NEVADA ASSOCIATION OF COUNTIES (NACO)

Board of Directors' Meeting
October 19th, 2018, 9:30 a.m.
Clark County Government Center
Pueblo Conference Room, 1st Floor
500 South Grand Central Parkway
Las Vegas, NV 89155

AGENDA

Some NACO Board members may attend via video link or phone from other locations. Items on the agenda may be taken out of order. The NACO Board may combine two or more agenda items for consideration. The NACO Board may remove an item from the agenda or delay discussion relating to an item on the agenda at any time.

Call to Order, Roll Call and Pledge of Allegiance

1. Public Comment. Please Limit Comments to 3 Minutes.

2. Approval of Agenda. **For Possible Action.**

3. NACO President's Report.

4. NACO Executive Director's Report.

5. Approval of Minutes of the September 28, 2018 NACO Board of Directors Meeting. **For Possible Action**

6. Discussion and Approval of 2019 NACO Board meeting dates. **For Possible Action**

7. Preliminary Discussion of NACO's 2019 Budget.

8. Presentation of a Reporting Tool for Rural Counties to Use to Monitor Contract Public Defenders. **For Possible Action**

9. Presentation and Discussion of the Stepping Up Initiative in Nevada Including County Efforts to Reduce the Number of People with Mental Illnesses in Jails, Jessica Flood, Regional Behavioral Health Coordinator, Northern Region, and Ariana Saunders, Behavioral Health Coordinator, Clark County Social Services. **For Possible Action**

10. Update on the Recent FCC Order to Preempt Local Government Authority to Regulate and Permit the Construction of Small Cell/5G Technology. **For Possible Action**

11. Discussion and Authorization of Legal Counsel of Record to Oversee, Prepare and File an Appeal to the United States Ninth Circuit Court of Appeals on Behalf of NACO as Defendant-Intervenor from the Federal District Court's "Order Re Summary Judgment" and "Remedy Order" in the Matter of Desert Survivors, et al. v. U.S. Department of the Interior, et al. **For Possible Action.**

12. Update on Interim Legislative Activities, Bill Draft Requests, and County Priorities for the 2019 Nevada Legislative Session. **For Possible Action**

13. **Update and Possible Action** Regarding Natural Resources and Public Lands and Issues Affecting Counties Including:

    a. The BLM and USFS Greater Sage Grouse Resource Management Plan Amendments.

    b. NACO Public Lands and Natural Resources Committee Update.

14. NACO Committee of the Emeritus Update.

15. National Association of Counties and Western Interstate Region Board Member Updates.

16. NACO Board Member Updates.

17. Public Comment. Please Limit Comments to 3 Minutes.

Adjournment.

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify NACO in writing at 304 S. Minnesota Street, Carson City, NV 89703, or by calling (775) 883-7863 at least three working days prior to the meeting.

Members of the public can request copies of the supporting material for the meeting by contacting Amanda Evans at (775) 883-7863. Supporting material will be available at the NACO office and on the NACO website at: www.nvnaco.org

This agenda was posted at the following locations:
NACO Office 304 S. Minnesota Street, Carson City, NV 89703
Washoe County Admin. Building 1001 E. Ninth Street, Reno, NV 89520
Elko County Manager's Office 540 Court Street #101, Elko NV 89801
POOL/PACT 201 S. Roop Street, Carson City, NV 89701

The following links and/or pages are support for agenda Item 5

NEVADA ASSOCIATION OF COUNTIES (NACO)

Board of Directors' Meeting
September 28, 2018, 9:30 a.m.
NACO Office
304 S. Minnesota Street
Carson City, NV 89703

UNDADOPTED MINUTES

Attendance: President Elect Waits, Vice President French, Washoe County Commissioner Lucey, Mineral County Commissioner Tipton, Lincoln County Commissioner Higbee, Lyon County Commissioner Hunewill, Washoe County Commissioner Hartung, Nye County Commissioner Wichman, Churchill County Commissioner Olsen, Elko County Commissioner Steninger, Western Interstate Region Member Elko County Commissioner Dahl, Storey County Commissioner McGuffey and Nancy Parent, Nevada Association of Clerks and Election Officials (NACO Staff: Dagny Stapleton, Vinson Guthreau and Amanda Evans)

Remote Attendance: President Weekly, Clark County Commissioner Kirkpatrick, Nye County Manager Sutton, Nye County Assistant Manager Dellinger and Nye County PIO Knightly

Other Attendance: Joni Eastly; Hank James, NV Rural Electric Association; Sandra Douglas-Morgan and Dan Jacobsen, AT&T; Lee Boner and Doug Miller, NDOT; Linda Bisset and Carolyn Barbash, NV Energy; Michael Bertrand, Bertrand & Associates; Ryan Cherry, Yes on 3; Tom Grady; Mike Roberson, Coalition to Defeat Question 3 and Nevada Supreme Court Justice Hardesty.

The meeting was called to order at 9:32 a.m. President Weekly turned the meeting over to President Elect Waits as he was attending remotely.

1. **Public Comment**. None was given.

2. **Approval of Agenda**. The agenda was approved, with the notation that item 11 would be heard time certain at 11:30 on a motion by Commissioner Tipton with second by Commissioner Higbee.

3. **NACO President's Report**. President Weekly thanked staff for the Association's engagement on Twitter and encouraged the Board to follow the Association's account. He reminded the Board to make their arrangements for October's meeting of the Board in Clark County and to communicate with staff if they will attend both the Board meeting and the dinner Commissioner Kirkpatrick will be hosting on Thursday evening. President Weekly also noted the upcoming conference in Douglas County.

4. **NACO Executive Director's Report**. Dagny highlighted the Certified Public Official training program and referenced the brochure distributed to the Board. She encouraged participation in the program. She also discussed the draft conference agenda, also distributed to the Board, and informed the Board that the President's Reception will have a boots and denim theme. She concluded her remarks by reminding the Board that Commissioner Kirkpatrick has invited Board members to her home for dinner on October 18th, prior to the next NACO Board meeting in Clark County. Information on the dinner will be distributed to the Board closer to the event.

5. **Approval of Minutes of the August 24, 2018 NACO Board of Directors Meeting**. The minutes were approved on a motion by Commissioner Tipton with second by Commissioner Olsen.

6. **NACO Annual Conference Update Including Discussion on Date and Location of the 2019 Annual Conference**. Dagny noted that with the NACo Annual Conference taking place in Clark County, it became apparent that the approach to the NACO Annual conference would need to be adjusted. She informed the Board that she had reviewed how the conference was handled when Washoe County hosted NACo in 2010 and that that year NACO had held a one-day conference. She also stated that many of the sponsors that support the Nevada NACO Conference will be asked to

support the National Conference and as a result, opportunities for NACO Conference sponsorships may be limited, as potentially will the revenue generated for the organization. Dagny proposed hosting a single-day event on September 25, 2019. Commissioner Tipton inquired as to the POWER courses held as part of the Certified Public Officials program, and it was clarified that UNR would still be able to offer those courses the day before the NACO conference. Dagny stated that staff would research central and affordable locations for the 2019 Conference. Both former Nye County Commissioner Joni Eastley and Commissioner Hartung offered their counties as potential hosts. Dagny also informed the Board that Churchill County officially offered to host the NACO Annual Conference in 2020. Commissioner Tipton moved to approve an abbreviated conference with location to be determined in 2019 and for Churchill County to be approved to host the event in 2020. The motion passed on a second from Commissioner Wichman.

7. **Presentation of NACO's 2017 Financial Audit, Michael Bertrand, Bertrand and Associates, LLC.** Mr. Bertrand referred to the financial statements included in the agenda packet. He highlighted an increase in the Association's assets, changes to the state's pension system and an increase in revenues which resulted in an improvement to the Association's financial position. He discussed the Management Recommendations and noted that recommendations made the previous year were completed and that financial statements are being reviewed in a timely manner. He gave an overview of the audit process, the sample disbursements that were tested and general ledger adjustments. Mr. Bertrand also discussed a review of investment policies and stated that the Association's accounting policy is being reviewed by Fiscal Officer Alan Kalt and Dagny, due to his recommendation. He concluded his remarks by noting the diligence of Mr. Kalt in reviewing the Association's financial statements and noting that there are no serious issues to be raised with the Board. Commissioner McGuffey inquired as to the lack of policies and procedures, and Mr. Bertrand clarified that there are policies in place but that it is his recommendation to review and compile a procedures manual. He said that Dagny and Mr. Kalt are working on revisions to the current policies. The audit was accepted on a motion by Commissioner Tipton with second by Commissioner Hartung.

8. **Presentation on the 2018 Nevada Statewide Ballot Question #3: The Energy Choice Initiative**. Dagny informed the Board that the item would be heard in a structured format giving the proponents on each side of the issue equal time to present to the Board and rebut statements made following the initial presentations. Ryan Cherry presented in support of the initiative. He referenced the packet distributed that morning, including the language of the question. He reviewed the three ways the question would allow for the procurement of electricity, guarantees for protections for residential solar consumers to sell power back to the market, and the ending of NV Energy's certification as the provider of public necessity. He also informed the Board that the question requires development and implementation of rules and regulations to be approved by the Legislature by 2023. Mr. Cherry reviewed price change models of states that currently have competitive markets and concluded his remarks with forecasts for economic development in the fields of clean and renewable energy. Mike Roberson spoke in opposition to the question. He noted that no states have deregulated electricity through a constitutional amendment. He stated that the proposal is expected to cost $4B to dismantle the current system and is projected to cause critical budget shortfalls to local governments. He informed the Board that should the question pass that all current service providers would be required to cancel any long-term contracts and divest their assets. Mr. Roberson stated that current Nevada rates are lower than the national average and up to 30% lower than rates in de-regulated states. He stated that deregulation would create a compete-to-sell market, rather than a compete-to-provide market, with no guarantees for service provided to Nevada consumers. He also addressed loss of franchise fees to the state and concluded his remarks with concerns of unintended consequences resulting from a constitutional amendment. Mr. Roberson yielded his final minutes to the Nevada Rural Electrical Association's Executive Director, Hank James. Mr. James informed the Board that the Association is a cooperative of power districts and other entities to acquire power on behalf of the members. He noted that the cooperatives are non-profit entities that provide power to areas of the state that would otherwise not be served. He expressed concerns with the proposed constitutional amendment and that the potential dissolution of current statutory language that enables electric coops to acquire and provide power to their service territories. Mr. Cherry stated that his group disagrees with Mr. James' concerns regarding the dissolution of the enabling language for coop's and stated that the question language provides these protections. He addressed municipalities that are producing power, noting that his group is prepared to work with all service providers in the drafting of rules and regulations. Mr. Cherry also disagreed with Mr. Roberson's statements regarding potential rate

increases and renewable energy projects. Mr. Roberson expressed additional concerns with constitutional amendments, a lack of policy protections, unknown details regarding implementation and concluded his remarks with the cross-section of groups that oppose the question. The Board expressed concern with the constitutional amendment included in the question, lack of local controls and lack of representation of rural communities. President Weekly noted that he has been facilitating educational presentations on the issue throughout his district and encouraged Board members to do so as well in order to provide constituents with the information to make an informed decision on the question. Commissioner Kirkpatrick informed the Board that she is the co-chair of the Coalition to defeat the question. The Board took no action on the item.

9. **Update from AT&T Including Provider of Last Resort Services in Nevada's Counties and AT&T's Role in Implementing FirstNet (First Responder Network Authority)**. Dagny reminded the Board that in 2016 AT&T petitioned the Public Utilities Commission (PUC) to be relieved of their designation as the Provider of Last Resort (the requirement to provide landline service in areas where there are no other service providers) in several areas of the State. She informed the Board that Lander, Eureka and White Pine counties requested that the designation not be removed, and that as a result AT&T does not currently have the authority to remove land line service in those counties. Dan Jacobsen reviewed the actions taken by the Legislature in 2013 that allowed for the removal of the designation if certain criteria were met. He spoke to the fact that a large percentage of AT&T's customers no longer use land line services and that the cost to maintain land line infrastructure is no longer feasible. Mr. Jacobsen noted the 2016 application to have the designation removed and the modifications made to the application following the presentation of concerns of the counties. He informed the Board that there is no application currently submitted or pending submission to have the designation removed in the areas where it currently exists and that there has been no removal of land line services. Vice President French stated that Humboldt County has no appetite for releasing the designation and expressed concerns with lack of wireless coverage and internet service resulting in challenges to economic development. Mr. Jacobsen stated that wireless service is a competitive market and that return on investment is key in investment in infrastructure development. President Elect Waits inquired about rate increases and Mr. Jacobsen noted that there is a lack of subsidy available to help control rates, but that all rates across the State are the same. Sandra Douglas-Morgan presented on FirstNet. She informed the Board that FirstNet is a federal first responder agency created on the recommendation of the 9/11 Commission. FirstNet provides a dedicated and secure network for public safety agencies to communicate across the country. Ms. Morgan informed the Board that AT&T was selected as the provider partner through a competitive bid process in 2017. All 50 states have opted into the Network and AT&T will be working with all public safety agencies to identify gaps in coverage. FirstNet has resulted in $40B in infrastructure investments in the largest public-private partnership to date. Commissioner McGuffey thanked AT&T for installing a cell tower in a portion of Storey County that lacked service. Vice President French inquired as to how the locations of towers was determined. Ms. Morgan stated that the locations were identified through cooperation with the Department of Public Safety, local agencies and the Department of Homeland Security. Vice President French encouraged the inclusion of local government engineering departments and the consideration of co-location of towers on existing county infrastructure sites.

10. **Update on the Nevada Right to Counsel Commission's Proposed Recommendations for Reforms of Nevada's Indigent Defense System**. Dagny informed the Board that the Commission is moving forward with recommendations. She reminded the Board that the Commission had contracted with the 6th Amendment Center who submitted their report to the Commission. The report found that the rural counties are doing their best to provide indigent defense without assistance or oversite from the State. The report also specifically noted budget constraints of the rural counties while some counties are not meeting national standards, it is not due to lack of effort or concern for indigent defense. Dagny informed the Board that the Commission's recommendation is a BDR that includes the recommendations within the report. The recommendations include: continuance of local control; the creation of a statewide oversite board independent of the judiciary and legislature that can set standards, conduct trainings and support and evaluate county public defenders. The recommendation also included that any standards or recommendations for changes by the statewide board would be funded by the State. Dagny informed the Board that the LCB will now draft the bill and the Commission will then review it. Dagny noted that NACO has four representatives on the Commission, Commissioner Tipton, Mayor Crowell, Joni Eastly and Tom Grady, and that Washoe and Clark Counties also have representatives on the Commission. Vice President French inquired as to if there

was discussion regarding giving the counties financial assistance for the services they already provide, since the state is legally responsible for indigent defense. Commissioner Tipton noted that it is unlikely that the State would pick up the costs and Ms. Eastly noted that it was discussed and that the language included in the BDR would cap the counties costs at what they are currently. Commissioners Wichman and Olsen noted that they are pleased with the results of the work completed by the Commission. Mr. Grady noted that the Commission was chaired by Justice Cherry and that he stated that the counties should not have to pay anymore than what they are for the services. Dagny also clarified that while the report did show deficiencies in rural county provision of indigent defense, it also stated that the only viable option is for the rural counties to continue providing the service and recommended that the State must support the counties. Ms. Eastly concluded the update with the need for continued work on caseload standards, and that broad sweeping standards will not work because of differences from county to county. Dagny inquired if the Board is satisfied with the direction its representatives on the Commission were taking and it was noted that the Board is very pleased. No action was taken.

11. **Update on the Nevada Supreme Court's Committee to Study Evidence-Based Pretrial Release**. This item was heard time certain at 11:30a.m. Dagny gave background on the item and thanked the Justice Hardesty for attending. She stated that the issue of pre-trial reform was introduced to the Board around two years ago by the Justice. She noted that the proposed reform is to use a risk assessment tool to determine if a person facing criminal justice charges should be released on their own recognizance, released with monitoring or held in jail, in lieu of the state's current bail system. Dagny informed the Board that she served on the Committee on behalf of the Association and that the Board's initial direction was to determine fiscal impacts to counties to implement the tool, including potential additions to staff as well as additional monitoring costs. She also noted that fiscal impacts could also be positive due to reduced costs associated with decreased jail populations. The bulk of the work completed centered around the policy of using the tool, development of and validation of the tool. There are three validated versions of the tool being tested in the state. The three pilot counties officially testing the tool are White Pine, Washoe and Clark and they have reported results including fiscal impacts back to the Committee. Several other counties have begun using the tool, but they have yet to report any findings back to the Committee. Though nothing conclusive has been reported back to the Committee on costs associated with implementing the tool, the Committee did ask the Court to mandate use of the tool, and the Supreme Court will consider mandating use of the tool across the State. Dagny informed the Board that staff is requesting direction regarding implementation of the tool, and whether NACO would like to provide a letter to the Court that would include concern regarding fiscal impacts to counties and timing of implementation. Justice Hardesty remarked that the issue came about due to questions surrounding the constitutionality of the bail system and lawsuits being filed against counties throughout the country. He noted that through a subcommittee it was determined that the bail system in Nevada is inconsistent even within the same jurisdictional boundaries. Justice Hardesty informed the Board that the tool is to be used by Judges pre-conviction to provide guidance for determining risk of failure to appear or to commit a crime while released. He noted that tool's behavior predictors have been validated by millions of cases throughout the country over the course of several years. He also noted that the tool is not a solution to overcrowding in jails but to allow low risk offenders to be released pending trial. The Board was informed that the average jail population in Nevada is 10,600 and that 74% of that population is comprised of 1st time misdemeanor offenders. He noted that NRS requires release on own recognizance (OR) if applicable but without the tool there was no way for a judge to determine the potential risk associated with OR releases. The Justice went through the counties implementing use of the tool and noted that the feedback received is that the costs are negligible for implementation. Commissioner Wichman inquired as to providing direction to law enforcement officers to the issuance of tickets vs. arrest for non-violent minor misdemeanors, to which the Justice stated that NRS already allows for that option. Commissioner Lucey informed the Board that Washoe County experienced some issue with implementation across jurisdictions and encouraged careful implementation planning prior to officially adopting the tool. Dagny informed the Board that, though Justice Hardesty may have heard anecdotally that some pilot counties did not incur significant costs by implementing the tool, that was information that was never provided to the Committee, though it had been requested. Dagny inquired as to the Board's desire to take a position. Commissioner Olsen informed the Board that Churchill County has been using alternative court services and pre-trial risk assessment for several years and that they have experienced about a $250,000.00 fiscal impact annually, which is significant for their county. Commissioner McGuffey noted that when he was a Justice of the Peace he had a great deal

of difficulty in determining bails and often consulted with colleagues. Commissioner Lucey stated that there is a need to have funds available to assist counties with implementation. Discussion from the Board also consisted of impacts to Human Services surrounding loss of employment, issues with child custody and housing. Commissioner Hartung moved to draft a letter to the Supreme Court indicating the Board's support for the implementation of a validated pretrial risk assessment tool on a statewide basis, and to request that, if the Supreme Court mandates the use of such a tool, they: 1) allow counties latitude in implementing the tool; and 2) gather additional information on potential budgetary and staffing impacts from implementation so that counties can adequately prepare to use the tool. The motion was approved on a second by Commissioner Steninger.

12. **Update on Interim Legislative Activities, Bill Draft Requests, and County Priorities for the 2019 Nevada Legislative Session**. This item was not heard in the interest of time as there were no significant updates to give the Board.

13. **Update and Possible Action Regarding Natural Resources and Public Lands and Issues Affecting Counties Including:** President Elect Waits had a prior commitment requiring her to leave the meeting and passed the gavel to Vice President French to conclude the meeting.

    a. **The BLM and USFS Greater Sage Grouse Resource Management Plan Amendments.** Dagny informed the Board that the Association had submitted comments on the BLM's internal draft FEIS and that they are expecting to publish their final FEIS on or about October 12. Once published there will be a 30-day protest period and a Governor's Consistency Review period and then the final Record of Decision (ROD) is expected sometime in December. The Association also submitted comments on the Forest Services' Internal Draft EIS earlier in the month and they are expected to publish their DEIS sometime the following week. This publication will start a 90-day public comment period. Dagny informed the Board that the comments submitted had mirrored prior discussion and direction of the Board.

    b. **The Department of the Interior Proposed Reorganization.** Commissioner Tipton informed the Board that the Proposed Reorganization is, for all intents and purposes, completed. She noted that the proposal is not intended to have an effect on state offices but is intended to give a path to relief beyond appeal to Washington D.C. for issues that the individual state offices are not able to resolve. She noted that through communications with Department Officials, there is hope that a representative will be present at the Annual Conference to provide further clarification on the plan.

    c. **Update on Outcome of the Center for Biological Diversity's Lawsuit Against the U.S. Fish and Wildlife Service Seeking to Vacate their Decision not to List the Bi-State Sage Grouse as an Endangered Species and NACO's Motion to Intervene on Behalf of the US F&WS.** Dagny reviewed the history of the issue and informed the Board that the Judge found on behalf of the Center. She informed the Board that the Judge set precedent by over-ruling the science the Agency used when making their decision and noted that the remedy listed in the decision requires that the Agency re-open and prepare a new listing decision within a year and a half. Dagny informed the Board that the Agency is weighing a decision to appeal and that if the Department chooses to appeal then the AG's office will also appeal as an intervenor. If that occurs there is a potential for NACO to join the appeal - this decision and options for the Board to consider will be presented at the October NACO Board meeting. Vice President French reiterated that the decision sets a new precedent that could have far reaching effects for future listing decisions. Dagny suggested any members of the Board with contacts within the Secretary's office encourage the Department to appeal.

    d. **NACO Public Lands and Natural Resources Committee Update.** Vice President French referenced the BLM's recent wild horse and burro gathers being conducted under 'emergency' actions. He also informed the Board that the next National Wild Horse and Burro Advisory Board (BLM) meeting will take place October 9-12 and he will report back. Commissioner Tipton informed the Board that comments had also been submitted on behalf of the Association on proposed ESA reforms. Discussion was also had regarding proposals to update the Forest Service's handbook.

14. **NACO Committee of the Emeritus Update**. Vinson informed the Board that the Newly Elected Official Training was in the final planning stages. He noted that the updates to the New Commissioner Handbook were complete and that the Committee had approved the panelists for the training. The panelists will be Committee members Joni Eastly and Tom Collins as well as Wayne Carlson from POOL/PACT.

15. **National Association of Counties and Western Interstate Region Board Member Updates**. The Board was informed that both Boards would be meeting in October in Arizona and that updates would be provided after those meetings.

16. **NACO Board Member Updates**. Updates were given by members of the Board on activities within their counties.

17. **Public Comment**. None was given.

The meeting was adjourned at 1:35 p.m.

The following links and/or pages are support for agenda Item 6

2019

Proposed 2019 NACO Board of Directors Meeting Dates.

Red=Observed State Holiday's

Green=NACo Conference Dates

Pink= 1st/Last Day of Session & Deadlines

Yellow=Proposed BOD Meeting Dates (December has two possible dates selected due to the Christmas Holiday)

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The following links and/or pages are support for agenda Item 8

Rural County Public Defender Reporting Tool

Instruction Manual

Created by the Nevada Association of Counties (NACO)
October 2018

Introduction: In 2017, Nevada's legislature took a preliminary step toward reforming the state's indigent defense system by establishing the Nevada Right to Counsel Commission (NRTCC). This Commission conducted, with the assistance of the Sixth Amendment Center (6AC), a study of the provision of indigent defense services in Nevada's rural counties. During the NRTCC's discussions, as well as through information gathered by the 6AC, the Nevada Association of Counties (NACO) heard from its rural county members about one important challenge they faced. That challenge is, although county commissions and county managers in rural Nevada are tasked with overseeing any contract public defenders they may have hired, they do not have a uniform reporting tool or system through which they could gather information from public defenders on their work. Such a tool could accomplish two things: 1) Help county managers and commissions understand the tasks and challenges rural contract public defenders face; and 2) Help counties ensure public defenders are meeting the terms of their contracts.

In response, NACO convened a working group to create such a tool. The working group included a county commissioner, current or former county or assistant county managers, a prosecutor, and a defense attorney. Rural counties are encouraged use the tool. Please ask your county's contract public defender(s) to fill it out once every quarter. It is suggested the reports be presented to the county commission. The instructions below provide information on how to use the tool.

Section	Question/Instruction
1	County: Please list the county in which you provide indigent defense services and for which the case load report pertains.
2	Law Firm: Please list the name of the law firm that employs you. If you are self-employed, please list "sole practitioner."
3	Attorney Name: Please list the first and last name of the attorney. Please note, a separate report must be filled out for each and every attorney in a public defender office or law firm.
4	Reporting Quarter: A county fiscal year begins on July 1st and ends on June 30th. Therefore, the four reporting quarters are as follows: Quarter 1: July 1st through September 30th. Quarter 2: October 1st through December 31st. Quarter 3: January 1st through March 31st. Quarter 4: April 1st through June 30th. Please indicate the appropriate fiscal quarter that is being reported.
5	Final Day of Last Reporting Period: Please indicate the day on which you last reported your public defender workload. For example, if the current report is for the second quarter of a fiscal year (e.g. October 1st through December 31st), then the final day of last reporting period should be marked "September 30th."

Caseload Reporting: For all public defense caseload reporting, Sections #6 through #9, please use the following uniform definition of a "case": Count the defendant and all charges involved in a single incident as a single case. If the charging document contains multiple defendants involved in a single incident, count each defendant as a single case. When cases involve multiple charges arising out of a single incident, please count the case by "top charge" at the time of filing, regardless of the severity of the case when it is disposed. That is, a case filed as a felony but disposed as a misdemeanor through plea negotiations should be counted in caseload reports as a felony.

Explanation: Using a district attorney's charging instrument to define a "case" does not produce uniform caseload data because different prosecutors have different philosophies on how to charge (as it should be). For example, one prosecutor may want to charge suspected co-conspirators on a single charging document. However, two separate public defense providers must each represent the individual co-defendants. Each right to counsel provider is ethically bound to provide zealous representation to the co-defendant assigned to them, meaning that each defense provider must conduct independent investigations and engage in separate case prep and plea negotiations. They are, in every sense of the word, two separate "cases."

Similarly, if a defendant is charged with shoplifting in one store on one day and a separate store on another day, and yet a third store on a third day, a prosecutor may want to file a single charging document to show the serial pattern of the accused. But, from the defense perspective, an attorney must interview three potential sets of eyewitnesses, and investigate three different crime scenes. It is quite possible the defendant committed two of the alleged crimes, but not the third. Each one must be treated as its own case.

This differs in kind with the work and effort needed to investigate and defend all of the charges arising from a single incident. Say a defendant is charged with reckless driving and subsequently is alleged to have resisted arrest or to have accosted the arresting officer. All of the work effort of a defense attorney is around the same sets of facts, the same eyewitnesses and the same crime scene.

Similar issue arise when trying to count a "case" by "charge" or by "defendant." Because defendants are sometimes charged with multiple counts arising out of a single incident, using "charges" as the definition of a "case," will artificially inflate caseload numbers. The opposite is true when counting cases by "defendant." Because defendants may be charged in multiple offenses occurring on different days in different places, counting "defendants" will underreport an attorney's actual workload.

Section	Question/Instruction
6	Pending Cases: Please list all open, pending public defense cases you have as of the date reported in Section #5 (above) by each classification listed. If you have no cases pending under a specific classification please list "0." No line should be left blank. If you list cases under the category "other," please list the case type.
7	New Appointments: Please list the total number of new cases to which you were appointed during the time period listed in Section #4 using the uniform definition of a "case." New appointments shall be broken down by each of the three months contained in the reporting quarter. If you have new assignments under a specific classification please list "0." No line should be left blank. If you list cases under the category "other," please list the case type. Cases in which an indigent defense client absconded and for which a bench warrant was issued in a prior report, and for which a client is returned to court during the current reporting period, should be counted as a new assignment.
8	Disposed Cases: Please list the total number of cases you disposed during the time period listed in Section #4 using the uniform definition of a "case." Dispositions shall be broken down by each of the three months contained in the reporting quarter. If you have no dispositions under a specific classification please list "0." No line should be left blank. If you list cases under the category "other," please list the case type.
9	Disposition Detail: For each classification of case type, please list the number of cases that were dismissed during the reporting period. Similarly, please list the number of cases by case type for which a defendant entered a guilty plea. Also, please list the number of cases for which an indigent defense client absconded and for which a bench warrant was issued. If an indigent defense client is returned on a bench warrant within the same reporting period and the case is disposed within the same reporting time period, count the case under the actual disposition category.
10	Number of Hours spent on court appointed representation (from this jurisdiction): Please indicate the total number of hours spent on all indigent defense cases arising from the county listed in Section #1. Do not count hours spent on indigent defense cases arising out of other counties or municipalities. Percentage of total hours spent on court-appointed representation (from this jurisdiction): Please estimate the percentage of work hours expended on indigent defense cases arising from the county identified in Section #1 as an overall percentage of your total time spent on all public and private cases. If you are a full-time government-employed public defender, you should indicate "100%." If you are a private attorney and take indigent defense cases from outside the county listed in Section #1, please count those other indigent defense cases as part of your "private" caseload for this response.
11	Other jurisdictional indigent defense workload: If you handled indigent defense cases during the reporting period in any other jurisdiction (including municipalities), please list the name of the county or municipality where this work occurred.
12	Other criminal justice work: If you performed any work in a different criminal justice capacity (e.g., magistrate, prosecutor, etc.) in any jurisdiction (including municipalities) other than the county listed in Section #1, please list the name of the county or municipality where this work occurred. Also, please indicate what criminal justice capacity performed.
13	Support personnel: Please list any and all support staff employed by the law firm indicated in Section #2 above. You do not need to list individual names but rather by job classification. For example, if a law firm or public defender office employs two legal secretaries, please indicate this as: "Legal secretaries (2)." If the law firm or public defender employs part-time support staff, please indicate the percentage of a full-time equivalent employee. For example, if a law firm or public defender office employs one full-time legal secretary and one half-time legal secretary, please indicate this as: "Legal secretaries (1.5)."

Draft County PD Reporting Tool

Created 10/2018 by the Nevada Association of Counties

1 County: _____
2 Law Firm: _____
3 Attorney Name: _____
4 Reporting Quarter: _____ to _____
5 Final Day of Last Reporting Period: _____

6 PENDING CASES - on final day of last reporting period

Death Penalty
Murder (Non-Death)
Class A
Other Felonies - Non-Specialty Courts
Other Felonies - Specialty Courts
Gross Misdemeanor
Misdemeanor (Non-Traffic)
Misdemeanor (Traffic)
Delinquency
Juvenile Status Offense
Abuse and Neglect (NRS 432B)
Termination Parental Rights (NRS 128 and NRS 432B)
Parole/Probation Revocation
Mental Health Commitment
Appeal
Other
SUB-TOTAL

7 NEW APPOINTMENTS

Month: ____ Month: ____ Month: ____

Death Penalty
Murder (Non-Death)
Class A
Other Felonies - Non-Specialty Courts
Other Felonies - Specialty Courts
Gross Misdemeanor
Misdemeanor (Non-Traffic)
Misdemeanor (Traffic)
Delinquency
Juvenile Status Offense
Abuse and Neglect (NRS 432B)
Termination Parental Rights (NRS 128)
Parole/Probation Revocation
Mental Health Commitment
Appeal
Other
SUB-TOTAL

8 DISPOSED CASES

Death Penalty Month: ____ Month: ____ Month: ____
Murder (Non-Death)
Class A

Other Felonies - Non-Specialty Courts
Other Felonies - Special Courts

Gross Misdemeanor
Misdemeanor (Non-Traffic)
Misdemeanor (Traffic)
Delinquency
Juvenile Status Offense
Abuse and Neglect (NRS 432B)
Termination Parental Rights (NRS 128)
Parole/Probation Revocation
Mental Health Commitment
Appeal
Other
SUB-TOTAL

9

DISPOSITION DETAIL	Death Penalty	Felony	Gr. Misdr.	Misdr	Misd. (Traffic)	Delinquency	432B	128	Revocation	Other	Juv. Status	Mental Health	Appeal	Total
Dismissal														
Pleas														
Bench Warrant														
# of Bench Trials														
# of Jury Trials														
# of Civil Hearings														
SUB-TOTAL														

10 Number of hours spent on court appointed representation (from this jurisdiction): _____
Percentage of total work hours spent on court appointed representation (from this jurisdiction): _____

11 List other counties and municipalities where you were appointed to represent indigent defendants: _____
_____
_____

12 What other work did you perform for the criminal justice system (e.g., magistrate)? _____
_____
_____

13 Please list all support personnel by job classification in your firm or public defender office: _____
_____
_____

Uniform Case Definition: Count the defendant and all charges involved in a single incident as a single case. If the charging document contains multiple defendants involved in a single incident, count each defendant as a single case

The following links and/or pages are support for agenda Item 9

The National Association of Counties (NACo), the Council of State Governments (CSG) Justice Center, and the American Psychiatric Association (APA) Foundation have come together to lead a national initiative to help advance counties' efforts to reduce the number of adults with mental illnesses and co-occurring substance use disorders in jails. With support from the U.S. Justice Department's Bureau of Justice Assistance and other sponsors, the initiative will build on the many innovative and proven practices being implemented across the country.

https://www.naco.org/resources/signature-projects/stepping-initiative

The following links and/or pages are support for agenda Item 10

FCC curtails local control in 5G deployment order

KEY TAKEAWAYS

FCC approves a new rule limiting local control of public rights-of-way for 5G wireless telecommunications facilities; NACo and NLC release joint statement in response The order limits fees local governments can charge providers and narrows the review process for municipalities to adequately assed 5G deployment applications

On September 26, the Federal Communications Commission (FCC) approved a new rule – the *Streamlining Deployment of Next Generation Wireless Infrastructure Declaratory Ruling and Third Report and Order* – on 5G wireless network deployment that curtails local authority. The FCC decision limits fees local governments may assess on telecommunications companies for the placement, construction or co-location of new wireless service facilities.

The ruling also constrains local governments to 60 days to evaluate applications from wireless companies to attach 5G Small Cells to existing structures and 90 days to review applications for equipment on entirely new structures. By narrowing the window for evaluating 5G deployment applications, the FCC rule could prevent local governments from properly examining the impact that construction, modification or installation of broadcasting facilities may have on public health, safety and welfare of the community.

In response to the order, NACo and National League of Cities (NLC) released a joint statement highlighting concerns with the new regulations. Citing over 100 local governments from 22 states who filed comments prior to the FCC's decision, NACo and NLC stated, "The FCC's impractical actions will significantly impede local governments' ability to serve as trustees of public property, safety and well-being. The decision will transfer significant local public resources to private companies, without securing any guarantee of public benefit in return."

The new regulations will go into effect 90 days after publication in the Federal Register. Once. Once in effect, counties will be susceptible to enforcement action if wireless providers or other small cell applicants claim a local government is not in compliance with the new requirements.

Specifically, the declaratory ruling and report and order will:

- **Create two new categories of shot clocks** for small cell wireless facility review. Local governments would have 60 days to complete review of applications for collocated small cells, and 90 days for small cells on new structures. These shot clocks include "all aspects of and steps in the siting process," including mandatory pre-application procedures, public notice and meeting periods, and construction permitting.
- **Determine that exceeding the shot clock is a "prohibition on the provision of services,"** and allow wireless site applicants to seek expedited injunctive relief in court within 30 days of a local government missing a shot clock deadline. More restrictive state laws will remain in effect and will not be replaced by this order.

- **Limit application fees for all small wireless facilities** to $500 for up to five sites, and $100 per site for each site thereafter.
- **Limit recurring fees for small cells in public rights-of-way** to a “reasonable approximation” of the locality’s “objectively reasonable costs” for maintaining the rights-of-way, which must be no higher than fees for similar actors. The FCC defines reasonable recurring fees to be limited to $270 per site, per year. Local governments are expressly prohibited from recovering any cost not directly related to rights-of-way maintenance. The FCC also finds gross revenue fees to be presumptively unreasonable and existing agreements are not grandfathered.
- **Limit allowable local aesthetic requirements**, including minimum spacing requirements, to those that are “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments and (3) published in advance.” The FCC notes that undergrounding requirements for wireless facilities would constitute an illegal prohibition of service by a local government.

file:///Users/dstapletonnaco/Downloads/DOC-353962A1%20(1).pdf

Office of the County Manager

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Jessica L. Colvin, Chief Financial Officer
Les Lee Shell, Chief Administrative Officer

September 18, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

Clark County, Nevada writes to express our concerns over the Federal Communications Commission's proposed Declaratory Ruling and Third Report and Order regarding state and local governance of small cell wireless infrastructure deployment. **Clark County is committed to continuing its strong relationship working with small cell providers in our community to establish fair and transparent processes to best support the communities priorities related to infrastructure deployment.**

While we share the Commission's objective of finding new ways to effectively deploy broadband technologies, especially in underserved communities, we are concerned that the proposed language would significantly impede local governments' ability to serve as trustees of public property, safety and welfare. Counties own substantial amounts of public right-of-ways, which many communication providers use to construct their own communications networks. The proposed order would significantly narrow the amount of time for local governments to evaluate 5G deployment applications from communication providers – effectively hindering our ability to fulfill public health and safety responsibilities during the construction and modification of broadcasting facilities.

- **The FCC's proposed new collocation shot clock category is too extreme.** The proposal designates any preexisting structure, regardless of its design or suitability for attaching wireless equipment, as eligible for this new expedited 60 day shot clock. When paired with the FCC's previous decision exempting small wireless facilities from federal historic and environmental review, this places an unreasonable burden on local governments to prevent historic preservation, environmental, or safety harms to the community. The addition of up to three cubic feet of antenna and 28 cubic feet of additional equipment to a structure not originally designed to carry that equipment is substantial and may necessitate more review than the FCC has allowed in its proposal.

- **The FCC's proposed definition of "effective prohibition" is overly broad.** The draft report and order proposes a definition of "effective prohibition" that invites challenges to long-standing local rights of way requirements unless they meet a subjective and unclear set of guidelines. While the Commission may have intended to preserve local review, this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding.

- **The FCC's proposed recurring fee structure is an unreasonable overreach that will harm local policy innovation.** We disagree with the FCC's interpretation of "fair and reasonable compensation" as meaning approximately $270 per small cell site. Local governments share the federal government's goal of ensuring affordable broadband access for every American, regardless of their income level or address. That is why many cities have worked to negotiate fair deals with wireless providers, which may exceed that number or provide additional benefits to the community. Additionally, the Commission has moved away from rate regulation in recent years. Why does it see fit to so narrowly dictate the rates charged by municipalities?

Clark County has worked with private business to build the best broadband infrastructure possible for our residents. We oppose this effort to restrict local authority and stymie local innovation, while limiting the obligations providers have to our community. We urge you to oppose this declaratory ruling and report and order.

Respectfully submitted,

for
YOLANDA T. KING
County Manager

The following links and/or pages are support for agenda Item 11

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DESERT SURVIVORS, et al.,

Plaintiffs,

v.

US DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. 16-cv-01165-JCS

REMEDY ORDER

I. INTRODUCTION

In this case, Plaintiffs Desert Survivors, Center for Biological Diversity, WildEarth Guardians, and Western Watersheds Project challenged: 1) the decision of the U.S. Fish and Wildlife Service to withdraw the proposed listing of the Bi-State Sage-Grouse as "threatened" under the Endangered Species Act (the "Withdrawal Decision"); and 2) the Service's "Final Policy on Interpretation of the Phrase 'Significant Portion of its Range' in the Endangered Species Act" (the "SPR Policy"). On May 15, 2018, the Court issued an order granting Plaintiffs' summary judgment motion and denying Defendants' summary judgment motions. In response to the Court's request, the parties have provided briefing on the appropriate remedy in light of the Court's rulings. The Court's ruling on remedies is set forth below.[1]

II. WITHDRAWAL DECISION REMEDY

Judicial review of agency action under the Endangered Species Act is governed by the "arbitrary or capricious" standard set forth in the Administrative Procedures Act ("APA"), which provides that "a reviewing court shall . . . hold unlawful and set aside agency action, findings, and

[1] The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In its summary judgment order, the Court concluded that the Service's Withdrawal Decision was arbitrary and capricious under the APA and unsupported by the record. Therefore, as the parties have agreed, the appropriate remedy is to vacate the Withdrawal Decision and remand with directions to the United States Fish and Wildlife Service ("FWS") to issue a new final listing decision. The parties also agree that the proposed rule to list the Bi-State DPS that was the subject of the Withdrawal Decision should be reinstated. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). Finally, the parties have agreed on certain requirements regarding the timing of the actions required of FWS upon remand, which the Court finds to be reasonable.

Therefore, with respect to the Withdrawal Decision, the Court ORDERS as follows:

1) The Withdrawal of the Proposed Rule to List the Bi-State Distinct Population Segment of Greater Sage-Grouse and Designate Critical Habitat ("Withdrawal Decision"), published at 80 Fed. Reg. 22,828 (Apr. 23, 2015), is HEREBY VACATED and set aside;

2) The prior proposal to list the Bi-State Sage-Grouse as a threatened species and to designate critical habitat, published at 78 Fed. Reg. 64,328 (Oct. 28, 2013) ("Proposed Listing"), is HEREBY REINSTATED;

3) Federal Defendants shall provide a new opportunity for public comment on the Proposed Listing and shall prepare and publish in the Federal Register a new and final listing determination on the proposed rule by **October 1, 2019**;

4) If the Federal Defendants make a finding that additional time is needed because there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination" and submit that finding to the Court by October 1, 2019, then the time for Federal Defendants to prepare and publish in the Federal Register a final listing determination on the proposed rule shall be extended to April 1, 2020.

III. SPR POLICY REMEDY

In its summary judgment order, the Court concluded that the definition of "significant" in the SPR Policy is an impermissible interpretation of the "significant portion of its range" language in the Endangered Species Act. The parties agree that some sort of vacatur of the SPR Policy is an appropriate remedy, and both sides agree that any vacatur of the SPR Policy should be limited to the definition of "significant" that the Court found to be impermissible. Defendants, however, contend the Court should limit the vacatur order to the particular geographical region in which Plaintiffs' injury occurred, namely, the District of Nevada and the Eastern District of California, where the Bi-State DPS is found. Plaintiffs contend there should be no such limitation. The Court concludes that Plaintiffs are correct.

As a preliminary matter, the Court notes that in "rare circumstances," an invalid rule may be left in place without vacatur on the basis of equity concerns. *Ctr. for Envtl. Health v. Vilsack*, No. 15-CV-01690-JSC, 2016 WL 3383954, at *10 (N.D. Cal. June 20, 2016) (citing *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) (Courts "leave an invalid rule in place only when equity demands that we do so.")). "To determine whether to make an exception to the usual remedy of vacatur, the Court considers two factors: (1) 'how serious the agency's errors are,' and (2) 'the disruptive consequences of an interim change that may itself be changed.'" *State v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017), appeal dismissed sub nom. *State by & through Becerra v. United States Bureau of Land Mgmt.*, No. 17-17456, 2018 WL 2735410 (9th Cir. Mar. 15, 2018) (citing *Cal. Cmtys. Against Toxics v. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Defendants do not invoke this exception, however, in support of their request for a geographical limitation on the Court's vacatur order.

Instead, Defendants point to the Ninth Circuit's admonition in *Los Angeles Havens Hospice, Inc. v. Sebelius*, that a remedy should be "no more burdensome . . . than necessary to provide complete relief to the plaintiffs." 638 F.3d 644, 664 (9th Cir. 2011). According to Defendants, because the injury Plaintiffs suffered occurred only in the Bi-State DPS, a remedy that

extends only to that geographical region is all that is needed or appropriate to afford sufficient relief. They further assert that under *Los Angeles Havens Hospice*, a geographically limited vacatur order is preferable to nationwide vacatur because other courts will have the opportunity to address a difficult issue in different factual contexts, resulting in multiple decisions by various courts of appeals. 638 F.3d at 664.

Defendants also suggest that a geographical limitation is required under *Lujan v. National Wildlife Federation*, 497 U.S. 871, 873 (1990) and the rules governing Article III standing. They point out that in *Center for Biological Diversity v. Jewell* ("*CBD I*"), Case No. 14-2506 (District of Arizona), Judge Marquez amended her order vacating the SPR Policy on the basis that the plaintiffs in that case had established Article III standing only "with respect to the Final Pygmy Owl Finding and the Final SPR Policy as applied in the District of Arizona" and not "to challenge the Final SPR Policy nationwide." Case No. 14-2506, Docket No. 81 (citing *Lujan v. Nat'l Wildife Fed'n*, 497 U.S. 871, 891 (1990)).

The Court is not persuaded that an order partially vacating the SPR Policy – without a geographic limitation – violates the principle set forth in *Los Angeles Havens Hospice* or the rules that govern Article III standing. First, the remedy requested by the plaintiffs in *Los Angeles Havens Hospice* went beyond asking the court to vacate the challenged regulation. In that case, a hospice provider brought a facial challenge to a regulation imposing an aggregate cap on Medicare payments to hospice providers. 638 F.3d at 665. The court found that the hospice provider, which had received an overpayment demand from the Department of Health and Human Services that was based on the hospice cap regulation, had standing to challenge the regulation, both on its face and as applied. *Id.* at 653. It further found that the regulation was inconsistent with the applicable hospice cap statute under which it was promulgated. *Id.* The judgment entered by the district court did "not only invalidate[ ] the 2006 overpayment demand and the hospice cap regulation," however. *Id.* It "also stated that 'HHS is hereby enjoined prospectively from using the current [version of] 42 C.F.R. § 418.309(b)(1) to calculate hospice cap liability for *any* hospice.'" *Id.* (emphasis in original). It was this injunctive relief that the court found to be unduly burdensome, concluding that the district court abused its discretion but stopping short of finding

that the nationwide injunction was "in excess of its jurisdiction." *Id.* at 661. In reaching this conclusion, the Court of Appeals relied on the district court's own finding that "a nationwide injunction would not be in the public interest because it would significantly disrupt the administration of the Medicare program by inhibiting HHS from enforcing the statutorily mandated hospice cap as to over 3,000 hospice providers, and would create great uncertainty for the government, Medicare contractors, and the hospice providers." *Id.*

In contrast to *Los Angeles Havens Hospice*, Plaintiffs here have not asked for a nationwide injunction. Nor have Defendants pointed to evidence that an order vacating one aspect of the SPR Policy will lead to the sort of disruption that was likely to result from a nationwide injunction in *Los Angeles Havens Hospice*. Indeed, it is not clear that the geographical limitation proposed by Defendants would not itself be a source of confusion given that Plaintiffs have identified a number of species whose habitats include the Eastern District of California and/or the District of Nevada and also other districts where the definition of "significant" under the SPR Policy would remain in effect under Defendants' proposal. Moreover, nothing in *Los Angeles Havens Hospice* suggests that the court would have abused its discretion if it had merely vacated the challenged regulation, as Plaintiffs request here. To the contrary, the court in that case made clear that "[a]n order declaring the hospice cap regulation invalid, enjoining further enforcement against Haven Hospice, and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief." *Id.*

Further, the Court is not persuaded that the possible benefit of multiple decisions by courts of appeals addressing different fact patterns justifies limiting the scope of the vacatur geographically. The Court found that the SPR Policy is deficient as a *matter of law*, meaning that it cannot be reconciled with any set of facts. Further, to the extent that the Court has found that the definition of "significant" is inconsistent with the Endangered Species Act, any possible benefit that might arise from multiple decisions addressing the lawfulness of the policy is outweighed by the fact that application of the policy could prevent species from being afforded the protection the ESA was intended by Congress to afford them. *See Nw. Envtl. Advocates v. U.S. E.P.A*, No. C 03-05760 SI, 2006 WL 2669042, at *10 (N.D. Cal. Sept. 18, 2006), *aff'd sub nom.*

Nw. Envtl. Advocates v. U.S. E.P.A., 537 F.3d 1006 (9th Cir. 2008) ("In considering which of the parties' positions most closely approximates the proper remedy in this case, the Court is primarily guided by one factor: the EPA regulation is plainly contrary to the congressional intent embodied in the Clean Water Act.").

The Court also rejects Defendants' argument that the Court should place a geographical limitation on the vacatur of the SPR Policy on the basis of Article III standing. Courts have "made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)(quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989)). The court in in *National Mining Association* pointed to the following passage in Justice Blackmun's dissent in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), which "apparently express[ed] the view of all nine Justices on this question:"

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

145 F.3d at 1409 (quoting *Lujan*, 497 U.S. at 913)(Blackmun, J., dissenting) (citation omitted).

Likewise, the majority in *Lujan* – while finding that there had been no final agency action that had subjected the plaintiff to concrete harm and thus, that the plaintiff's claims were not ripe for review under Article III – recognized that if there *had* been some final agency action that was ripe for review, an individual who was adversely affected by the action could seek a remedy that went beyond the individual's injury. 497 U.S. at 890 n. 2. In particular, Justice Scalia stated:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the

> APA by a person adversely affected-and the entire "land withdrawal review program," insofar as the content of that particular action is concerned, would thereby be affected.

Id. The Court found in its summary judgment order that Plaintiffs' challenge to the definition of "significant" under the SPR Policy is ripe for review. Accordingly, *Lujan* supports the conclusion that Plaintiffs have standing under Article III to seek vacatur of the SPR Policy without a geographical limitation.[2]

For these reasons, the Court vacates and sets aside the "significant portion" part of the SPR Policy that it found to be unlawful in its summary judgment order.

IT IS SO ORDERED.

Dated: August 24, 2018

JOSEPH C. SPERO
Chief Magistrate Judge

[2] The Court respectfully declines to follow the decision in *CBD I* limiting the vacatur order in that case to the District of Arizona. Although the court in *CBD I* cited *Lujan* for the proposition that a regulation is not ripe for review under the APA until there has been some concrete action applying to the claimant's situation, the court did not explain how that language supported the conclusion that the plaintiffs in that case – who *had* been subject to concrete agency action and were bringing a facial challenge to the SPR Policy based on the harm that they suffered from that concrete action – lacked standing to seek vacatur beyond the geographical area where they suffered injury. As discussed above, *Lujan* recognizes that a successful facial challenge to a regulation may result in its invalidation even if that remedy affects nonparties. The Court finds nothing in *Lujan* that suggests that a party who brings a facial challenge based on a concrete injury has standing only as to the geographical area where the injury occurred. The only other case Defendants cite in which vacatur was geographically limited is *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). In that case, however, the court limited the scope of the vacatur simply because the parties had agreed to do so and did not discuss any of the issues raised by the parties here as to the scope of the vacatur.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

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

MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVERNORS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

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REGULATIONS

NOTICE OF MOTION AND MOTION

To all Parties and their Attorneys of Record: Please take notice that on March 16, 2018, at 9:30 a.m., in Courtroom G, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, or as soon thereafter as the matter may be heard, under Fed. R. Civ. P. 56 and Civ. L-R 7-2, 7-4, and 56-1, Defendant-Intervenors Nevada, Nevada Association of Counties, and County of Mono, California, move this court for summary judgment against all claims in Plaintiffs' Complaint relating to the final withdrawal of a proposed rule to list the bi-state sage grouse as threatened under the Endangered Species Act. This motion is based on this Memorandum of Points and Authorities, the Administrative Record, other admissible documents, and any oral evidence or argument offered at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs seek by court order what they could not get through the administrative process. In doing so, they disparage the unprecedented efforts of dozens of on-the-ground state and federal officials as, effectively, a sham. They describe a do-nothing Fish & Wildlife Service whose decisions are "sleight-of-hand."[1] They belittle with skeptical quotations the "commitment" of various agencies.[2] They seize on every instance of fresh thought as evidence of bad faith or laziness. They deprecate every departure from an uncompromising pro-listing position as suspect or "abrupt" or "inexplicable."[3] They nitpick, observing, for instance, that although the Bi-State Action Plan ("Plan") specified that it would continue to remove pinyon-juniper trees to benefit the sage grouse—as has been done for years, over thousands of tree acres—the Plan fails, they say, to "articulate" precisely how many future acres to remove.[4]

The truth is that when it comes to complex, multi-year decisions like how best to protect a species in territory where other species, including humans, must also live, there is always room to disagree. The very scientists and policy-planners who serve shoulder to shoulder on committees, and who study the same technical reports, themselves engage in earnest dispute. This, in the end, is why

[1] Pltfs. Mot. at 34, 39.
[2] Pltfs. Mot. at 2, 3, 13, 14, 17, 28, 30, 31, 32.
[3] Pltfs. Mot. at 2, 28, 16.
[4] Plfts. Mot. at 33.

Congress requires that courts uphold such decisions so long as there is a rational basis for the decision.

The Obama Administration's Fish & Wildlife Service chose to withdraw a proposed "threatened" listing of the bi-state sage grouse because the Service saw assembled before it one of the broadest and best-funded coalitions ever formed to protect one species.[5] This coalition's plan—the Bi-State Action Plan—was approved in 2012 by the Fish & Wildlife Service ("Service"), U.S. Forest Service, Bureau of Land Management, National Resources Conservation Service, U.S. Geological Survey, Nevada State Department of Wildlife, and California Department of Fish and Wildlife.[6] The leadership of these agencies formed an Executive Oversight Committee and a Technical Advisory Committee (an inter-agency team of scientists) that would collaborate with the long-established Local Area Working Group, a ground-level team of concerned citizens, nonprofits, private landowners, industry representatives, counties, tribal representatives, Department of Defense, and other state and federal agencies. All collaboratively implemented targeted conservation efforts.

In 2013, this unmatched "all hands" alliance redoubled its efforts *precisely* in response to the Service's concerns—in order to prevent a decision to list the species.[7] These labors paid off: in 2015, after years of work, the majority of experts among the state, federal, and private biologists across the region, including those within the Service, came to agree that the Bi-State Action Plan will effectively protect the bi-state sage grouse population.[8] A victory for Plaintiffs here would undermine this extraordinary collaborative effort and, in fact, endanger the very species that all sides wish to conserve.

II. FACTUAL HISTORY

In 2013, the Service proposed to list the bi-state sage grouse as a threatened species because it found that "existing regulatory mechanisms" were "inadequate to protect" the species subset.[9] At the same time, the Service added that "managing agencies are beginning to work more collaboratively across jurisdictional boundaries" and that the Bi-State Action Plan, "if completely refined and fully

[5] BSSG0079929 (Doc. 5460) (Service applauds work of Bi-State Local Area Working Group, Executive Oversight Committee, and Technical Advisory Committee); BSSG0079929 (Doc. 5460).
[6] BSSG090789 (Doc. 5870).
[7] 80 Fed. Reg. 22,828 (Apr. 23, 2015); BSSG079486-542 (Doc. 5716).
[8] BSSG090789 (Doc. 5870); 80 Fed. Reg. 22,828.
[9] 78 Fed. Reg. 64,358 (Oct. 28, 2013).

implemented, may result in the removal of threats to the Bi-State DPS so that the protections of the Act may no longer be warranted."[10] On this summons, the agencies, federal and state, in California and Nevada, intensified their commitment to improve, fund, and implement the Plan.

Pre-2013 conservation efforts had been significant. But under the Service's stringent standards, Plan partners had to achieve new levels of certainty of implementation and effectiveness.[11] The partners, informed by local science and expertise, developed new empirical models, specified new project locations, secured new funding, and put into motion new projects to address threats to the bird such as habitat loss and fragmentation.[12] All this was consistent with the 2013 report of the Conservation Objectives Team of State agencies and Service representatives—the COT Report.[13] The COT Report contained a discrete set of objectives for each threat category to achieve stable or positive bi-state sage grouse population trends, covering fire, non-native or invasive plant species, energy development, sagebrush removal, grazing, range management structures, free-roaming equid management, pinyon-juniper expansion, agricultural conversion, mining, recreation, ex-urban development, infrastructure, and fences.[14] The Plan partners identified actions for each threat category and explored conservation models and data collection tools to obtain reliable population and habitat projections to inform future actions.[15]

By 2015, Plan partners had completed or initiated 200 key projects and identified 79 priority ongoing or future projects ranked by immediacy of threat and broken down by threat categories; these would require $38 million in funding.[16] Analysis under the Policy for Evaluation of Conservation Efforts ("PECE") measured the effectiveness of these actions against COT Report objectives.[17] Partners, for instance, finalized two sophisticated new scientific models for population and habitat

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[10] *Id.* at 64,372, 64,377.
[11] *Id*. at 64,377; BSSG003074 (Doc. 0674).
[12] *Id*.
[13] BSSG103823 (Doc. 5829); BSSG079489 (Doc. 5716).
[14] BSSG103867-81 (Doc. 5829).
[15] BSSG005473 (Doc. 0138).
[16] BSSG056464-72 (Doc. 4702); BSSG079517 (Doc. 5716); BSSG080385-88, BSSG080437-78 (Doc. 4100); BSSG043775 (Doc. 3229).
[17] BSSG079489 (Doc. 5716).

projections: the "Conservation Planning Tool" and "Integrated Population Model."[18] The first model allowed the Service to measure the effectiveness of current and future projects and to assess the effect of management actions on sage grouse populations.[19] The second model let the Service confirm stable population projections, even taking into consideration Population Management Units for which data was unavailable.[20] The Plan partners provided an extraordinary $45,233,333 in financial assurances.[21] Finally, the Agencies executed a "Service First Agreement" that let funding acquired by *any* partner to be applied to *any* project across the bi-state sage grouse range.[22]

Plaintiffs claim that the "only difference" between the Bi-State Action Plan found lacking by the Service in 2013 and the Bi-State Action Plan accepted by the Service in 2015 is a "packet" consisting of a "flowchart," "commitment" letters to fund vegetation and easement projects, and a claim that the packet "represent[s] a unified and collaborative approach."[23] In other words, mere paperwork. Plaintiffs' itemization leaves out documents like the (1) Memorandum of Understanding Facilitating Interagency Cooperation, (2) Service First Agreement, (3) Technical Advisory Committee's Summary Letter of Implementation to Date and Effectiveness, (4) Science Support for Effectiveness of Actions by Threat to Conserve the Bi-State Distinct Population Segment, (5) Bi-State Sage Grouse Habitat Characterization and Verification, (6) Conservation Planning Tool, (7) Bi-State Integrated Population Model, and (8) numerous documents related to regulatory mechanisms and assurances.[24] These are critical documents. They set out not only pledges by agencies to solidify their commitment but provided information essential to the Service's PECE analysis. Plaintiffs' characterization of developments from 2013 to 2015 as being one of paper promises is plainly untrue. The far-reaching accomplishments outlined above more than provided a rational basis for the Service's finding that the Plan was certain to be implemented and effective. Plaintiffs fail to show that the Service did not explain its reasoning or rationally apply PECE in

[18] BSSG080398 (Doc. 4100).
[19] BSSG079495-520 (Doc. 5716).
[20] BSSG106394 (Doc. 6862); BSSG058529-30 (Doc. 4911); BSSG046922 (Doc. 3884).
[21] BSSG080368-408 (Doc. 4100).
[22] BSSG080581 (Doc. 4100).
[23] Pltfs. Mot. at 31.
[24] BSSG080368-408 (Doc. 4100).

evaluating the Plan. Plaintiffs offer no information that the Service failed to consider. The Service's withdrawal rests on overwhelming record evidence.

III. LEGAL BACKGROUND

The Endangered Species Act of 1973 ("ESA") reflects Congress's view that collaborative multi-jurisdictional agreements, with pooled resources and mutual safeguards, best support conservation. The Fish & Wildlife Service is mandated to "encourage the States and other interested parties" to develop and maintain conservation programs.[25] Service decisions are to be made only "after taking into account those efforts, if any, being made by any State or…political subdivision."[26] Case law, likewise, captures the truth that local community involvement is the surest guarantor of long-term results. For instance, in *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011), the Ninth Circuit recognized that the Service, in de-listing the grizzly bear, rightfully relied on a voluntary inter-agency, multi-state conservation plan achievement as the basis for de-listing.

The ESA defines a "threatened" species as one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[27] Section 4(a)(1) of the ESA requires that the Secretary determine whether a species is endangered or threatened because of one or more of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[28] Listing Factor D, largely at issue here, does not require that "existing regulatory mechanisms" be legally binding.[29] The D.C. Circuit this year explained that "[h]ad Congress intended to so limit the analysis, it could have used 'State law or regulation,' as it did elsewhere in the ESA."[30] Courts describe Listing Factor D's "regulatory mechanisms" and PECE's

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[25] 16 U.S.C. §1531(a)(5).
[26] 16 U.S.C. §1533(b)(1)(A); *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 4 (D.C. Cir. 2016) ("*DoW III*").
[27] 16 U.S.C. § 1532(20).
[28] *Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1079 (D.C. Cir. 2017) ("*DoW IV*") (citing 16 U.S.C. §1533(a)(1)).
[29] *Id*. at 1082.
[30] *Id*.

"conservation efforts" interchangeably, as "nonbinding measures" that "'if sufficiently certain and effective to alleviate a threat [of endangerment] may render a [legally binding] regulatory mechanism unnecessary."[31] The terms "significant" and "range," are sufficiently unspecific and broad that the Secretary "necessarily has a wide degree of discretion in delineating 'a significant portion of its range.'"[32]

The Policy for Evaluation of Conservation Efforts, dating from March 2003, is a framework by which the Service evaluates voluntary conservation plans that are certain to occur but as yet (1) are unimplemented or (2) haven't yielded results.[33] PECE considers future efforts in the present tense.[34] The basic inquiry is whether these future efforts are "sufficiently certain to be implemented and effective."[35] In particular, the Service looks at "conservation efforts identified in conservation agreements, conservation plans, management plans, or similar documents developed by Federal agencies, State and local governments, Tribal governments, businesses, organizations, and individuals."[36] PECE is how the Service fulfills its duty under 16 U.S.C. § 1533(b)(1)(A) to consider existing conservation efforts before making a listing determination. One of PECE's purposes is to "guide the development of conservation efforts that sufficiently improve a species' status" so that listing becomes unnecessary.[37] PECE, then, operates not only to help evaluate voluntary conservation efforts, but to spur them.[38] PECE also reserves power to the Service to "re-evaluate its listing decision should there be a 'failure to implement the conservation effort' for *any* reason."[39]

IV. STANDARD OF REVIEW

Plaintiffs' challenge to the Service's listing decision is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). A court must uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A court's

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[31] *Id.* at 1082-83.
[32] *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001).
[33] 68 Fed. Reg. 15,100, 15,113-115.
[34] *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 187 (D. D.C. 2014) ("*DoW II*").
[35] *Id.*
[36] 68 Fed. Reg. 15,100.
[37] 68 Fed. Reg. 15,112.
[38] *Id.*
[39] 68 Fed. Reg. 15,114; *DoW III*, 815 F.3d at 10, 11.

responsibility is to determine, in light of the record considered by the agency, whether the decision was a product of reasoned decision-making.[40]

The ESA's mandate that the Service rely on the "best scientific and commercial data available" is fairly unrestrictive; the requirement "merely prohibits [an agency] from *disregarding* available scientific evidence that is in some way better than the evidence it relies on."[41] What constitutes the "best scientific and commercial data available" falls squarely within the Service's special expertise.[42] There is a strong presumption in favor of upholding the decision of the Service in view of its expertise in the area of wildlife conservation and management.[43] This is because these decisions turn on the Service's predictive judgment as to "models, methodologies, and weighing scientific evidence."[44] Courts may not choose among competing scientific views respecting the status of a species, even where alternative conclusions are presented that "as an original matter, a court might find…more persuasive."[45]

V. ARGUMENT

The perfectly rational reason behind the Service's withdrawal decision comes across in Plaintiffs' own briefing. They acknowledge that the Service's April 2015 decision reflected its acceptance of promises of voluntary action and future funding.[46] They quote the Service's statement in the Federal Register that the Service acted after seeing a "documented track record of active participation and implementation by the signatory agencies, and commitment to continue implementation into the future."[47] Interpreting for themselves the meaning and weight of internal assessments, Plaintiffs label the Service's reliance on future efforts "inexplicable." Yet the supposedly "abrupt" shift that Plaintiffs decry—"abrupt" meaning, apparently, occurring over an 18-month period—arose from considerable new and energetic efforts.[48]

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[40] *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014).
[41] *Id*. at 581.
[42] *Id*.
[43] *DoW IV*, 849 F.3d at 9.
[44] *San Luis*, 747 F.3d at 621.
[45] *Id*. at 603-04.
[46] Pltfs. Mot. at 17.
[47] Pltfs. Mot. at 18.
[48] Pltfs. Mot. at 2 (18 months); BSSG058552-54 (Doc. 4911); BSSG058590 (Doc. 4915).

Plaintiffs try to undermine the Service's views by selective citation—nowhere easier than with a record of this size—of internal correspondence among agency staffers reflecting ongoing deliberations.[49] But these records only demonstrate the intensity of the deliberations; the demanding nature of the Service's consideration; and the fact that no predetermined conclusions existed.[50] The Service's decision was more than rational—it was exacting. The record shows, between 2013 and 2015, some 23 public meetings discussing PECE compliance for the Plan between the Executive Oversight Committee, Technical Advisory Committee, Local Area Working Group, and Mono County Working Group.

Courts, of course, do not overturn agency decisions based on internal deliberations. The Service has not only the right to change its mind but a *duty* to do so if new facts compel it. Here, the Service met with substantial new developments during the public comment period. In *Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Service*, 475 F.3d 1136, 1145 (9th Cir. 2007), the Ninth Circuit explained that a "paramount purpose" of the APA is *precisely* to "make an agency publish its preliminary rule and then to rethink that position, in light of the comments and additional information received."[51] When the Service withdrew its 2013 proposed listing, it systematically considered the relevant factors and articulated a rational connection between the facts found and the choices made. The decision, the Service explained, was based on new science and information that became available after the 2013 proposal.

A. The ESA and its implementing regulations require the Service to consider voluntary or future measures, such as the Bi-State Action Plan, in listing decisions.

Plaintiffs argue that the ESA does not allow the Service to consider voluntary or future conservation measures in determining whether to list species. To the contrary, such consideration is obligatory.[52] In many of these cases, the very Plaintiffs here raised similar objections that courts

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[49] Pltfs. Mot. at 8, 12- 13, 26, 33.

[50] *See, e.g., National Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007); *DoW III*, 815 F.3d at 11.

[51] *Id.*; *see* Dfs. Mot. at 9.

[52] *DoW II*, 70 F. Supp. 3d at 183 and *DoW III*, 815 F.3d at 1 (Conservation Plan for Dune Sagebrush Lizard); *DoW IV*, 849 F.3d at 1082 (Grey Wolf Management Plan); *Servheen*, 665 F.3d at 202 (Grizzly Bear Recovery Plan); *Permian Basin Petroleum Ass'n v. Dep't. of the Interior*, 127 F. Supp. 3d 700, 706, 708 & 710 n.7 (W.D. Tex. 2015) (Lesser Prairie Chicken Range-wide Conservation Plan).

rejected, finding that the Service exercised its judgment in a responsible, reasoned way.[53] PECE requires the Service to consider all pertinent conservation efforts, not just selected ones and not merely when requested to do so.

B. The Service properly applied and explained its use of the PECE to withdraw its proposal to list the bi-state sage grouse as a threatened species.

Plaintiffs' argument that the Service misapplied PECE by addressing voluntary or "speculative" future efforts is essentially a facial attack on PECE.[54] Yet PECE was developed specifically to measure the certainty of efforts that, as Plaintiffs write, "have not been implemented."[55] So long as these efforts are certain to be implemented and effective, they are deemed *not speculative*.

But what is more, the Bi-State Action Plan was, in 2015, an *existing* plan that had already accomplished much. Plaintiffs note, for instance, that the Service decided that listing was unwarranted after examining "*partially completed* and *ongoing* conservation measures," in addition, of course, to "planned future conservation."[56] And the Plan's efforts were never *rejected* by the Service. To the contrary, in 2013, at the time of the listing proposal, the Service's position was that Plan efforts "*continue* to provide conservation benefits to the DPS into the future," and that the Plan, "*if completely refined and fully implemented*, may result in the removal of threats to the bi-state [sage grouse] so that the protections of the Act may no longer be warranted."[57] Plaintiffs proclaim the supposed impermissibility of relying on efforts yet to be executed, but every plan, by definition, has its execution in the future. This is true, too, of any plan that would follow an ESA listing.

1. The Service's finding that the Bi-State Action Plan was certain to be implemented was not irrational.

PECE specifies numerous fact-specific criteria that must be considered in assessing the

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[53] *DoW III*, 815 F.3d at 8-9. Plaintiffs omit these cases and rely instead on statements in non-binding district court decisions that were either decided pre-PECE or that do not speak to the application of the Service's PECE criteria. We do not address those decisions here, as Dfts. Mot. at 16, 18 does.
[54] *DoW III*, 815 F.3d at 9.
[55] Pltfs. Mot. at 28.
[56] Pltfs. Mot. at 16-18 (emphasis added) (citing BSSG065299, BSSG065311 (Doc. 5185)); BSSG065309 (Doc. 5185); 80 Fed. Reg. at 22,834-35, 22,849).
[57] 78 Fed. Reg. 64,358, 64,377 (emphasis added); BSSG003074 (Doc. 0674).

likelihood that future conservation efforts will be implemented and that those efforts will be effective.[58] But the key is that so long as the Service's findings are supported by substantial evidence—meaning reasonable even if contrary evidence exists—there is, as courts explain, "no risk" that the Service would rely on an "overly speculative agreement."[59]

The Service properly applied the "implementation" prong factors and adequately explained its reasoning. By 2015, as noted, new scientific models had been completed; Plan partners had completed or begun implementing 200 key projects; 79 priority projects were identified, ranked by immediacy of threat and threat categories; and more than $45 million in financial assurances were in place. This information, quite reasonably, persuaded the Service that the Plan's efforts were certain to be implemented. These projects addressed close to a million acres of grazing permit terms and conditions, infrastructure improvements such as fence improvements and powerline removals, horse gathers, targeted conifer-removal treatments, meadow improvements, conservation easements, prescribed and fire rehabilitation, road closures, monitoring, data collection, and research.[60] For instance, over 2,682 miles of roads were closed to address threats like habitat fragmentation, human noise, and car collisions.[61] Or take conservation easements: Plaintiffs diminish them as purely speculative, but before 2015, conservation easements were actually emplaced on 12,538 acres in the Bodie, Desert Creek-Fales, White Mountains, and South Mono PMUs.[62]

In *DoW II* and *III*, the court found that the Service properly withdrew a proposed listing for the dune sagebrush lizard when it concluded, two years after its initial decision, that a State of Texas plan made that listing unnecessary.[63] The Texas plan was far less comprehensive than the Bi-State Action Plan here. With the former, for example, unlike here, the Service, though upheld, "did not explain how the Texas plan has identified the specific participation necessary for the plan's success" and enrollees

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[58] 68 Fed. Reg. 15,115.
[59] *DoW III*, 815 F.3d at 8.
[60] BSSG005447-BSSG005454 (Doc. 0133); BSSG079517 (Doc. 5716); BSSG080385-88, BSSG080437-38 (Doc. 4100); BSSG103823 (Doc. 5829).
[61] BSSG080437 (Doc. 4100).
[62] Pltfs. Mot. at 3, 17, 30 (speculative); BSSG080436 (Doc. 4100).
[63] *DoW III*, 815 F.3d at 7; *see DoW* II 70 F. Supp. 3d at 195.

had only committed $773,000 to the project.[64] The court also noted that the plaintiffs there, like those here, "merely repackage their challenge to the Service's predictions about the likelihood" that the Plan will be successfully implemented.[65]

The Bi-State Action Plan's structure is strikingly similar to the Grizzly Bear Recovery Plan discussed in *Servheen*—a plan "widely regarded as a success and a model for recovery plans elsewhere."[66] There, as here, Plan signatories were a state-federal partnership including the U.S. Forest Service, National Park Service, Geological Survey, Bureau of Land Management, Montana Department of Fish, Wildlife, and Parks, Wyoming Game and Fish Department, and the Idaho Department of Fish and Game.[67] These agencies formed the Yellowstone Grizzly Coordinating Committee that oversaw a Geological Survey-led team of scientists called the Interagency Grizzly Bear Study Team.[68] The key difference is that the Service in *Servheen* failed to evaluate a new threat to the Grizzly Bear's food source, whitebark pine loss.[69] No such problem arises in our case, because "no new threats to the [bi-state sage grouse] were discovered since the 2013 proposed listing rule, and [Plan] efforts since 2013 already had or were certain to reduce existing threats."[70]

The movement from proposed listing in 2013 to a withdrawal of that proposal in 2015 makes sense given that the Service had always planned, as early as 2012, to evaluate the Plan under PECE.[71] Before 2015, Plan partners worked diligently to accomplish delineated conservation goals based on threat priorities. Collaboration and adaptive management allowed Plan partners, including the Service, to improve at obtaining the tools required, like new technical data and models and funding, and to identify and complete key projects. In fact, in 2012, before the proposed listing decision, the Local Area Working Group and Technical Advisory Committee developed a matrix listing all past completed projects, along with an assessment regarding each of the listing factors, and identified future projects

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[64] *Id*. at 10, 12.
[65] *Id* at 14.
[66] BSSG090789 (Doc. 5870); *Servheen*, 665 F.3d at 1020.
[67] *Id*. at 1021.
[68] *Id*. at 1022.
[69] *Id*. at 1026-28.
[70] *Id*. at 1030; 80 Fed. Reg. 22,852.
[71] BSSG003754 (Doc. 0247).

necessary to continue reducing the threats to the bi-state population.[72] As these matrices were updated over time, Plan partners were able to use past successes and failures to develop new conservation and population models to address priority habitat objectives. The Plan was methodically implemented to achieve these objectives, which, in turn, guided future partner funding and implementation.[73] By 2015, the Service was confident that these efforts were reducing threats to the bi-state sage grouse and that future projects were certain to be implemented and effective.

i. Plaintiffs wrongly suggest that BLM and USFS Plan Amendments were the "primary basis" for the Service's decision and ignore record evidence that the Service relied upon.

In 2015, the Service determined that "existing regulatory mechanisms are adequate" on account of the Bi-State Action Plan—not because (as Plaintiffs claim) the Service relied on incomplete Bureau of Land Management and Forest Service Plan Amendments.[74] The Service sufficiently explained what it ultimately decided: that the Plan was the "primary document guiding conservation efforts that have resulted in significant amelioration of the threats to the DPS."[75] The Service viewed federal plan amendments as parallel but not controlling, noting that "[b]ecause the [Bi-State Action Plan] has effectively addressed the threats to the DPS, the plan amendments, while helpful, are not necessary to achieve conservation through reduction of threats to the DPS."[76]

The Service was entitled to rely on its PECE analysis to evaluate the adequacy of regulatory mechanisms under Listing Factor D. It consistently signaled that in conducting such an analysis it would rely on the Plan. For example, it said in 2013 that if additional specifics (e.g., funding) were provided, the Plan could well result in the removal of threats such that a listing would no longer be warranted.[77]

Plaintiffs argue that in considering "existing regulatory mechanisms," the Service, by law, may

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[72] BSSG005447-5454 (Doc. 0133).
[73] BSSG093477 (Doc. 6488).
[74] BSSG079486 (Doc. 5716); 80 Fed. Reg. 22,845; 78 Fed. Reg. 64,377.
[75] BSSG079507 (Doc. 5716); 80 Fed. Reg. 22,845.
[76] BSSG079305 (Doc. 5712). BSSG003074 (Doc. 0674); BSSG058590-93 (Doc. 4915).
[77] 78 Fed. Reg. 64358, 64377; BSSG003074 (Doc. 0674). An administrative record search reveals 197 *documents* with PECE in the title alone.

not consider *future* conservation efforts.[78] Oddly, the first decision cited by Plaintiffs on this point rejected their argument.[79] In *Rocky Mountain Wild v. Walsh*, the court wrote that Listing Factor D "does *not*…foreclose consideration of planned conservation efforts" in making a listing decision.[80] Other courts discuss Listing Factor D's "regulatory mechanisms" and PECE's "conservation efforts" interchangeably.[81] The court in *DoW III* rejected outright Plaintiffs' argument that future efforts—there, a Texas plan and New Mexico agreement—"fail a reasonable analysis under Factor D because they are not regulatory mechanisms and are too speculative."[82] This was a "non-starter," the court said, because plaintiffs' claim that PECE criteria "cannot wholly substitute for the ESA's five factor evaluation" was merely an "attempt to supplement the *Policy* with a requirement that is not in it."[83]

ii. The Service adequately determined that there was a high level of certainty that the parties would obtain the necessary funding.

Certainty of implementation is examined in part by looking at whether funding is available for prescribed projects.[84] Here Plaintiffs concentrate their attack. PECE requires that funding be assured for at least one year.[85] For future funding, PECE recommends that the Service receive a "written commitment from the senior official of a state agency or organization to request or provide necessary funding in subsequent budget cycles" or "documentation showing that funds are available through appropriations to existing programs and that the implementation of this plan is a priority for these programs."[86] The Service received each of these assurances.[87] During PECE development, several commenters expressed concern over federal authorizations; the Service responded that a "high level of certainty of funding does not mean that funding must be in place now for implementation of the entire plan."[88] Plaintiffs raise the specter of

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[78] Pltfs. Mot. at 27.
[79] Pltfs. Mot. at 27.
[80] *Rocky Mt. Wild v. Walsh*, 216 F. Supp. 3d 1234, 1248 (D. Colo. 2016) (emphasis added).
[81] *DoW IV*, 849 F.3d at 1083 (citing *DoW II*, 815 F.3d at 6, 17).
[82] *DoW III*, 815 F.3d at 8.
[83] *Id*.
[84] 68 Fed. Reg. 15,100, 15,108, 15,114.
[85] *Id*. at 15100, 15108.
[86] *Id*.
[87] BSSG080368-410 (Doc. 4100).
[88] *Id*.

unfulfilled federal promises by pointing to a website discussing supposed 2018 budget cuts,[89] but this citation postdates the decision at issue and so is irrelevant (and moreover appears to depart from Plaintiffs' pledge, made at the January 13, 2017 hearing, not to go outside the administrative record).

The Plan commitment package showed up to *three* years of funding were assured, with a funding schedule and commitments to obtain the remaining funding over the next *ten* years.[90] The $45,233,333 in funding commitments coupled with the Service First Agreement ensured, moreover, that Plan projects would not be contingent on any one partner's ability to obtain funding.[91] The Service also considered the Plan partners' ability to obtain past funding for the 200 completed or initiated projects to show the likelihood that future funding would be obtained.[92]

In total, federal Plan partners pledged $33.8 million: Bureau of Land Management ($6.5 million), Natural Resources Conservation Service ($12 million), Department of Agriculture ($13.9 million), Geological Survey ($400,000), and the Service ($1 million).[93] Portions of these amounts were appropriated in February 2014, amounts to be used for sage grouse conservation efforts through FY 2018; the remainder would be requested for future funding cycles.[94] Plaintiff Center for Biological Diversity, during the public comment period, actually emphasized the strength of these federal dollars on the proposed critical habitat designation: in June 2014, the Center noted, the "administration announced that $31 million in spending through 2024 would be allocated to help ranchers and others improve habitat for the bi-state population" and urged the Service to subtract the full $31 million from the cost estimate in the final economic analysis.[95]

The remaining $11,433,333 is to come from state and private funds: the Nevada Department of Wildlife ($3.4 million), California Department of Fish and Wildlife ($2.5 million), Mono County ($2.2

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[89] Pltfs. Mot. at 31 n.6.
[90] BSSG080385-57 (Doc. 4100).
[91] BSSG093474 (Doc. 6487); BSSG080368-408 (Doc. 4100); BSSG093477 (Doc. 6488); BSSG079520 (Doc. 5716).
[92] 68 Fed. Reg. 15,108; BSSG079517, BSSG079495-6 (Doc. 5716).
[93] BSSG058521 (Doc. 4900).
[94] BSSG080534-5 (Doc. 4100).
[95] BSSG088130 (Doc. 5983).

million), and private and nonprofit contributions ($3.33 million).[96] Even if federal appropriations were not reliable, a position outright rejected in the Service's PECE, these State and private funds do not derive from federal appropriations. Not only is this level of commitment to conservation efforts high by national standards, it far exceeds what courts recently have found adequate.[97] For example, it dwarfs the $773,000 in participation fees deemed sufficient to protect the sagebrush lizard in Texas and New Mexico.[98] The Plan alliance, with its multiple funding sources, is well prepared to withstand the ebb and flow of administrative financial priorities by contrast to an effort that the Service conducts on its own.

2. The Service exercised its expert judgment and adequately explained why Bi-State Action Plan efforts were certain to be effective.

Plaintiffs assert that the Service had too much confidence in the effectiveness of proposed conservation efforts. But the Service relied on its expertise and experience.[99] Plaintiffs fail to demonstrate that the Service acted arbitrarily in agreeing with multiple concurring experts that the Plan was highly certain to be effective. The "effectiveness" prong of PECE is by nature a technical inquiry that requires weighing scientific evidence; court review is "at its most deferential" here.[100]

Plaintiffs allege that the withdrawal decision is inconsistent with the best available science on the bi-state sage grouse population.[101] Yet they do not allege that the science or models are insufficient, or that the Service failed to explain them or acknowledge their limitations. This dooms the allegation. Nor does the record support Plaintiffs' insinuation that the withdrawal decision was driven by "politics."[102] The Service noted in fall 2014: "there hasn't been any pressure felt by the Directorate or the Department."[103] The charge, moreover, is irrelevant given that Plaintiffs cannot "point to any science that the Service ignored, misused, or manipulated, or to any material switch in the Service's position."[104] This

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[96] BSSG058521 (Doc. 4900).
[97] *Id.*
[98] *DoW III*, 815 F.3d at 9.
[99] *DoW II*, 70 F. Supp. 3d at 194; *DoW III*, 815 F.3d at 16.
[100] *San Luis*, 747 F.3d at 603.
[101] Pltfs. Mot. at 22.
[102] Pltfs. Mot. at 16, 30.
[103] BSSG058544 (Doc. 4911).
[104] *Humane Soc'y*, 849 F.3d at 613; *DoW II* at 194.

circuit recognizes that the best available science requirement is broad; it just disallows an agency from *ignoring* scientific evidence better than the evidence it relies on.[105] The existence or weighing of competing views as to scientific conclusions or policy choices (inherent in virtually every such decision) cannot be used to show that the Service's determinations were arbitrary or capricious.[106] A reviewing court evaluates "agency choices with respect to models, methodologies, and weighing scientific evidence" *only* to ensure that the agency's choices are supported by reasoned analysis.[107]

The Service met this standard. Plaintiffs themselves report that scientists were actually optimistic when looking forward.[108] Plaintiffs note, for example, that during the Service's Recommendation Team meeting, thirteen Service biologists were asked: "Given the information provided since 2013 and the anticipated future conservation efforts, what is the proposed status for the future (threatened/endangered/not warranted)?"[109] Three still supported a "threatened" listing—but more than twice as many did *not*. These eight, instead, recommended a "not warranted" decision—based, again, precisely on future conservation efforts.[110] These experts provided various explanations that are reflected in the withdrawal decision.[111] This shows not only that the Service undertook considerable deliberations on this issue but that the Service adopted, rationally, the majority expert opinion regarding the anticipated success of the Plan. Plaintiffs do not allege that the experts were given incorrect information. The Service explained in its final 2015 decision that, consistent with these internal deliberations, the Plan had "reduced threats to the DPS now and into the future."[112] Where, as here, the Service articulates a rational connection between the facts concerning threats to the species and determinations on listing, courts defer to the Service's expert judgment.

i. The Service adequately explained its use of the Conservation Planning Tool and Integrated Population Model.

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[105] *San Luis*, 747 F.3d at 602; *see DoW IV*, 849 F.3d. at 1089.
[106] *Id.*
[107] *Id.*
[108] Pltfs. Mot. at 15.
[109] BSSG058551 (Doc. 4911).
[110] Pltfs. Mot. at 16; BSSG058552-54 (Doc. 4911); BSSG058590 (Doc. 4915).
[111] BSSG058553 (Doc. 4911); BSSG085264 (Doc. 4916).
[112] 80 Fed. Reg. 22,8339.

The Service properly detailed its reliance on new planning tools for priority conservation projects. Plan partners in 2012 identified the data and models needed to meet conservation objectives.[113] By 2014, Plan-funded models were populated by telemetry and GPS tracking of marked birds and modeling inputs such as vegetation, topography, surface roughness, proximity to anthropogenic disturbance or infrastructure, and other information pertinent to sage grouse use or avoidance.[114] These tools provided a way to scientifically inform conservation efforts.[115] For instance, the Integrated Population Model uses lek counts and demographic parameters to assess population growth and trajectories over time. This, in turn, refines the Conservation Planning Tool.[116] All this, again, was a development between 2013 and 2015, i.e., between the proposed listing and withdrawal of that proposed listing.

The Plan targets, using the Conservation Planning Tool, the most important areas for conservation. The projects populated by this tool are ranked by a variety of inputs, including acreage and return on investment; the tool produces a list of projects based on urgency and effectiveness.[117] This is especially important when considering the significance of woodland treatments and private conservation easements and in understanding the Service's explanation for why only a few thousand acres of targeted private conservation easements or woodland treatments could effectively reduce threats to the population.[118] For example, improper grazing can be a threat to bi-state sage grouse persistence, but conservation easements that encourage sustainable grazing practices, maintain water features, and prevent urbanization are key to species survival.[119] Private lands constitute a small percentage of habitat, but 5,400 acres of such lands contain upwards of 75% of the "core breeding habitat" in Nevada.[120] So it stands to reason that conservation easement acreage is proportional to the availability of core breeding

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[113] BSSG005470-73 (Doc. 0138); BSSG080513 (Doc. 4100).
[114] BSSG080398 (Doc. 4100).
[115] BSSG079520 (Doc. 5716).
[116] BSSG080398, BSSG080426 (Doc. 4100); BSSG091039 (Doc. 6096).
[117] BSSG080398 (Doc. 4100).
[118] BSSG048850-59 (Doc. 3965); BSSG004803 (Doc. 0026).
[119] BSSG005306 (Doc. 0121), cf. BSSG088140 (Doc. 6919) (Plaintiff Western Watersheds Project argues that grazing can *never* be a useful tool for conservation, suggesting even that the "visual presence of cattle" causes increased stress hormone levels in sage grouse).
[120] BSSG004803 (Doc. 0026); BSSG003797 (Doc. 1708); 80 Fed. Reg. 22,840.

habitat. Conservation of these areas through easements or fee title acquisitions has significantly reduced threats to this key component of bi-state sage grouse habitat.[121]

The best available science—the Integrated Population Model—shows that the trend is stable or improving for most bi-state sage grouse.[122] The trend is what matters. Plaintiffs claim that the "present survival prospects for the Bi-State Sage Grouse are bleak."[123] This is contradicted by the record, including even by their own comment letters during the public process. One Plaintiff wrote then that "preliminary results from modeling appear to show some population stability in the groups of bi-state sage grouse for which data was available of high enough quality to be included in the modeling."[124] Another Plaintiff acknowledged that the model found that "trends in males counted per lek for the Bi-State populations have been relatively stable since 2003."[125] Plaintiffs today assert that the "once-thriving population" has declined, precipitously, to "as few as 2,497 birds."[126] They neglect to mention that this figure, the record's lowest population count, dates from 2008—almost a decade ago, well before the concerted efforts that have served to guarantee the bird's future. The population count in 2012, the latest year used in the Population Model, showed an almost quadrupled population of 9,828.[127] The Integrated Population Model nevertheless incorporated all data points on population count—low and high—into its growth trajectories and still found population growth trends stable or improving.

In addressing populations by Population Management Unit (or PMUs), the model showed stable or increasing trends for the central core of the DPS—the Bodie, Desert Creek-Fales, and South Mono PMUs.[128] In 2013 the Service found that the central core populations had a "probability of persistence between 85 and 100 percent over the next 30 years."[129] There is little data to support *any* conclusions about the Pine Nut, Mount Grant, and White Mountains PMUs because the data was inadequate or

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[121] 80 Fed. Reg. 22,840; BSSG080437 (Doc. 4100).
[122] BSSG106390 (Doc. 6862); 80 Fed. Reg. 22,831.
[123] Pltfs. Mot. at 3.
[124] BSSG090533 (Doc. 5853) (Center for Biological Diversity).
[125] BSSG091036 (Doc. 6424) (WildEarth Guardians).
[126] Pltfs. Mot. at 7.
[127] BSSG000444 (Doc. 5508); 80 Fed. Reg. 22,828.
[128] BSSG106394 (Doc. 6862); BSSG058529-30 (Doc. 4911); 80 Fed. Reg. 22,831.
[129] 78 Fed. Reg. 64,359, 64,362, 64,373-74; *see also* BSSG003785 (Doc. 1708).

unavailable for those populations.[130] Yet lack of data does not mean a lack of sage grouse. The record does not support Plaintiffs' claims of precipitous decline.

Plaintiffs misstate Service conclusions to paint a grim (but inaccurate) picture. For example, Plaintiffs write: "[e]ach of the Bi-State Sage Grouse's six PMUs is now largely geographically and genetically isolated."[131] What the Service actually said was that the bi-state sage grouse is "genetically unique and markedly separate from the rest of the species' range."[132] The Service was not asserting that individual 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, i.e., a distinct population segment. Or Plaintiffs quote the Service's 2015 decision as stating that "connectivity"—important to genetic diversity—"between the Bi-State Sage Grouse's PMUs continues to erode,"[133] but omit the next sentence: "However, as discussed in the [PECE analysis], conservation efforts are effectively…helping maintain connectivity."[134] The 2015 decision also emphasized that "[o]ngoing and future conservation efforts are likely to *increase*…connectivity."[135] Elsewhere, Plaintiffs use a Service species status report to assert that leks in the South Mono area "have begun producing nonviable eggs."[136] Actually, the report only said that nonviable eggs appeared in a "single isolated" subpart of the South Mono area (called Parker Meadows) but not in the larger, core portion of the area.[137] The bottom line is that on these and other factual questions, the Service plainly weighed the evidence and addressed it in its decision.

Plaintiffs assert that the bi-state sage grouse has lost "half of its habitat" during the past 150 years. But a timeline that begins near the close of the Civil War is a problematic starting point, since reliable modern data on habitat was not collected until about 2002.[138] The Ninth Circuit has held that "it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range

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[130] 78 Fed. Reg. 64,359, 64373-74; 80 Fed. Reg. 22,831.
[131] Pltfs. Mot. at 7.
[132] 80 Fed. Reg. 22,829.
[133] Pltfs. Mot. at 26.
[134] 80 Fed. Reg. 22,831.
[135] *Id.* at 22,849 (emphasis added).
[136] Pltfs. Mot. at 26.
[137] BSSG000549, BSSG000569 (Doc. 5508).
[138] BSSG106367 (Doc. 6862).

would necessarily qualify a species for listing."[139] This is why the Service's interpretation of "range" as focusing on "current range" has been upheld as reasonable.[140] Where the area that a species is expected to survive is much smaller than its historical range, the Secretary must only "explain her conclusion that the area in which the species can no longer live is not a "'significant portion of its range.'"[141]

Notwithstanding this lack of data for non-core PMUs and overall stable population-growth trends, the withdrawal decision analyzed together the Pine Nut, Grant, and White Mountains PMUs for its "significant portion of its range" analysis and found this portion, without the core population, is not in danger of extinction or likely to become so in the foreseeable future.[142] This conclusion is appropriate. The best available science standard does not require the Service to obtain perfect data, especially where it is not technically feasible.[143] The Service found that, although available information "may lead some to believe" these PMUs may be at risk, the "best available information currently indicates that a substantial amount of conservation is currently being applied (and will be carried out in the future)" within these PMUs.[144] The Service adequately explained its findings in 2013 and then why those findings changed in 2015 given new scientific models and the forecasted effectiveness of Plan efforts.

VI. CONCLUSION

Plaintiffs dislike that bi-state sage grouse conservation efforts are proceeding along different lines than they prefer. They seem not to trust state and federal officials in the way that the Service must. But the Service took its withdrawal decision seriously—and it is to the Service that Congress entrusted this decision. The best available science does not support a listing. The only question for the Court is whether, on this record, the agency had a reasonable basis to withdraw its proposed rule. The Service's judgment was more than amply supported.

DATED this 27th day of October, 2017.

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[139] *Norton*, 258 F.3d at 1145.
[140] *Humane Soc'y of the United States v. Zinke*, 865 F.3d 585, 603 (D.C. Cir. 2017).
[141] *Id.*
[142] 80 Fed. Reg. 22,853.
[143] *San Luis*, 747 F.3d at 602.
[144] 80 Fed. Reg. 22,853.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I electronically filed the foregoing Motion and Memorandum in Support of Defendant-Intervernors' Motion for Summary Judgment, Opposition to Plaintiffs' Motion for Summary Judgment, and Proposed Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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