.3d at 10-15.

other factors.[18] The Court disagreed, labeling the Plaintiffs' objections "a variety of narrow, fact-based challenges that are refuted by the record as interpreted by the Service based on its experience and expertise."[19] The Bi-State Action Plan's efforts, at issue now, far surpass those relied upon for the lizard at issue in those precedents. This Court, here, has even stronger grounds to rule similarly.

Plaintiffs say that the Service does not know what efforts would protect the bi-state sage-grouse. But to the contrary, the Bi-State Action Plan identified a number of projects to do just that. Neither the Service nor peer-reviewing scientists even once questioned the need for the projects identified by Plan—and Plaintiffs don't either.[20] The science shows that measures like pinyon and juniper removal, weed treatments, habitat restoration, conservation easements, grazing terms and conditions, road closures, infrastructure removal, and other efforts that create quality habitat will prevent the bi-state sage-grouse from becoming endangered.[21] Plaintiffs seem even largely to agree, by quoting a study that states, for example, that "[m]anagement actions that promote genetic connectivity"—among them the very sort listed by the Bi-State Action Plan— "may be critical to the long-term viability of the bi-State DPS."[22]

i. The Service properly determined the Bi-State Action Plan was certain to be implemented.

The Service's only real concern in 2013 was that the Bi-State Action Plan's list of projects were "never funded or implemented."[23] This meant that what the Plan Partners needed to do was obtain funding and put in place a process to complete the projects. They did so. On this point, Plaintiffs argue

---

[18] Pltfs. Opp. at 2; *DoW II* 70 F. Supp. 3d at 183, 188.

[19] *DoW III*, 815 F.3d at 9; *DoW IV* and *Servheen* are both applicable *because* those conservation efforts, just like those here, were certain to be effective in maintaining populations at levels below the listing threshold. *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011); *Defs. of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017) ("*DOW IV*").

[20] (Doc. 1671) BSSG023832; 80 Fed. Reg. 22,844; BSSG058545 (Doc. 4911) ("Take-Away Message: threats interacting with each other was the dominant concern."); 78 Fed. Reg. 64,335, 64,343.

[21] BSSG023835 (Doc. 1671); BSSG000433, 465 (Doc. 5508); 80 Fed. Reg. 22,839-40, 851; BSSG079525 (Doc. 5716); BSSG058545 (Doc. 4911) ("PJ encroachment... is the most visible threat and management of it is also straight-forward to address").

[22] BSSG109821 (Doc. 6538)("management actions"); Pltfs. Opp. at 10-11 ("connectivity"); *see* BSSG023832-33 (Doc. 1671); 68 Fed. Reg. 15,102 ("We agree that it could take several years for some conservation efforts to demonstrate results... However, the PECE criteria provide the framework for us to evaluate the likely effectiveness of such formalized conservation efforts").

[23] BSSG023832 (Doc. 1671); 78 Fed. Reg. 64,372, 377 (Oct. 28, 2013).

that the commitment of some $45 million is unreliable, simply because some of this amount derives from federal funding.[24] Yet the PECE specifically affirms the reliability of federal funding.[25] Plaintiffs *only* disagreement on the PECE's implementation prong, then, is refuted by the PECE and moreover is based on information that they do not dispute is in fact outside the scope of the record.[26] The Service rationally relied on serious commitments to fund and implement the Bi-State Action Plan.

ii. The Bi-State Action Plan's new scientific model, the Conservation Planning Tool, populated 79 Projects that were sufficiently certain to be effective.

Plaintiffs then pivot to argue that the Bi-State Action Plan's 79 projects were not *specific enough* and, relatedly, that the Service did not have the means to measure and address the bi-state sage-grouse's needs. But Plaintiffs ignore ample record evidence that shows scientific support for the need and effectiveness of these 79 specific proposed actions.[27] Nor do Plaintiffs mention that the U.S. Geological Survey created a new scientific model, the Conservation Planning Tool, in 2014 for precisely this purpose—to update the Plan's project database with new priority projects certain to ensure quality habitat.[28] The record shows that any lack of specificity, noted by the Service in its proposed withdrawal, was cured in 2014 when this Conservation Planning Tool—the cornerstone of the Bi-State Action Plan's adaptive management model—was finalized by the Geological Survey's newly hired Science Advisor.[29]

Plaintiffs say that the Conservation Planning Tool was in place when the listing decision was first proposed in 2013. Actually, the Tool was not completed until 2014.[30] And only once this critical conservation model was developed could the adaptive management approach "be implemented

---

[24] Pltfs. Mot. at 13-14; Pltfs. Opp. at 26.
[25] 68 Fed. Reg. 15,100, 108, 114.
[26] Pltfs. Opp. at 26. *San Luis*, 747 F.3d at 602.
[27] BSSG080600-6 (Doc. 4100); BSSG079486-550 (Doc. 5716); BSSG114181-202 (Doc. 5827).
[28] For the usefulness of the CPT see BSSG080508 (Doc. 4100); BSSG023953 (Doc. 1671); BSSG079494, 520, 533 (Doc. 5716); BSSG058551 (Doc. 4911).
[29] BSSG079534 (Doc. 5716); BSSG000430 (Doc. 5508) ("participating agencies have made significant progress to further refine the conservation actions identified in the 2012 BSAP").
[30] Pltfs. Opp. at 25; BSSG080508 (Doc. 4100); BSSG079501 (Doc. 5716).

immediately" and the new project list measured for effectiveness against the recommendations in the 2013 Conservation Objectives Team Report.[31]

Plaintiffs turn a blind eye to evidence that shows Plan Partners applied the Conservation Planning Tool to decide exactly why, how, and by whom these 79 projects would be implemented. Just as with targeted conservation easements, identified cheatgrass and pinyon-juniper removal is proportional to the amount needed.[32] Additionally, Mono County's closure of the Benton Crossing landfill specifically implements identified conservation measures for the South Mono PMU.[33] Conservation goals tailored to reducing specific impacts on at-risk species may be properly viewed as formal conservation efforts.[34]

iii. Due to proposed conservation efforts, the Service rationally found that none of the bi-state sage-grouse populations would become endangered.

Plaintiffs invoke the Service's "Significant Portion of Its Range" Policy (or "SPR Policy") in order, apparently, to deflect attention from the Service's PECE analysis finding that that smaller PMUs will *not* worsen in the future, thanks to "intervention" and "substantial management attention."[35] Here Plaintiffs try to entangle the Court in semantics, arguing that the outcome would have been different had the Service applied a different SPR Policy. Not so. Given tailored proposed conservation efforts,

---

[31] 80 Fed. Reg. 22,851; BSSG058550-1 (Doc. 4911); BSSG023953 (Doc. 1671); BSSG080508 (Doc. 4100); BSSG079489, 494, 520, 535 (Doc. 5716); BSSG114144, 181-202 (Doc. 5827).

[32] 80 Fed. Reg. 22,851 (Apr. 23, 2015); BSSG079525 (Doc. 5716); BSSG079525-7 (Doc. 5716) (targeted cheatgrass and pinyon-juniper removal efforts are outlined in the BSAP, and may be adjusted in the future); BSSG048850 (Doc. 3965) (Maps and spreadsheets showing P-J removal projects by acre, land manager, and cost); BSSG023972 (Doc. 1671) ("By 2013, woodlands had expanded by an estimated 50,000-150,000 acres over the past decade in the bi-state area").

[33] Mono County's landfill is described in the 2012 Bi-State Action Plan as the highest priority threat to the South Mono PMU due to predation, at Action MER 3-2. Mono County closed its landfill and developed a raven mitigation plan in response to this conservation need. BSSG000466 (Doc. 5508); BSSG023877 (Doc. 1671); BSSG080401 (Doc. 4100). This is distinguishable from the facts in *Lubchenco*, where a pre-existing fisheries program was not considered a formalized conservation effort simply because beluga whales eat fish. *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 219 (D.D.C. 2011). Therefore, the inclusion of Mono County's $2.2 million contribution is proper. Still, the amount of funding secured by the Bi-State Partnership would exceed the $38 million needed.

[34] *Lubchenco*, 825 F. Supp. 2d at 219.

[35] Pltfs. Opp. at 37-8, 40; 80 Fed. Reg. 22,832-34, 853.

the Pine Nut, Mount Grant, and White Mountains PMUs would not be endangered even under the strictest of definitions.[36] Plaintiffs ignore the critical point in this case—that the Service relied on proposed conservation efforts certain to remove foreseeable threats.

Plaintiffs imply that the Service failed to customize conservation efforts to the degree needed by PMU. [37] But the efforts populated by the Conservation Planning Tool were never a one-size-fits-all method—these efforts are targeted, by degree, to the treatment needed, depending on the vulnerability of any given subpopulation.[38] This is why the Service found that any potential risks will be "moderated by the ongoing and continued restoration of habitat, which will improve connectivity and minimize habitat fragmentation, thereby...improving genetic diversity."[39] Further, specifically referencing the Pine Nut PMU, the Service wrote that the "moderate to high level of representation across the bi-State DPS, and ongoing and planned conservation actions...reduces the likelihood of future extirpations."[40]

The term "significant portion of its range" allows the Service to list a species even if "all" of its range isn't threatened by directing the Service to also weigh how sub-populations interact and affect the health and viability of the species as a whole.[41] In other words, the term "significant portion of its range" means the Service must also provide an additional level of scrutiny, or take a "hard look," at certain subparts of the range. [42] Here, the Service first looked to the status of the species as a whole using the Integrated Population Model and found that "all" of the range was not threatened due to overall stable trend levels.[43] But the analysis did not stop there. The Service, in a separate "portion of its range" analysis, did take a "hard look" at the three PMUs at highest potential risk—the Pine Nut, White

---

[36] BSSG079525-9 (Doc. 5716) ("Specific actions have been developed to treat specific focus areas").
[37] Pltfs. Opp. at 21.
[38] 80 Fed. Reg. 22,853; BSSG000549 (Doc. 5508); BSSG079489, 494, 501, 520, 535 (Doc. 5716).
[39] 80 Fed. Reg. 22,839-40.
[40] *Id*.
[41] 80 Fed. Reg. 22,853; *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1141 (9th Cir. 2001).
[42] This is similar to the "hard look" analysis applied in the National Environmental Policy Act context to "ensure that the agency will not act on incomplete information, only to regret its decision after it is too late." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858 (1989).
[43] BSSG000456 (Doc. 5508).

Mountains, and Mount Grant PMUs— and properly determined, due to ongoing and proposed conservation efforts, that threats in those areas were not expected to materialize.[44]

It was logical for the Service to conclude that the bi-state sage-grouse will not become endangered throughout a significant portion of its range where the science shows that, owing to proposed conservation efforts, *none* of the PMUs are threatened. This is distinguishable from *CBD I*, where there were no conservation efforts to evaluate and the Service reversed its draft listing proposal even after finding the Sonoran Desert Ecoregion was likely to be extirpated and was "important for long-term survival" of the pygmy-owl species as a whole.[45] There is no such finding in the instant case.

Even assuming that the Service had concluded the Pine Nut PMU could potentially become lost, Plaintiffs impermissibly ask that the Pine Nut PMU be listed as a threatened species. The Service did not, and should not, independently list any PMU. This is because such PMUs are not designated as "Distinct Population Segments" and therefore are not considered a "species" under the ESA.[46] Section § 1533(c)(1) of that law, one court noted, requires the Secretary to "list 'endangered species' and 'threatened species,' not parts of a species' range."[47] To do otherwise would "rewrite Congress's definition of an endangered species such that it could refer to a portion**"** of a species range.[48]

Finally, Plaintiffs focus on the lack of population data for those sub-populations where data in fact *could not* be collected due to physical barriers.[49] The Bi-State Action Plan continues to identify data needs, but the Service cannot perform an analysis which "is not possible" and may rely on the latest data or scientific model available.[50] The Service acknowledged the finding that there were historically "as many as 122 leks" is "almost certainly an overestimate as locations were poorly

---

[44] 80 Fed. Reg. 22,853 (these conservation efforts "change the trajectory" to not endangered).
[45] *Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946, 952-3, 955 (D. Ariz. 2017) (*CBD I*).
[46] *WildEarth Guardians v. Salazar*, No. CV-09-00574-PHX-FJM, 2010 U.S. Dist. LEXIS 105253, at *6 (D. Ariz. Sep. 30, 2010).
[47] *Id*.; 16 U.S.C. § 1532(20); 16 U.S.C. § 1533(c)(1).
[48] *Id*.
[49] BSSG000445, 449, 553 (Doc. 5508); Plaintiffs cite to an unrelated case on the International Dolphin Conservation Program Act. *Brower v. Evans*, 257 F.3d 1058, 1063 (9th Cir. 2001).
[50] BSSG080368-748 (Doc. 4100); *San Luis & Delta-Mendota* 747 F.3d at 610 (courts will reject a scientific model "only when the model bears no rational relationship" to the data); *see also WildEarth Guardians v. Jewel*, 134 F. Supp. 3d 1182, 1193-94 (D. Ariz. 2015).

documented."[51] The Service also considered historical range to the extent it could, although "range loss is not well understood" due to "the quality and availability of information."[52] In the end, however, the data adequately still shows what threats need to be addressed—and the Service explained that the promised conservation measures act synergistically to reverse those threats.[53]

B. The Service relied on the best available science.

Plaintiffs selectively restate scientific findings, portions of conservation efforts, internal drafts, out-of-context comments, and deliberations produced by the Service and Bi-State Plan Partners—all to reach *different* scientific conclusions. But the Service properly relied on considerable new scientific information and conservation efforts that occurred from 2013-2015. By 2015, two new models—the Integrated Population Model and Conservation Planning Tool— were finalized; new genetic studies had become available; over a million acres of restrictions and thousands of acres of conservation actions had been completed; and the Service received significant commitments from Plan Partners.[54]

Courts agree that they may not choose among competing scientific views, especially when the agency relies on scientific modeling.[55] Yet Plaintiffs offer that assumptions in the Coates Analysis are not "*clearly* correct" and quibble over statistics.[56] As one court explained, however, to grasp determinations like those by Coates "requires a crash course in population viability analysis—an exercise involving a 'great deal of predictive judgment' that is 'entitled to particularly deferential review.'"[57] The results of the Integrated Population Model were not only due to a change in

---

[51] BSSG023846 (Doc. 1671).
[52] BSSG023812-3 (Doc. 1671); BSSG000439 (Doc. 5508); 75 Fed. Reg. 13,923.
[53] 80 Fed. Reg. 22,844, 853; BSSG058545 (Doc. 4911).
[54] 1,369 acres habitat purchases; 2,582 miles road closures; 380 acres meadow restoration treatments; 1,213 acres weed treatments; 6,430 acres seeding; 23,529 acres pinyon and juniper removal; horse gathers; and 18,346 acres of conservation easements, 70% would be enrolled by the end of 2015. Grazing permits account for the majority land use in bi-state habitat and 100% of the grazing permit terms and conditions, covering more than one million acres, had been modified. See BSSG000462-6 (Doc. 5508); BSSG080436, 545-552 (Doc. 4100); BSSG079501 (Doc. 5716); 80 Fed Reg. 22,848.
[55] *San Luis*, 747 F.3d at 581, 610 ("Our deference to agency determinations is at its greatest when that agency is choosing between various scientific models.").
[56] Pltfs. Opp. at 7 (emphasis added).
[57] *Lubchenco*, 825 F. Supp. 2d at 220-21.

methodology, but "also due to a more robust analysis of data conducted by Coates."[58] The Integrated Population Model is a so-called Bayesian model and the Service's Recommendation Team said that the "point is that [the population] is not decreasing in the Bayesian world of modeling."[59]

Plaintiffs discount the ability of the bi-state sage-grouse to sustain its populations; they write that Defendant-Intervenors are wrong on this issue. But the record demonstrates connectivity—a central component of species sustenance—among the Pine Nut, Desert Creek-Fales, Bodie, Mount Grant, and South Mono PMUs.[60] Service scientists said in 2013 there is "no indication that genetic factors such as inbreeding depression, hybridization, or loss of genetic diversity place the Bi-State DPS at immediate risk."[61] The Recommendation Team even noted that the "amount of genetic exchange needed is minor."[62] Plaintiffs' failure to offer a more accurate method or model, or superior data, for projecting the status or foreseeable threats to the bird, or for evaluating the effectiveness of conservation efforts into the future, suggests that "what is available *is* the best."[63]

III. CONCLUSION

The Service rationally relied on the best viable solution for bi-state sage-grouse conservation—broad state-federal partnerships with pooled financial and logistic resources. This is why the Service invested itself in the success of the Bi-State Action Plan. The sheer amount of collaboration, scientific expertise, and resources committed to save this species—and the already demonstrated efficacy of these efforts—is unprecedented. The Bi-State Action Plan is a model effort in its level of engagement and in its comprehensiveness of objectives, strategies, and actions. This model will protect the bi-state sage-grouse and, we believe, spur similar efforts across the greater sage-grouse's range.[64]

---

[58] BSSG023844, 61 (Doc. 1671); BSSG000445 (Doc. 5508); *see* BSSG058547 (Doc. 4911).
[59] BSSG058548 (Doc. 4911); *San Luis*, 747 F.3d at 610.
[60] Pltfs. Opp. at 6; BSSG023935 (Doc. 1671); BSSG000451, 568 (Doc. 5508); 80 Fed. Reg. 22,832-3.
[61] *See* BSSG023935 (Doc. 1671); BSSG000452, 549 (Doc. 5508).
[62] BSSG058551 (Doc. 4911).
[63] 16 U.S.C. §1533(b)(1)(A); *Lubchenco*, 825 F. Supp. 2d at 220-21 (emphasis added); *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006) (imperfections do not violate the ESA).
[64] BSSG111227-28 (Doc. 6607) ("many parallels can be drawn between the significant effort and action that has gone into addressing the Bi-State DPS and the initiatives also underway for the greater sage-grouse" across eleven western states, including in Nevada).

DATED this 6th day of February, 2018.

ADAM PAUL LAXALT
Attorney General

/s/ Joseph Tartakovsky
Joseph Tartakovsky
Nevada Deputy Solicitor General

Attorneys for Defendant-Intervenor State of Nevada

/s/ Tori N. Sundheim
Tori N. Sundheim
Nevada Association of Counties

Attorney for Defendant-Intervenor Nevada Association of Counties

/s/ Christian E. Milovich
Christian E. Milovich
Assistant County Counsel

Attorney for Defendant-Intervenor County of Mono

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 6th day of February, 2018, I filed of the foregoing, **DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**, with the U.S. District Court CM/ECF Electronic Filing, parties who are registered with this Court:

/s/ Sandra Geyer
Sandra Geyer
Office of the Attorney General