

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESERT SURVIVORS, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, et al.,

Defendants.

Case No. 20-cv-06787-JSC

**ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 33, 36

This lawsuit challenges the federal government’s withdrawal of its proposal to list the bi-state sage grouse as “threatened” under the Endangered Species Act (“ESA”). (*See* Dkt. No. 1.)¹ Before the Court are the parties’ cross-motions for summary judgment. (Dkt. Nos. 33, 36.) Having carefully considered the briefing, and having had the benefit of oral argument on April 21, 2022, the Court GRANTS Plaintiffs’ motion, DENIES Defendants’ motion, and REMANDS for a new final listing decision, as explained below.

BACKGROUND

The bi-state sage grouse, a bird, is a type of greater sage grouse that lives around parts of the California-Nevada border. (*See* Administrative Record (“AR”) 35,283 (map)); *see also* 85 Fed. Reg. 18,057 (Mar. 31, 2020) (map). The clearing areas where bi-state sage grouse court and breed are known as leks. 85 Fed. Reg. 18,056–57. The U.S. Fish and Wildlife Service (“the Service”) monitors bi-state sage grouse using six “population management units” (“PMUs”), “delineated based on aggregations of leks, known seasonal habitats, and telemetry data.” *Id.* at 18,057. Proceeding from north to south, the PMUs are Pine Nut, Desert Creek-Fales, Bodie,

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 Mount Grant, South Mono, and White Mountains. *Id.*; (see AR 16,805–08 (explaining that some
2 PMUs contain more than one subpopulation or grouping of bi-state sage grouse)). Bi-state sage
3 grouse in some PMUs “appear to be isolated to varying degrees from one another.” 85 Fed. Reg.
4 18,059. The bi-state sage grouse’s population and habitat have each declined by about 50% since
5 1850. (AR 16,805.) Based on data from 2018, the Service estimates a current population of
6 3,305. 85 Fed. Reg. 18,080; (see AR 35,304).

7 In 2013, the Service published a proposal to list the bi-state sage grouse as threatened
8 under the ESA. 78 Fed. Reg. 64,358 (Oct. 28, 2013). Two years later, the Service withdrew its
9 proposal. 80 Fed. Reg. 22,828 (Apr. 23, 2015). After Plaintiffs filed suit, a court of this district
10 vacated the 2015 Withdrawal and reinstated the 2013 Proposal. See *Desert Survivors v. U.S.*
11 *Dep’t of Interior* (“*Desert Survivors I*”), 321 F. Supp. 3d 1011 (N.D. Cal. 2018); see also *Desert*
12 *Survivors v. U.S. Dep’t of the Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018) (remedy order).

13 The *Desert Survivors I* court held that the 2015 Withdrawal was arbitrary and capricious in
14 violation of the Administrative Procedure Act (“APA”) and the ESA, because: (1) a study on
15 which the Service relied, Coates 2014, did not provide a rational basis to conclude that the bi-state
16 sage grouse population was stable, *Desert Survivors I*, 321 F. Supp. 3d at 1040–45; (2) the Service
17 erroneously concluded that conservation measures were sufficiently certain to be effective, *id.* at
18 1052–66; (3) the Service used a facially impermissible interpretation of “significant,” *id.* at 1070–
19 74; and (4) the Service’s conclusion regarding the “significant portion of its range” (“SPR”) policy
20 was not rationally supported, *id.* at 1074–76. The court rejected Plaintiffs’ other arguments,
21 including that: (1) the Service drew unsupported conclusions about the resiliency of the bi-state
22 sage grouse from the Oyler-McCance 2014 and Tebbenkamp 2014 studies, *id.* at 1045–48; (2) the
23 Service did not adequately consider the impact of cumulative threats, *id.* at 1048–50; (3) the
24 Service considered not only existing conservation measures but also merely proposed measures,
25 *id.* at 1050–52; (4) the Service erroneously concluded that conservation measures were sufficiently
26 certain to be implemented, *id.* at 1059–60; and (5) the Service used a facially impermissible
27 interpretation of “range,” *id.* at 1066–68.

28 On remand, the Service reopened public comment on the 2013 Proposal. 84 Fed. Reg.

1 52,058 (Oct. 1, 2019); *see Desert Survivors*, 336 F. Supp. 3d at 1133 (remedy order). In 2020, the
 2 Service again withdrew the proposal. 85 Fed. Reg. 18,054. Plaintiffs filed this lawsuit
 3 challenging the 2020 Withdrawal.

4 DISCUSSION

5 The ESA charges the Secretary of the Interior with determining whether particular species
 6 should be listed as “threatened” or “endangered.” 16 U.S.C. § 1533(a)(1). The Secretary has
 7 delegated authority to the Service. *See* 50 C.F.R. § 402.01(b). An endangered species is “any
 8 species which is in danger of extinction throughout all or a significant portion of its range.” 16
 9 U.S.C. § 1532(6). A threatened species is “any species which is likely to become an endangered
 10 species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §
 11 1532(20). Listing is a key mechanism because the ESA makes it unlawful for any person to
 12 “take” a species listed as endangered or threatened. *See Babbitt v. Sweet Home Chapter of Cmty.*
 13 *for a Great Or.*, 515 U.S. 687, 690, 692 n.5 (1995).

14 Courts review the Service’s decision not to list a species or DPS under the APA. *See Ctr.*
 15 *for Biological Diversity v. Zinke* (“Zinke”), 900 F.3d 1053, 1067 (9th Cir. 2018). A court “‘shall’
 16 set aside agency actions, findings, or conclusions under the APA that are ‘arbitrary, capricious, an
 17 abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. §
 18 706(2)(A)). Under this standard of review, a court “ensure[s] that the agency considered the
 19 relevant factors and articulated a rational connection between the facts found and the choices
 20 made.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011)
 21 (cleaned up). A decision is arbitrary and capricious “if the agency has relied on factors which
 22 Congress has not intended it to consider, entirely failed to consider an important aspect of the
 23 problem, offered an explanation for its decision that runs counter to the evidence before the
 24 agency, or is so implausible that it could not be ascribed to a difference in view or the product of
 25 agency expertise.” *Id.* (cleaned up). Agency decisions deserve the highest deference when “the
 26 agency is making predictions[] within its area of special expertise.” *Lands Council v. McNair*,
 27 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (cleaned up). But a court “need not defer to the
 28 agency when the agency’s decision is without substantial basis in fact.” *Ariz. Cattle Growers’*

1 *Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

2 **I. BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE**

3 The Service must base its listing decision on “the best scientific and commercial data
4 available,” 16 U.S.C. § 1533(b)(1)(A); failure to do so violates the APA. The Service must
5 consider five factors: “(a) the present or threatened destruction, modification, or curtailment of [a
6 species’] habitat or range; (b) overutilization for commercial, recreational, scientific, or
7 educational purposes; (c) disease or predation; (d) the inadequacy of existing regulatory
8 mechanisms; or (e) other natural or manmade factors affecting [the species’] continued existence.”
9 *Id.* § 1533(a)(1). The Service must also “tak[e] into account those efforts, if any, being made by
10 any State or foreign nation . . . to protect such species, whether by predator control, protection of
11 habitat and food supply, or other conservation practices.” *Id.* § 1533(b)(1)(A). “Species” includes
12 “any distinct population segment” (“DPS”) of a species, *id.* § 1532(16), and a DPS may be listed
13 as endangered or threatened. *See Zinke*, 900 F.3d at 1060. The bi-state sage grouse is a DPS. 85
14 Fed. Reg. 18,054.

15 “An agency complies with the best available science standard so long as it does not ignore
16 available studies, even if it disagrees with or discredits them.” *San Luis & Delta-Mendota Water*
17 *Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014); *see Zinke*, 900 F.3d at 1060. Additionally,
18 “[e]ven where there is no better science available,” *Desert Survivors I*, 321 F. Supp. 3d at 1044, an
19 agency action may be arbitrary and capricious if it lacks “a rational connection between the facts
20 found and the determinations made.” *Ariz. Cattle Growers*, 606 F.3d at 1163.

21 Plaintiffs contend that the Service violated this standard by: (1) cherry-picking data from
22 the Coates 2020 study to conclude that the bi-state sage grouse population is stable; (2) ignoring
23 evidence that extirpation of smaller PMUs will increase the risk of extirpation for the entire
24 population; and (3) ignoring evidence that the PMU populations are below the threshold for long-
25 term viability. (Dkt. No. 33 at 14–20.) Defendants counter that the Service (1) appropriately
26 concluded that the population is stable; (2) adequately considered the risks of extirpation; and (3)
27 reviewed all the best available science. (Dkt. No. 36 at 14–21.)

1 **A. Coates 2020**

2 **1. Background**

3 In *Desert Survivors I*, the court held that a study on which the Service relied, Coates 2014,
4 did not provide a rational basis to conclude that the bi-state sage grouse population was stable.
5 321 F. Supp. 3d at 1040–45. Coates 2014 analyzed population trends from 2003 to 2012, using
6 data from bi-state sage grouse in the Pine Nut, Desert Creek-Fales, Bodie, and South Mono PMUs,
7 although not the Mount Grant and White Mountains PMUs. *See* 85 Fed. Reg. 18,059–61. The
8 2020 Withdrawal relied in part on an update to Coates 2014, Coates 2020, along with seven other
9 studies representing four different methodologies. *Id.* In the 2020 Withdrawal, the Service
10 concluded that the bi-state sage grouse population has “fluctuated over the past 40 years (both
11 increased and decreased), but over the entire timeframe has remained relatively stable.” *Id.* at
12 18,060.

13 Coates 2020 analyzed population trends from 1995 to 2018, using data from all six PMUs
14 and a new approach “that segmented the trends into three time intervals.” *Id.* The new approach
15 was meant “to account for population cycling in sage-grouse; that is, regular periods of growth and
16 decline naturally experienced by sage-grouse rangewide,” *id.*, with each cycle lasting about six to
17 10 years. (AR 35,279; *see* AR 35,286–87 (diagrams).) It had “bec[ome] apparent” that earlier
18 analyses “were being biased low due to an overrepresentation of down cycle years.” 85 Fed. Reg.
19 18,060. Thus, Coates 2020 analyzed the intervals 2008-2018, 2001-2018, and 1995-2018 to
20 “represent[] one (11 years), two (18 years), and three (24 years) complete population cycles.” (AR
21 35,279.)

22 Coates 2020 found “a general pattern of population cycling within an otherwise stable
23 population,” with considerable variation among the PMUs. 85 Fed. Reg. 18,060. For the entire
24 bi-state sage grouse population, the study reported a 9.6% decrease from 2008-2018, a 15.7%
25 decrease from 2001-2018, and a 57.7% increase from 1995-2018. (AR 35,279.) These results
26 mean that “the 2018 estimate[] was greater than the estimate at the nadir of 1995, and slightly less
27 than estimates during nadirs of 2001 and 2008.” (AR 35,303 (cleaned up).) When broken out by
28 PMU, the study reported that two PMUs increased overall from 1995-2018, 85 Fed. Reg. 18,060;

1 for example, the Bodie Hills PMU population increased fourfold overall from 1995-2018. (AR
2 35,279; *see* AR 35,309 (diagrams).) But four PMUs decreased overall from 1995-2018. (AR
3 35,279; *see* AR 35,309 (diagrams).) The study estimated that the bi-state sage grouse overall has a
4 1.1% chance of extirpation in the next 10 years. (AR 35,304.) The PMUs each have the
5 following 10-year extirpation probabilities: Pine Nut, 69.7%; Desert Creek-Fales, 9%; Bodie Hills,
6 2.4%; Mount Grant, 24.6%; South Mono, 3.8%; and White Mountains, 75.1%. (AR 35,304; *see*
7 AR 35,280.)

8 2. Discussion

9 Plaintiffs contend that, because the 2008-2018 and 2001-2018 analyses used data from
10 more PMUs and more subpopulations than the 1995-2018 analysis, the study’s findings of
11 population decrease from 2008-2018 and 2001-2018 are more significant than its finding of
12 population increase from 1995-2018. (*See* AR 35,280 (“Owing to differences among available
13 datasets, the long-term analysis primarily reflected spatial shifts among subpopulations comprising
14 the majority of the Bi-State DPS (that is, Bodie Hills and Long Valley) while the short-term
15 analysis also quantified changes among subpopulations along the periphery.”), 35,305 (chart
16 indicating unavailable data).)

17 The Court finds it is beyond the scope of arbitrary and capricious review to assess whether
18 it was appropriate to compare the 2008-2018 and 2001-2018 analyses to the 1995-2018 analysis,
19 given the different underlying data. Each analysis used data from every PMU that had data
20 available; the study did not exclude any available relevant data. (*See* AR 35,280, 35,287.) It was
21 not manifestly irrational to conduct the 1995-2018 analysis, and use it for comparison, despite
22 having less comprehensive data available. The Coates 2020 authors determined that the available
23 data were adequate and the Service found that conclusion to be reasonable. *See Greater*
24 *Yellowstone Coal.*, 665 F.3d at 1028 (“We recognize that scientific uncertainty generally calls for
25 deference to agency expertise.”); *Desert Survivors I*, 321 F. Supp. 3d at 1045 (“[I]t is beyond the
26 scope of [] arbitrary and capricious review to determine whether [Coates 2014] could . . . make
27 predictions about the overall population of the Bi-State DPS without data from the Mount Grant
28 and White Mountains PMUs. The authors of the study opined that the subpopulations that they

1 did study provided a ‘reliable representation of demography’ for the entire DPS and the Service
 2 found that conclusion to be reasonable. The Court defers to the expertise of the Service on this
 3 issue . . .”). Moreover, in addition to Coates 2020, other studies informed the Service’s
 4 conclusion that the bi-state sage grouse population has “fluctuated over the past 40 years (both
 5 increased and decreased), but over the entire timeframe has remained relatively stable.” 85 Fed.
 6 Reg. 18,060; *see id.* at 18,059–61; *cf. Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 879
 7 (9th Cir. 2009) (finding the Service’s conclusion arbitrary and capricious where it agreed that
 8 older studies were discredited, relied on one newer study showing that there was no large
 9 population decline in two discrete sections of lizard’s habitat over two years, and made the
 10 “sweeping conclusion that viable lizard populations persist throughout most of the species’ current
 11 range”).

12 Accordingly, Coates 2020 provided a rational basis for the Service’s conclusion that the
 13 population has been fluctuating cyclically but has been generally stable over the past several
 14 decades.

15 **B. Extirpation of Smaller PMUs**

16 **1. Background**

17 The bi-state sage grouse population is unevenly distributed across the six PMUs. From
 18 smallest to largest subpopulation, Coates 2020 estimated: Pine Nut (33), White Mountains (45),
 19 Mount Grant (374), Desert Creek-Fales (447), South Mono (885), and Bodie Hills (1,521). (AR
 20 35,304; *see* AR 16,805 (identifying the two largest subpopulations as located in Bodie and South
 21 Mono).) Bodie and South Mono are towards the geographical center of the six PMUs, (*see* AR
 22 35,283), and “represent the core populations” of the bi-state sage grouse. 85 Fed. Reg. 18,063.
 23 Coates 2020 reported “long-term patterns in redistribution” whereby “subpopulations at the
 24 periphery are declining while the largest population at the core is increasing.” (AR 35,280; *see*
 25 AR 16,806 (“Historical extirpations outside the existing boundaries of the six PMUs present a
 26 similar pattern of lost peripheral populations. . . . [L]oss of the sage-grouse population in [the Pine
 27 Nut PMU] (i.e., the northern-most population within the range of the Bi-State DPS) appears
 28 likely.”).) “We found substantial evidence of range contraction. All peripheral populations and

1 one core population (that is, Long Valley) have declined substantially in distributional area and
2 volume, while Bodie Hills has increased substantially over time.” (AR 35,345.)

3 “Connectivity within and among PMUs is variable” and “slowly deteriorating.” (AR
4 16,663.) Subpopulations in the PMUs are “isolated to varying degrees from one another,” with bi-
5 state sage grouse in the South Mono and White Mountains PMUs “largely isolated” from the rest
6 of the population. 85 Fed. Reg. 18,059. Isolation “increases the risk of loss of individual PMUs
7 via stochastic events.” (AR 16,663; *see* AR 16,808 (identifying “wildfire, drought, and disease”
8 as examples of stochastic events)); *see* 85 Fed. Reg. 18,079 (“[S]maller populations are more
9 challenged by environmental and demographic stochasticity.”), 18,081 (identifying “disease
10 epidemics, prey population crashes, [and] environmental catastrophes” as examples of stochastic
11 events). Coates 2020 reported:

12 [T]he Bi-State can be characterized by fragmented subpopulations,
13 largely as a result of conifer expansion into sagebrush ecosystems.
14 Although declines in smaller peripheral populations may have minor
15 contributions to overall population rate of change, extirpation of these
16 populations may impact sage-grouse distribution and connectivity.
That is, extirpation of small periphery subpopulations appear to have
disproportionate impacts on overall occupied habitat, when compared
to their influence on overall population growth trends for the Bi-State
DPS.

17 (AR 35,345.) As noted above, Coates 2020 reported that while the bi-state sage grouse overall has
18 a 1.1% probability of 10-year extirpation, every PMU has a higher probability. (AR 35,304; *see*
19 AR 35,280.) The two PMUs with the smallest subpopulations have the highest probabilities of 10-
20 year extirpation: Pine Nut (69.7%) and White Mountains (75.1%). (AR 35,304.)

21 As part of the listing decision process, the Service completed a species report that
22 “provide[s] the scientific basis that informs our regulatory decisions.” 85 Fed. Reg. 18,064. The
23 2020 Species Report on the bi-state sage grouse stated:

24 Declining population trends are generally apparent for the Pine Nut
25 [PMU] and Desert Creek-Fales PMU. These trends are of concern at
26 the DPS level because fluctuations in these small, less secure
populations are likely to result in extirpations and loss of population
redundancy across the DPS.

27 (AR 16,806.)

28 The populations and habitat in the northern extent of the Bi-State area

1 including the Pine Nut and Desert Creek-Fales PMUs are now and
 2 will likely continue to be most at risk. We anticipate loss of some
 3 populations and contractions in the range of others in these two
 4 PMUs, which will leave them susceptible to extirpation from
 stochastic events such as wildfire, drought, and disease (each of which
 is currently acting upon certain populations within the Bi-State DPS).
 We expect the two largely isolated core populations in the Bodie and
 South Mono PMUs . . . will remain in 30 years.

5 (AR 16,808.)

6 The Bi-State DPS is experiencing multiple, identifiable interacting
 7 impacts Individually, each of these impacts is unlikely to affect
 8 persistence across the entire Bi-State DPS, but each may act
 9 independently to affect persistence of individual populations. The
 scope, severity, and timing of these impacts vary at the individual
 10 PMU level. . . . [W]here impacts are occurring in sage-grouse habitat,
 the risk they pose to the DPS may be exacerbated and magnified due
 11 to the small number, size, and isolation of populations within the DPS.
 . . . Due to the scope of the impacts, current habitat degradation,
 fragmentation and loss, and isolation of small populations, presents
 [sic] challenges to the entire Bi-State DPS.

12 (AR 16,808–09.)

13 In the 2020 Withdrawal, after reviewing Coates 2020 and two other reports on extirpation
 14 probabilities among the PMUs, the Service concluded:

15 [E]ven though some populations in this most recent model have high
 16 probabilities of extirpation over the next ten years, the DPS as a whole
 17 is likely to persist over this time period. These extinction probabilities
 are created from continuing and forecasting past trends into the future,
 and thus likely do not reflect the effects of conservation measures
 18 started or completed in recent years.

19 85 Fed. Reg. 18,061.

20 **2. Discussion**

21 Plaintiffs contend that the Service’s conclusion that the bi-state sage grouse population is
 22 stable failed to account for the risk that extirpation of smaller PMUs will disproportionately
 23 increase the whole population’s probability of extirpation. Plaintiffs argue that due to current
 24 isolation, if one PMU is extirpated, it may increase the degree of isolation among the remaining
 25 PMUs. Moreover, they contend, as long-term redistribution towards the core continues, the entire
 26 population becomes more vulnerable to extirpation by a stochastic event occurring near that core.

27 The Court finds that the 2020 Withdrawal did not address the Service’s earlier
 28 determinations in the species report that declining populations in the smaller, isolated PMUs “are

1 of concern at the DPS level” and that isolation “presents challenges to the entire Bi-State DPS.”
2 (AR 16,806, 16,809); *see also* 85 Fed. Reg. 18,096 (noting that effects of “threats from wildfire,
3 invasive species, urbanization,” “infrastructure effects,” and “recreation” “may be exacerbated by
4 population isolation and discontinuous population structure”); 80 Fed. Reg. 22,839 (2015
5 Withdrawal) (“Multiple, interacting populations across a broad geographic area provide insurance
6 against the risk of extinction caused by catastrophic events If a [PMU] population is
7 permanently lost, the DPS’ population redundancy would be lowered, thereby decreasing the
8 DPS’ chance of survival in the face of potential environmental, demographic, and genetic
9 stochastic factors and catastrophic events.”). The Service accepted the findings from Coates 2020
10 and other studies that there is a low risk of 10-year extirpation of the bi-state sage grouse
11 generally. However, the Service did not explain how it or Coates 2020 squared those findings
12 with the fairly high extirpation risks of individual PMUs and the Service’s assessment that
13 extirpation of individual PMUs may negatively impact the bi-state sage grouse’s overall
14 population and range. *Cf. Desert Survivors I*, 321 F. Supp. 3d at 1045 (“In light of the Service’s
15 own recognition of the questionable validity of the model . . . , the Service erred in relying on that
16 study in support of its finding.”); *Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234, 1253–54
17 (D. Colo. 2016) (holding that Service’s “fail[ure] to explain why the beartongues would not be
18 threatened in the foreseeable future” was arbitrary and capricious where its 15-year conservation
19 agreement left unprotected 36% and 24%, respectively, of two subpopulations).

20 The 2020 Withdrawal did not grapple with the interplay between the high probabilities of
21 10-year extirpation of individual PMUs and the isolation of PMUs that persist. As such, it “failed
22 to consider an important aspect of the problem,” *Greater Yellowstone Coal.*, 665 F.3d at 1023
23 (cleaned up): that 10-year extirpation of one or more PMUs, which the Service assesses as more
24 likely than not, may have a more severe impact than the mere loss of that PMU’s subpopulation.
25 The Service’s acceptance of Coates 2020’s estimate lacked a “rational connection” to the
26 Service’s own assessment of the negative consequences of PMU isolation. *Ariz. Cattle Growers*,
27 606 F.3d at 1163.

1 **C. Effective Population Size**

2 **1. Background**

3 “One way to address population health and viability is through analysis of effective
4 population size,” “defined as the size of the idealized population of breeding adults.” 85 Fed. Reg.
5 18,080. Effective population size relies on two concepts. First, what percentage of the species’
6 population are breeding adults? Second, applying that percentage to the species’ estimated actual
7 population size, is the estimated number of breeding adults large enough to preserve genetic
8 diversity that the species needs to survive? *See Zinke*, 900 F.3d at 1073 (describing effective
9 population size as “a sufficient number of breeding adults to minimize th[e] threat” of “loss of
10 genetic diversity” and explaining that “scientific literature debat[es] the effective population size
11 adequate to conserve genetic diversity over the long term”). “The effective population size of a
12 wildlife population is often much less than its actual size.” 85 Fed. Reg. 18,080.

13 As effective population size decreases, the rate of loss of genetic
14 diversity increases. The consequences of this loss of genetic
15 diversity, reduced fitness through inbreeding depression and reduced
16 adaptive (evolutionary) potential, are thought to elevate extinction
17 risk[.]

18 *Id.* The bi-state sage grouse’s polygamous mating systems, asymmetrical mate selection, variation
19 in female reproductive success, unequal sex ratios, and other traits mean that “population sizes in
20 sage-grouse must be greater than in non-lekking bird species to maintain long-term genetic
21 diversity.” *Id.*

22 With respect to what percentage of bi-state sage grouse are breeding adults, the 2020
23 Withdrawal cited, in part: (1) a study on greater sage grouse, Aldridge 2003, that determined there
24 must be an actual population of 5,000 to maintain an effective population size of 500 (a 10%
25 ratio); (2) a study on “a wide array of species,” Traill 2010, that determined the same; and (3) a
26 study on Gunnison sage grouse that determined a 20% ratio. *Id.*

27 With respect to whether that percentage produces a number large enough to preserve
28 genetic diversity, the 2020 Withdrawal cited two species-generic studies. *Id.* One suggested that a
species needs an effective population size of at least 50–100 “to avoid short-term extinction risk
caused by inbreeding,” and the other suggesting at least 500 “to retain evolutionary potential and

1 avoid long-term extinction risk.” *Id.*

2 The Service estimated the actual population of bi-state sage grouse is 3,305. *Id.* The
 3 Service also determined that the effective population size for the bi-state sage grouse is 10–20% of
 4 the actual population. *Id.* Accordingly, the Service estimated that the effective population size is
 5 330–661 overall. *Id.* “[H]owever, . . . some sage-grouse populations in the Bi-State area are
 6 isolated, suggesting that the effective population size is actually less”: 3–6 for the Pine Nut PMU;
 7 234–468 for Desert Creek-Fales, Mount Grant, and Bodie combined; 81–163 for Long Valley; and
 8 4.5–9 for White Mountains. *Id.* The Service concluded:

9 We are unaware of any other published estimates of minimal
 10 population sizes necessary to maintain genetic diversity and long-
 11 term population sustainability in sage-grouse and specifically for the
 12 Bi-State DPS, and whether the described effective population sizes
 13 above are of concern. Most populations of the Bi-State DPS have
 14 been below the possible minimum population sizes as described
 15 above, in large part due to the natural cycling of sage-grouse
 16 populations, yet continue to persist. . . . Because we expect
 17 conservation implementation to continue under the [Bi-State Action
 18 Plan], the risks associated with small population size will be reduced.

15 *Id.* at 18,080–81.

16 2. Discussion

17 Plaintiffs argue that the Service’s analysis of effective population size ignored the best
 18 available evidence.

19 The Court finds that the cited studies provide a rational basis for the Service’s conclusion
 20 that 10–20% of the bi-state sage grouse population are breeding adults. Accordingly, the Service
 21 had adequate support to estimate an effective population size of 330–661.

22 However, the data did not provide a rational basis for the Service’s other conclusions. The
 23 Service did not “disagree[] with or discredit[]” Aldridge 2003, which required a minimum
 24 effective population size of 500 and a minimum actual population size of 5,000, or Traill 2010,
 25 which required a minimum actual population size of 5,000. *San Luis & Delta-Mendota*, 776 F.3d
 26 at 995; *see* 85 Fed. Reg. 18,080. Yet, the Service estimated that the bi-state sage grouse has an
 27 effective population size of 330–661; the low end of that range is below Aldridge 2003’s threshold
 28 of 500, meaning that the effective population size may be too small to preserve genetic diversity

1 that the bi-state sage grouse needs to survive. The Service did not address that issue or the other
2 side of the coin: that the estimated actual population of 3,305 is below Aldridge 2003 and Trill
3 2010's thresholds of 5,000.

4 Moreover, the Service did not meaningfully address the issue that "isolated"
5 subpopulations have very small estimated effective population sizes: 3–6, 4.5–9, 81–163, and
6 234–468. 85 Fed. Reg. 18,080. Some of these ranges are below the lowest cited threshold of 50–
7 100 "to avoid short-term extinction risk," and all are below Aldridge 2003's threshold of 500. *Id.*
8 Thus, by the Service's own analysis these PMUs are at risk of short- or long-term extinction. The
9 Service stated that the isolation of PMU subpopulations "suggest[] that the effective population
10 size is actually less" than the overall figure of 330–661. *Id.* Nevertheless, the Service stated it
11 was not aware of research that would indicate the very small effective population sizes in the
12 PMUs were "of concern." *Id.* at 18,080–81. The Service's key reasoning was that the
13 subpopulations "continue to persist," *id.* at 18,081, essentially discounting the data on effective
14 population size without adequate explanation or support in the record. The persistence of bi-state
15 sage grouse subpopulations, alone, is not a rational basis to reject the best available data indicating
16 that an effective population size of 50 is the minimum threshold for short-term viability of the
17 species. *Cf. Greater Yellowstone Coal.*, 665 F.3d at 1030 ("The Rule presents no data indicating
18 that whitebark pine declines will not threaten the Yellowstone grizzly population, and
19 considerable data . . . pointing in the opposite direction.); *Tucson Herpetological Soc'y*, 566 F.3d
20 at 877 ("It is insufficient . . . to point to one area or class of areas where lizard populations persist
21 to support a finding that threats to the species elsewhere are not significant; the ESA requires a
22 more thorough explanation.").

23 By simply dismissing the relevant data, rather than "disagree[ing] with or discredit[ing]" it,
24 the Service "ignored" the best available data. *San Luis & Delta-Mendota*, 747 F.3d at 602.
25 Accordingly, the Service's unsupported determination that the bi-state sage grouse's effective
26 population size is above the minimum threshold for viability undermines its broader conclusion
27 that the population is stable.

28 * * *

1 Coates 2020 provided a rational basis for the Service to conclude that the bi-state sage
2 grouse population has been cyclical, but overall stable, over the past several decades, and the
3 Service did not ignore other available data on that point. However, the Service erred in adopting
4 Coates 2020’s low estimate of bi-state sage grouse extirpation without explaining how that
5 estimate fit with Coates 2020’s high estimates of PMU extirpation and the Service’s own
6 assessment that PMU isolation is a significant concern for the population as a whole. Finally, the
7 Service did not have a rational basis to conclude that the estimated actual population (3,305) and
8 effective population size (330–661) are above the minimum threshold for viability and a “stable”
9 population, in light of the effective population sizes of isolated PMUs (3–6, 4.5–9, 81–163, 234–
10 468). Thus, the Service’s determination that the bi-state sage grouse population is stable lacked “a
11 rational connection [to] the facts found,” *Ariz. Cattle Growers*, 606 F.3d at 1163, was not based on
12 “the best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2), and was arbitrary and
13 capricious.

14 **II. SIGNIFICANT PORTION OF ITS RANGE**

15 An endangered species is “any species which is in danger of extinction throughout all or a
16 significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is “any species which
17 is likely to become an endangered species within the foreseeable future throughout all or a
18 significant portion of its range.” *Id.* § 1532(20). As the Ninth Circuit has noted, “Standing alone,
19 the phrase ‘in danger of extinction throughout . . . a significant portion of its range’ is puzzling[,] .
20 . . . since ‘extinction’ suggests total rather than partial disappearance.” *Def. of Wildlife v. Norton*
21 (“*Norton*”), 258 F.3d 1136, 1141 (9th Cir. 2001). Accordingly, “[t]he Secretary necessarily has a
22 wide degree of discretion in delineating ‘a significant portion of its range,’ since the term is not
23 defined in the statute.” *Id.* at 1145.

24 The 2015 Withdrawal applied the following interpretation:

25 [A] portion of the range of a species is “significant” if the species is
26 not currently endangered or threatened throughout all of its range, but
27 the portion’s contribution to the viability of the species is so important
28 that, without the members in that portion, the species would be in
danger of extinction, or likely to become so in the foreseeable future,
throughout all of its range.

1 79 Fed. Reg. 37,578; see 80 Fed. Reg. 22,852. *Desert Survivors I* found that interpretation
 2 impermissible, 321 F. Supp. 3d at 1066–74, because it “result[ed] in a threshold under the
 3 ‘significant portion of its range’ definition that [was] functionally equivalent to the threshold
 4 under the ‘throughout all’ definition,” *id.* at 1070–71. See *Norton*, 258 F.3d at 1141–42 (holding
 5 that interpretation of ESA must give independent meaning to phrase “significant portion of its
 6 range”).

7 The 2020 Withdrawal laid out a different analysis (“2020 SPR Analysis”). See 85 Fed.
 8 Reg. 18,097–99. The Service first determined the bi-state sage grouse “is not in danger of
 9 extinction or likely to become so in the foreseeable future throughout *all* of its range.” *Id.* at
 10 18,097 (emphasis added). Turning to “significant portion of its range,” the Service identified two
 11 “prongs,” “significance” and “status”: “(1) The portion is significant and (2) the species is, in that
 12 portion, either in danger of extinction or likely to become so in the foreseeable future.” *Id.* With
 13 respect to “significant,” the Service wrote:

14 As an initial note, the Service’s most recent definition of “significant”
 15 within agency policy guidance has been invalidated by court order
 16 (see [*Desert Survivors I*]). Therefore, for purposes of this analysis the
 17 Service is screening for significant portions of the range by applying
 any reasonable definition of “significant.” Biological
 importance/significance is often considered in terms of resiliency,
 redundancy, or representation.

18 *Id.* at 18,098. Elsewhere in the 2020 Withdrawal, the Service defined the “3Rs”:

19 Briefly, resiliency supports the ability of the species to withstand
 20 environmental and demographic stochasticity (for example, wet or
 21 dry, warm or cold years), redundancy supports the ability of the
 22 species to withstand catastrophic events (for example, droughts, large
 23 pollution events), and representation supports the ability of the
 24 species to adapt over time to long-term changes in the environment
 (for example, climate changes). In general, the more resilient and
 redundant a species is and the more representation it has, the more
 likely it is to sustain populations over time, even under changing
 environmental conditions.

25 *Id.* at 18,065. The Service described a “screening” in which it would consider, for “potential
 26 portions of the species’ range,” whether “substantial information” indicates that each prong—
 27 significance and status—“may be” met. *Id.* at 18,098. The Service would then do “a more
 28 thorough analysis to determine whether the portion does indeed meet both . . . prongs.” *Id.* at

1 18,097. At both the screening and “more detailed analysis” stages, the Service might address “the
2 ‘significance’ question or the ‘status’ question first”; if the first question were answered in the
3 negative, “we [would] not need to evaluate the second question for that portion of the species’
4 range.” *Id.*

5 Applying the 2020 SPR Analysis to the bi-state sage grouse, the Service began by
6 screening the “status” prong, “i.e., identifying portions where the Bi-State DPS may be in danger
7 of extinction or likely to become so in the foreseeable future.” *Id.* The Service examined whether
8 a variety of identified threats to the bi-state sage grouse population overall are “geographically
9 concentrated in any portion of the range at a biologically meaningful scale.” *Id.* It identified two
10 such portions: the Pine Nut and White Mountains PMUs. *Id.* at 18,097–98. For both, the Service
11 determined that there was substantial information indicating that the “status” prong may be met—
12 that is, the bi-state sage grouse in those portions is either in danger of extinction or likely to
13 become so in the foreseeable future.² *Id.* The Service then screened the “significance” prong and
14 found that neither portion had substantial information indicating the prong may be met. *Id.* at
15 18,098. The Pine Nut and White Mountains PMUs have “similar habitat use and behaviors to
16 sage-grouse in the remainder of the Bi-State DPS; thus, there is no unique observable
17 environmental usage or behavioral characteristics attributable to just this area’s population.” *Id.*
18 Both have “unique genetic characteristics . . . , including haplotypes not present elsewhere in the
19 DPS.” *Id.* But because other PMUs also have unique genetic characteristics, the characteristics of
20 the Pine Nut and White Mountains PMUs do not “represent a unique or significant adaptive
21

22 ² The Service noted that risks to the White Mountains PMU may be overestimated; the area is
23 geographically remote and the Service infers that the population is undercounted. (*See* AR 35,314
24 (Coates 2020).) Although available data may “over represent the probability of extirpation to
25 some degree,” “out of an abundance of caution” the Service “proceeded under the premise that this
26 portion of the range meets the screening criteria” of the “status” prong. 85 Fed. Reg. 18,098. At
27 oral argument, Defendants reiterated that the White Mountains population may be undercounted
28 and therefore the “status” prong may not be met on initial screening, rendering irrelevant the
“significance” prong. Because the 2020 SPR Analysis proceeded under the premise that the White
Mountains PMU meets the status prong on initial screening, the Court cannot conclude otherwise.
See Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50
(1983) (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency
itself.”).

1 capacity compared to the remainder of the DPS.” *Id.* The Service also noted that both are small
 2 subpopulations, such that while they “provide[] some contribution to the DPS’s overall ability to
 3 withstand catastrophic or stochastic events (redundancy and resiliency, respectively), and to adapt
 4 to changing environmental conditions (representation), . . . this contribution is very limited in
 5 scope due to [their] small population size and isolation from other populations.” *Id.* Because the
 6 “significance” prong was not met on initial screening, the 2020 SPR Analysis ended there. *Id.* at
 7 18,099.

8 Plaintiffs contend that the 2020 SPR Analysis is arbitrary and capricious because it is too
 9 vague and because it depends on the portion’s contributions to the general population in violation
 10 of *Norton*. (Dkt. No. 33 at 24–30; *see* Dkt. No. 36 at 29–37.) They argue that the Service: (1)
 11 incorrectly concluded that Pine Nut and White Mountains are not significant; (2) should have
 12 considered two or more PMUs together as a potential portion of the range; and (3) should have
 13 considered other PMUs and subpopulations as potential portions. The Service’s interpretation is
 14 entitled to *Chevron* deference. *See Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, Nos. 21-cv-
 15 00344-JSW, 21-cv-00349-JSW, 21-cv-00561-JSW, 2022 WL 499838, at *10 (N.D. Cal. Feb. 10,
 16 2022), *appeals filed*³; *Desert Survivors I*, 321 F. Supp. 3d at 1072; *Ctr. for Biological Diversity v.*
 17 *Jewell*, 248 F. Supp. 3d 946, 955–56 (D. Ariz. 2017), *as amended*, 2017 WL 8788052 (Oct. 25,
 18 2017).

19 **A. Pine Nut and White Mountains**

20 After finding substantial information indicating that the Pine Nut and White Mountains
 21 PMUs are portions where the bi-state sage grouse is likely to become in danger of extinction, the
 22 Service did not provide a rational basis for its determination that the two portions are not
 23 significant. As for Pine Nut, the Service found that “unique genetic characteristics have been
 24 documented in the PMU’s birds, including haplotypes not present elsewhere in the DPS.” 85 Fed.
 25 Reg. 18,098. The Service then went on:

26 [W]e note that each of the five other populations in the DPS also
 27 exhibit unique genetic characteristics and haplotypes. So although

28 ³ (Nos. 22-15529, 22-15532, 22-15534, 22-15535, 22-15536, 22-15626, 22-15627, 22-15628).

1 there is genetic differentiation between the Pine Nut PMU and other
 2 PMUs, we found no information indicating that the Pine Nut PMU's
 genetic characteristics represent a unique or significant adaptive
 capacity compared to the remainder of the DPS.

3 *Id.* The Service engaged in the same reasoning as to White Mountains:

4 [U]nique genetic characteristics have been documented in the PMU's
 5 birds, including haplotypes not present elsewhere in the DPS.
 6 However, although there is genetic differentiation between the White
 Mountains PMU and other PMUs, we found no information
 7 indicating that the White Mountains PMU's genetic characteristics
 represent a unique or significant adaptive capacity compared to the
 remainder of the DPS.

8 *Id.* (citation omitted). The existence of other subpopulations with their own unique genetic
 9 characteristics is not a rational basis to find that Pine Nut and White Mountains' unique genetic
 10 characteristics are not significant. That other subpopulations have *different* unique characteristics
 11 is not a rational basis for concluding that the unique genetic characteristics of Pine Nut and White
 12 Mountains do not "represent a unique or significant adaptive capacity compared to the remainder
 13 of the DPS." *Id.* They may not, but the Service did not explain why. *See Norton*, 258 F.3d at
 14 1145 ("[T]he Secretary must at least explain her conclusion that the area in which the species can
 15 no longer live is not a 'significant portion of its range.'"); *Def. of Wildlife*, 2022 WL 499838, at
 16 *10 ("[T]he significance standard provides no threshold for determining what makes any one of
 17 the factors of resiliency, representation, and redundancy 'meaningful' such that the population
 18 could be considered 'significant.'").

19 Defendants' reliance on *Tucson Herpetological Society* is not persuasive. There, the
 20 Service determined that the flat-tailed horned lizard had lost 23% of its baseline range from 100
 21 years prior and "offered a set of reasons for discounting the significance" of that loss. 566 F.3d at
 22 877. "Taking these reasons together," the Ninth Circuit upheld the determination that the portions
 23 were not significant, including: the lizard's persistence corroborated the conclusion that the lost
 24 portions "[did] not provide any unique or critical function for the well-being of the species"; the
 25 lost portions did not represent "a critical pathway for maintenance of genetic diversity"; and the
 26 lost portions were not recoverable and therefore could not support long-term survival. *Id.* at 877–
 27 78.

28 In essence, the Secretary determined that the Coachella Valley is

1 home to a very small (in comparison with the three other segments of
 2 the lizard's remaining domestic range) non-unique lizard population.
 3 As such, the demise of the Coachella Valley population would not be
 4 significant within the meaning of the ESA. This is a reasonable
 5 approach to assessing the significance of threatened range.

6 *Id.* at 881. Here, by contrast, the Service conceded that the Pine Nut and White Mountains PMUs
 7 have unique genetic characteristics, but simply dismissed that diversity.

8 **B. Two or More PMUs**

9 As an initial matter, the Court rejects Plaintiffs' interpretation that *Desert Survivors I*
 10 required the Service, on remand, to analyze two or more PMUs combined as a potential "portion"
 11 of the range. *See* 321 F. Supp. 3d at 1074–76. However, the Court agrees that the Service did not
 12 provide a rational basis for considering only separately whether Pine Nut or White Mountains was
 13 significant. Noting that "[t]he range of a species can theoretically be divided into portions in an
 14 infinite number of ways," the Service opted to consider "whether any of the threats acting on the
 15 DPS are geographically concentrated in any portion of the range at a biologically meaningful
 16 scale." 85 Fed. Reg. 18,097. That general criterion, using threats identified earlier in the listing
 17 decision, had a rational basis. But while the Service was not required to choose to analyze PMUs
 18 in every combination out of an infinite array of choices, it was required to at least explain why it
 19 chose to analyze the two PMUs with a greater than 50% chance of extirpation only separately as if
 20 only one or the other would extirpate, but not both. A piecemeal approach runs the risk of
 21 underestimating significance because the loss of multiple somewhat significant subpopulations
 22 may well amount to a loss of great significance. Accordingly, that approach requires a meaningful
 23 explanation. *See Norton*, 258 F.3d at 1145; *Def. of Wildlife*, 2022 WL 499838, at *11 ("Because
 24 the Service has not provided any threshold for meaningfulness, the Court cannot assess whether
 25 the Service's interpretation gives independent meaning to the phrase [SPR] or has again
 26 implemented an interpretation that renders it redundant or superfluous.").

27 **C. Other PMUs**

28 Finally, the Service adequately supported its determination that Pine Nut and White
 Mountains were the only "potential" portions to screen under the 2020 SPR Analysis. 85 Fed.
 Reg. 18,097. The Service identified which threats it considered and explained that Pine Nut is

1 “experiencing a concentration of . . . threats” and White Mountains “may be experiencing a
 2 disproportionate response to threats.” *Id.* at 18,097–98. “Although these threats are not unique to
 3 this PMU area, they are acting at a greater intensity here . . . , either individually or in
 4 combination, than elsewhere in the range.” *Id.* at 18,097. The significance prong focused on the
 5 3Rs, which indicate that “[i]n general, the more resilient and redundant a species is and the more
 6 representation it has, the more likely it is to sustain populations over time, even under changing
 7 environmental conditions.” *Id.* at 18,065. In light of this definition of “significant,” greater
 8 intensity and geographical concentration of identified threats was a rational basis to analyze Pine
 9 Nut and White Mountains, and to decline to analyze other configurations among an infinite array.

10 * * *

11 The 2020 SPR Analysis was arbitrary and capricious because it did not provide a rational
 12 basis for determining that the Pine Nut and White Mountains PMUs were not “significant” and
 13 that they should be analyzed only separately. The Service did, however, have a rational basis for
 14 determining that those were the only two potential “portions” at issue.

15 **III. POLICY FOR EVALUATION OF CONSERVATION EFFORTS**

16 The Policy for Evaluation of Conservation Efforts (“PECE”) explains how the Service
 17 “determin[es] whether a formalized conservation effort contributes to forming a basis for not
 18 listing a species, or for listing a species as threatened rather than endangered.” 68 Fed. Reg.
 19 15,114 (Mar. 28, 2003); *see* 85 Fed. Reg. 18,081; (AR 254). “The underlying premise of [the]
 20 PECE is that the ESA requires the Service to consider both current actions that affect a species’
 21 status and sufficiently certain future actions—either positive or negative—that affect a species’
 22 status.” *Desert Survivors I*, 321 F. Supp. 3d at 1020 (cleaned up). “An agreement or plan may
 23 contain numerous conservation efforts, not all of which are sufficiently certain to be implemented
 24 and effective. Those conservation efforts that are not sufficiently certain to be implemented and
 25 effective cannot contribute to a determination that listing is unnecessary or a determination to list
 26 as threatened rather than endangered.” 68 Fed. Reg. 15,115. The Service “evaluate[s] whether the
 27 conservation effort improves the status of the species” by “contribut[ing] to the elimination or
 28 adequate reduction of one or more threats to the species identified” in the listing analysis. *Id.* at

1 15,114–15.

2 The PECE involves two factors: “(1) for those efforts yet to be implemented, the certainty
3 that the conservation effort will be implemented and (2) for those efforts that have not yet
4 demonstrated effectiveness, the certainty that the conservation effort will be effective.” *Id.* at
5 15,114. There are nine criteria to evaluate the certainty of implementation, of which Criterion A.8
6 is: “[a]n implementation schedule (including incremental completion dates) for the conservation
7 efforts.” *Id.* at 15,115. There are six criteria to evaluate the certainty of effectiveness, Criteria
8 B.1–B.6:

9 1. The nature and extent of threats being addressed by the
10 conservation effort are described, and how the conservation effort
reduces the threats is described.

11 2. Explicit incremental objectives for the conservation effort and dates
12 for achieving them are stated.

13 3. The steps necessary to implement the conservation effort are
14 identified in detail.

15 4. Quantifiable, scientifically valid parameters that will demonstrate
16 achievement of objectives, and standards for these parameters by
17 which progress will be measured, are identified.

18 5. Provisions for monitoring and reporting progress on
19 implementation (based on compliance with the implementation
20 schedule) and effectiveness (based on evaluation of quantifiable
21 parameters) of the conservation effort are provided.

22 6. Principles of adaptive management are incorporated.

23 These criteria should not be considered comprehensive We will
24 consider all appropriate factors in evaluating formalized conservation
25 efforts. The specific circumstances will also determine the amount of
26 information necessary to satisfy these criteria.

27 *Id.*

28 The 2015 Withdrawal PECE primarily considered measures from the 2012 Bi-State Action
Plan (“BSAP”), a conservation plan developed by biologists from the Service, Bureau of Land
Management, U.S. Forest Service, Natural Resources Conservation Service, U.S. Geological
Survey, Nevada Department of Wildlife, and California Department of Fish and Game. *See*
Desert Survivors I, 321 F. Supp. 3d at 1023–24, 1052–58. The *Desert Survivors I* court held that
the 2015 Withdrawal PECE appropriately determined that conservation measures were sufficiently

1 certain to be implemented, *id.* at 1059–60, but erroneously determined the measures were
2 sufficiently certain to be effective, *id.* at 1060–66. In particular, the court held that with respect to
3 removal of pinyon-juniper and cheatgrass, there was no evidence establishing “the likely *impact* of
4 the planned conservation measures and whether they will actually improve the status of the Bi-
5 State DPS enough to justify withdrawal.” *Id.* at 1061.

6 The 2020 Withdrawal stated that “wildfire and altered fire regimes, and nonnative invasive
7 and native woodland succession” are “the threats with the highest impact” to the bi-state sage
8 grouse. 85 Fed. Reg. 18,081. “Threats from urbanization and habitat conversion; infrastructure;
9 mining; grazing and rangeland management; climate change; predation, and small population size
10 and population isolation are also occurring.” *Id.* “All of these threats are exacerbated by the
11 population isolation and discontinuous population structure.” *Id.* The 2020 Withdrawal PECE⁴
12 primarily relies on the same conservation measures at issue in *Desert Survivors I*, those formalized
13 in the 2012 BSAP. Plaintiffs now challenge the 2020 Withdrawal PECE on the grounds that it did
14 not show certainty of effectiveness and that it lacks incremental progress objectives.⁵ (Dkt. No. 33
15 at 20–24; *see* Dkt. No. 36 at 21–29.) The parties focus on two conservation measures: removal of
16 pinyon-juniper and cheatgrass. *See Desert Survivors I*, 321 F. Supp. 3d at 1061 (same). The
17 PECE requires that each “formalized conservation effort” used in a listing decision must be
18 sufficiently certain to be effective. 68 Fed. Reg. 15,115.

19 **A. Certainty of Effectiveness**

20 **1. Pinyon-Juniper Removal**

21 **a. Background**

22 The 2020 Withdrawal PECE identified removal of pinyon-juniper as a conservation
23

24 ⁴ This term refers to the PECE summary in the 2020 Withdrawal, 85 Fed. Reg. 18,081–86, and to
25 the full PECE, (AR 254–323).

26 ⁵ The latter argument could be construed to refer to certainty of implementation Criterion A.8:
27 “[a]n implementation schedule (including incremental completion dates) for the conservation
28 efforts.” 68 Fed. Reg. 15,115. However, because the *Desert Survivors I* court held that the 2015
Withdrawal PECE appropriately determined that the same conservation measures were sufficiently
certain to be implemented, 321 F. Supp. 3d 1059–60, the Court construes this argument to refer to
certainty of effectiveness Criteria B.2, B.3, and B.5. *See* 68 Fed. Reg. 15,115.

1 measure. 85 Fed. Reg. at 18,084. Pinyon-juniper is a native woodland species that has
 2 encroached on the sagebrush ecosystem in which bi-state sage grouse live. (*See* AR 16,734.)
 3 About 40% “of the historically available sagebrush habitat has been usurped by woodland
 4 succession over the past 150 years,” with variation among the PMUs. (AR 16,735.) “[E]cologists
 5 have developed clear and effective recommendations to target appropriate phases of encroachment
 6 . . . to ensure restoration occurs in sagebrush and sage-grouse habitat areas that are most
 7 meaningful (e.g., critical brood-rearing habitat, corridors in fragmented areas).” 85 Fed. Reg.
 8 18,084. “As of December 2018, pinyon and juniper removal has taken place on more than 18,700
 9 ha (46,400 ac) within or adjacent to sage-grouse habitat . . . to expand available sage-grouse
 10 habitat and enhance existing conditions within nesting, brood-rearing, and winter habitats.” *Id.*

11 In the 2015 Withdrawal PECE, the Service was “not aware of any study documenting a
 12 direct correlation between [pinyon-juniper removal] treatments and sage-grouse population
 13 response.” *Desert Survivors I*, 321 F. Supp. 3d at 1063 (quoting 2015 Species Report). Thus, the
 14 main support for the proposition that pinyon-juniper removal would positively impact the bi-state
 15 sage grouse population was data showing that pinyon-juniper presence negatively impacted the
 16 population. *See id.* (“[T]his negative inference is simply a guess; it is not based on any scientific
 17 evidence linking pinyon-juniper removal to improvement as measured by population trends.”); *cf.*
 18 *Tucson Herpetological Soc’y*, 566 F.3d at 879 (“If the science on population size and trends is
 19 underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of
 20 population decline equates to evidence of persistence.”). The 2020 Withdrawal PECE discussed
 21 three new studies on the effectiveness of this measure that were not available during the 2015
 22 Withdrawal. 85 Fed. Reg. 18,084. Each studied greater sage grouse generally, not bi-state sage
 23 grouse specifically. *See id.*

24 Sage-grouse readily nest in conifer treatment sites after trees had been
 25 removed [Severson 2017]; woodland treatments increased suitable
 26 available breeding habitat and enhanced nest and brood success
 27 [Sandford 2017]; and removal of pinyon-juniper trees encroaching
 28 into sagebrush vegetation communities can increase sage-grouse
 population growth through improving juvenile, yearling, and adult
 survival as well as improving nest survival [Olsen 2019].
 Additionally, sage-grouse population growth was 11.2 percent higher
 in treatment versus control sites within 5 years of conifer removal

1 [Olsen 2019]. Thus, we conclude that pinyon-juniper removal is
 2 effective in restoring areas impacted by woodland succession such
 that they become suitable and productive for sage-grouse, reducing
 the magnitude of the threat on the species.

3 *Id.*; (see AR 16,734–35).

4 **b. Discussion**

5 Plaintiffs take issue with the three new studies. They also contend that pinyon-juniper
 6 removal does not have a “track record” of success, largely because, in Plaintiffs’ estimation, the
 7 bi-state sage grouse population has continued to decline despite partial implementation of the
 8 conservation measure.

9 The new data discussed in the 2020 Withdrawal PECE met the Service’s burden to show
 10 that pinyon-juniper removal is sufficiently certain to be effective. The data supplied exactly what
 11 the *Desert Survivors I* court observed was missing: a reasonable inference that the measure “will
 12 actually have a beneficial impact.” 321 F. Supp. 3d at 1063. The three studies showed that the
 13 measure resulted in increased nesting, enhanced nest and brood success, and improved survival at
 14 several life stages. See 85 Fed. Reg. 18,084. These results supported a finding that pinyon-juniper
 15 removal will improve the bi-state sage grouse population by reducing the high-impact threat of
 16 native woodland succession.⁶ See *id.* at 18,081; 68 Fed. Reg. 15,115 (explaining that certainty of
 17 effectiveness depends in part on “[t]he nature and extent of the threats being addressed” and “how
 18 the conservation effort reduces the threats”); see also *Desert Survivors I*, 321 F. Supp. 3d at 1061
 19 (“While a track record of success is not an absolute requirement under PECE . . . , evidence that
 20 past conservation efforts have achieved measurable success with respect to the status of the
 21 species may support a finding of sufficient certainty of effectiveness.” (cleaned up)). Plaintiffs do
 22 not identify other studies or conflicting evidence. Moreover, the data provided a rational basis for
 23 the Service to “consider the magnitude of the impact on the species that the measure[] can be
 24 expected to achieve.” *Desert Survivors I*, 321 F. Supp. 3d at 1065; see 68 Fed. Reg. 15,115
 25 (Criterion B.1). Olsen 2019 reported that, after some areas were treated with pinyon-juniper
 26 removal measures, greater sage grouse population growth “steadily increased” in those areas

27 _____
 28 ⁶ The 2020 Withdrawal PECE also indicated that pinyon-juniper removal can reduce the high-
 impact threat of wildfires. (AR 296–97.)

1 relative to control areas “and was 11.2% higher” four years later. (AR 45,786.) Additionally, the
2 Service’s analysis estimated that while pinyon-juniper encroachment exceeded the amount of
3 habitat being restored as of 2013, as of 2020 pinyon-juniper removal was “on par with the rate of
4 expansion.” (AR 295.) Together, these findings provided a rational basis for the Service’s
5 conclusion that pinyon-juniper removal can be expected to reduce the underlying threat enough to
6 justify withdrawal. *See* 85 Fed. Reg. 18,084.

7 Plaintiffs argue that some of the studies were limited to a life stage and did not consider the
8 full life cycle of greater sage grouse. (*See* AR 48,068 (Sandford 2017: “We caution that we
9 analyzed probability of nest and brood success, not survival. Thus, we only report the increased
10 probability of successfully hatching a nest or raising at least one chick to independence; we cannot
11 report whether nest and/or brood survival rates increase.”), 48,242 (Severson 2017: “[We]
12 monitored . . . until incubation was terminated (e.g., hatched, depredated).”)) But it was not
13 manifestly irrational for the Service to infer that increased nesting in treated areas, increased nest
14 success (i.e. at least one egg hatched), and increased brood success (i.e. chick survived at least 50
15 days) is likely to improve the status of the population overall. (*See* AR 48,065, 48,240); *cf.*
16 *Greater Yellowstone Coal.*, 665 F.3d at 1026 (“Based on the evidence of a relationship between
17 reduced whitebark pine seed availability, increased grizzly mortality, and reduced grizzly
18 reproduction, it is logical to conclude that an overall decline in the region’s whitebark pine
19 population would have a negative effect on its grizzly bear population.”). The Court defers to the
20 Service’s expertise on the *implications* of the scientific data. *See Zinke*, 900 F.3d at 1067
21 (“Agency decisions deserve the highest deference when the agency is making predictions, within
22 its area of special expertise,” so long as they have “substantial basis in fact.” (cleaned up)).
23 Additionally, Olsen 2019 reasonably compensated for the limitations of the other studies because
24 it reported “increasing sage-grouse population growth rates” “driven by increases in juvenile,
25 adult, first nest, and yearling survival.” (AR 45,786.)

26 Finally, Plaintiffs’ argument with respect to continuing population decline is not
27 persuasive in the PECE context. They assert a 25% population decrease in the past decade, but
28 their calculation is not reasonable: they compare the 2013 estimated median of 4,625, within the

1 considerable range of 1,833–7,416, with the 2018 estimated median of 3,305. Coates 2020
 2 provides a more thorough and scientifically sound basis to estimate a 9.6% population decrease in
 3 the last decade. (AR 35,279.) Moreover, Plaintiffs’ calculation does not engage with the data
 4 indicating population cycling, discussed above. The population decrease, properly understood,
 5 does not cast significant doubt on the potential success of pinyon-juniper removal as a
 6 conservation measure.

7 **2. Cheatgrass Removal**

8 **a. Background**

9 The 2020 Withdrawal PECE also identified removal of cheatgrass as a conservation
 10 measure. 85 Fed. Reg. 18,084. Cheatgrass is a nonnative invasive species that has degraded the
 11 bi-state sage grouse’s sagebrush habitat. (*See* AR 16,731.) It influences nesting and population
 12 performance, and “can create long-term changes in ecosystem processes, such as fire cycles . . .
 13 and other disturbance regimes that persist even after an invasive plant is removed.” (AR 16,731–
 14 32.) “Cheatgrass is considered a low level threat across four PMUs (i.e., White Mountains, South
 15 Mono, Bodie, and Desert Creek-Fales), a moderate threat in the Mount Grant PMU and a high
 16 threat in the Pine Nut PMU.” (AR 16,732.)

17 Reviewing the 2015 Withdrawal PECE, the *Desert Survivors I* court found that cheatgrass
 18 removal was insufficiently certain to be effective. 321 F. Supp. 3d at 1064–65. The conservation
 19 measures at issue were “meager . . . (based on acreage alone)” and there was no evidence to
 20 support a finding that they were “sufficient to result in a beneficial impact,” especially because the
 21 Service described the measures’ effectiveness as “mostly unproven and experimental.” *Id.* at
 22 1065.

23 The 2020 Species Report again described the effectiveness of cheatgrass removal as
 24 “unproven and experimental.” (AR 16,733.) It “anticipate[d] a challenging scenario into the
 25 future,” with several areas of the bi-state sage grouse habitat vulnerable to cheatgrass invasion.
 26 (AR 16,733–34.) “The greatest defense against cheatgrass and other nonnative invasive species is
 27 to maintain habitat in a competitive condition by ensuring native understory species remain
 28 healthy and viable, especially following disturbance events such as fire and drought.” (AR

1 16,733.) The 2020 Withdrawal PECE stated:

2 Although invasive, nonnative plants are widespread in the west and
 3 within the Bi-State area, reduction of other threats to the Bi-State DPS
 4 and its habitat (e.g., pinyon-juniper encroachment, impacts to critical
 5 brood-rearing habitat) are a higher priority (overall) at this time. As
 6 a result, conservation efforts related to invasive, nonnative plants will
 occur only in specific areas that may be most meaningful to the Bi-
 State DPS (e.g., targeting invasive species that are impacting critical
 brood rearing habitat) as opposed to widespread treatments.

7 (AR 295.) Thus, the limited cheatgrass removal efforts targeted the Pine Nut PMU (where
 8 cheatgrass is a high threat) in addition to Desert Creek-Fales. (AR 295.) On cheatgrass removal,
 9 the 2020 Withdrawal PECE concluded:

10 In conclusion, all of these future efforts to treat increasing nonnative
 11 invasive and native plants are expected to significantly contribute to
 12 two of the three currently identified most significant concerns for the
 13 DPS into the foreseeable future (i.e., reducing impacts by protecting
 and restoring critical brood-rearing habitat, and removing/restoring
 habitat impacted by nonnative, invasive species and native increasing
 species).

14 (AR 296.)

15 **b. Discussion**

16 Plaintiffs challenge the Service’s reliance on cheatgrass removal as a conservation
 17 measure. Defendants counter that the Service was not required to explain why cheatgrass removal
 18 alone was sufficiently certain to be effective, but rather, that it was part of the overall conservation
 19 measure addressing “nonnative invasive and native increasing plants.” (AR 294.)

20 The 2020 Withdrawal PECE did not adequately support a finding that cheatgrass removal
 21 was sufficiently certain to be effective. It suffered from the same inadequacies as the 2015
 22 Withdrawal PECE: small, targeted measures that are, according to the 2020 Species Report, not
 23 proven to be effective. *See Desert Survivors I*, 321 F. Supp. 3d at 1064–65. To be sure, the
 24 Service can implement conservation measures that are not sufficiently certain to be effective but
 25 that may improve a population on the margins. But a conservation measure that is not sufficiently
 26 certain to be effective “cannot contribute to a determination that listing is unnecessary or a
 27 determination to list as threatened rather than endangered.” 68 Fed. Reg. 15,115. The Service
 28 stated that “all of these future efforts,” including removal of nonnative invasive plants (primarily

1 cheatgrass) and native succession plants (primarily pinyon-juniper) “are expected to significantly
2 contribute to” reducing two significant threats. (AR 296.) The Service erred in considering the
3 contributions of cheatgrass removal in its listing decision.

4 If the Service had disregarded any contribution from cheatgrass removal, it might well
5 have concluded that pinyon-juniper removal alone was sufficiently certain to be effective in
6 reducing the identified threats and that a “threatened” listing was unnecessary. But the Service
7 stated otherwise, and the Court’s review is limited to “the basis articulated by the agency itself.”
8 *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983);
9 *see Greater Yellowstone Coal.*, 665 F.3d at 1027 n.4 (“[T]he Service . . . did not adequately
10 connect the dots in the Rule such that its path may reasonably be discerned.” (cleaned up)).

11 3. Incremental Objectives

12 a. Background

13 There is no standalone requirement that the Service provide incremental objectives for the
14 PECE conservation measures. Criteria B.2–B.5 for certainty of effectiveness are:

- 15 2. Explicit incremental objectives for the conservation effort and dates
16 for achieving them
- 17 3. The steps necessary to implement the conservation effort
- 18 4. Quantifiable, scientifically valid parameters that will demonstrate
19 achievement of objectives, and standards for these parameters by
20 which progress will be measured
- 21 5. Provisions for monitoring and reporting progress on
22 implementation (based on compliance with the implementation
23 schedule) and effectiveness (based on evaluation of quantifiable
24 parameters) of the conservation effort

25 68 Fed. Reg. 15,115. Yet, each criterion is not an absolute requirement:

26 These criteria should not be considered comprehensive We will
27 consider all appropriate factors in evaluating formalized conservation
28 efforts. The specific circumstances will also determine the amount of
information necessary to satisfy these criteria.

Id.

The 2020 Withdrawal PECE stated that pinyon-juniper removal was a “[c]urrent identified
priorit[y] . . . funded and planned for implementation from 2015-2024,” (AR 264), by several of

1 the agencies that participate in the 2012 BSAP, (AR 264–71). It continued: “Although the . . .
 2 comprehensive project database and the agency implementation schedules have limited
 3 descriptions of any incremental objectives and schedules, we are satisfied that the purpose of this
 4 criterion has been met.” (AR 303.) It explained that some of the conservation measures “do not
 5 require incremental objectives or schedules,” but many do have such incremental objectives. (AR
 6 303–04.) It also described the 2012 BSAP as “a living document” that is discussed and updated as
 7 needed by implementing agencies two to four times per year, and the conservation measures of
 8 which are reprioritized as needed. (AR 303–05.)

9 As of December 2018, nearly 350 projects have been completed that
 10 address impacts associated with wildfire, invasive weeds, pinyon-
 11 juniper encroachment, urbanization, and dispersed recreation
 12 This demonstrates a high level of assurance that there has been and
 will continue to be a conservation investment from the various
 agencies to ensure that the BSAP’s goals and objectives will be
 achieved into the future.

13 (AR 303.)

14 **b. Discussion**

15 The 2020 Withdrawal PECE sufficiently analyzed the certainty of effectiveness criteria,
 16 including Criteria B.2, B.3, and B.5. The Service’s experience in successfully implementing many
 17 components of the 2012 BSAP, in productive collaboration with the other agencies involved,
 18 provided a rational basis for its conclusion that “the purpose of [Criterion B.2] has been met.”
 19 (AR 303); *cf. Desert Survivors I*, 312 F. Supp. 3d at 1060 (“[T]hese same agencies had a history of
 20 involvement in the conservation[] efforts under the 2012 BSAP. This is a permissible basis to find
 21 that there is a high level of certainty that they will continue to be involved in this effort and to
 22 abide by the commitments in their Commitment Letters.”). The 2012 BSAP, together with the
 23 agencies’ years-long collaboration in implementing it, provided a rational basis for the Service’s
 24 conclusion that “[t]he steps necessary to implement the conservation effort” were well-
 25 documented (Criterion B.3) and that “[p]rovisions for monitoring and reporting progress on
 26 implementation” were adequate (Criterion B.5). 68 Fed. Reg. 15,115.

27 * * *

28 In the 2020 Withdrawal PECE, the Service adequately supported its conclusion that

1 pinyon-juniper removal is sufficiently certain to be effective in reducing the high-impact threat of
2 native woodland succession. *See* 85 Fed. Reg. 18,084 (identifying threat). However, it did not do
3 so with respect to cheatgrass removal. Thus, while pinyon-juniper removal was sufficiently
4 certain to be implemented and effective, cheatgrass removal was only sufficiently certain to be
5 implemented. *See Desert Survivors I*, 321 F. Supp. 3d at 1059–60 (analyzing certainty of
6 implementation). Of the two, only pinyon-juniper removal could “contribute to a determination
7 that listing is unnecessary or a determination to list as threatened rather than endangered.” 68 Fed.
8 Reg. 15,115. Finally, the Service reasonably considered incremental objectives as a potential
9 indicator, though not a requirement, and had a rational basis to conclude that “all appropriate
10 factors” regarding certainty of effectiveness criteria were met. *Id.*

11 **IV. HARMLESS ERROR**

12 The APA provides that “the court shall review the whole record or those parts of it cited by
13 a party, and due account shall be taken of the rule of prejudicial error.” 5 U.S.C. § 706. The
14 “harmless error doctrine may be employed only when a mistake of the administrative body is one
15 that clearly had no bearing on the procedure used or the substance of decision reached.” *Tucson*
16 *Herpetological Soc’y*, 566 F.3d at 880 (cleaned up); *see Paulsen v. Daniels*, 413 F.3d 999, 1008
17 (9th Cir. 2005) (explaining that courts “must exercise great caution in applying the harmless error
18 rule in the administrative rulemaking context . . . to avoid gutting the APA’s procedural
19 requirements” (cleaned up)).

20 As analyzed above, the Service erred in: analyzing the data on extirpation of smaller
21 PMUs; concluding that the effective population size was above the minimum threshold for
22 viability; determining that the bi-state sage grouse is not likely to become an endangered species
23 within the foreseeable future throughout a significant portion of its range; and determining that
24 cheatgrass removal was sufficiently certain to be effective as a conservation measure, although the
25 conclusion about cheatgrass removal may not change the outcome here. These combined errors
26 undercut the Service’s broader conclusion that the bi-state sage grouse population is stable, that
27 the portions where it is likely to be extirpated are not significant, and that its conservation
28 measures will reduce one or more threats enough so that the bi-state sage grouse is not threatened.

1 Thus, these errors go to the heart of the Service’s listing decision and are not harmless. *See Desert*
2 *Survivors I*, 321 F. Supp. 3d at 1066.

3 **CONCLUSION**

4 The Court concludes that the 2020 Withdrawal was arbitrary and capricious. Accordingly,
5 the Court VACATES the 2020 Withdrawal, *see* 85 Fed. Reg. 18,054; REINSTATES the 2013
6 Proposal, *see* 78 Fed. Reg. 64,358; and REMANDS to the Service to issue a new final listing
7 decision. *See Paulsen*, 413 F.3d at 1008 (“Ordinarily when a regulation is not promulgated in
8 compliance with the APA, the regulation is invalid. . . . The effect of invalidating an agency rule
9 is to reinstate the rule previously in force.” (cleaned up)); *Desert Survivors*, 336 F. Supp. 3d at
10 1133 (remedy order) (vacating 2015 Withdrawal, reinstating 2013 Proposal, and remanding).

11 This Order disposes of Docket Nos. 33, 36.

12 **IT IS SO ORDERED.**

13 Dated: May 16, 2022

14 
15 JACQUILINE SCOTT CORLEY
16 United States District Judge
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United States District Court
Northern District of California