

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

**CENTER FOR BIOLOGICAL DIVERSITY
and AUDUBON SOCIETY OF PORTLAND,**

Plaintiffs,

v.

DEBRA HAALAND, in her official capacity as
Secretary of the United States Department of the
Interior; **MARTHA WILLIAMS**, in her official
capacity as Director of the U.S. Fish and Wildlife
Service; and **U.S. FISH AND WILDLIFE
SERVICE,**

Defendants.

Case No. 23-cv-00150-AN

**COMBINED REPLY IN
SUPPORT OF SUMMARY
JUDGMENT AND
OPPOSITION TO
DEFENDANTS' CROSS-
MOTION FOR SUMMARY
JUDGMENT**

Request for Oral Argument

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INTRODUCTION

With overall population numbers better measured in the hundreds rather than the thousands, and with the majority of local populations numbering less than 10 pairs, the streaked horned lark (“Lark”) stands on the brink of extinction, whether its status is viewed throughout the entirety of its range or by focusing on the unique threats impacting its regional and local populations.

In response, and in defense of its decision to list the Lark as a threatened rather than an endangered species (“Threatened Determination”), the U.S. Fish and Wildlife Service (“Service”) attempts to paint Plaintiffs Center for Biological Diversity and the Audubon Society of Portland (collectively the “Conservation Groups”) as quibbling about the Service’s scientific conclusion, one to which the agency is allegedly owed deference. But this ignores the fact that the Conservation Groups’ critiques are largely based on the critiques of the Service’s *own* hand-picked Lark experts, who criticized the agency’s failure to list the species as endangered and admonished the Service for trying to “present a rosier picture than reality.” AR08047.

Deference is not owed when the Service “entirely failed to consider an important aspect of the problem[.]” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). In this case, the Service failed to address whether the threat inherent in the exceedingly small size of the Lark’s remaining populations warrants an endangered rather than threatened listing. The Service also failed to explain the bases for the assumptions underpinning its Threatened Determination, and failed to consider the unique, concentrated threats the Lark faces in the distinct regions of its range.

The Service’s response regarding the reaffirmed and expanded 4(d) Rule also misses the mark. The Service does not (and cannot) deny that, although the 4(d) Rule inflicts actual harm on the Lark—including by allowing, without any limitation or mitigation, the crushing of active

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nests and nestlings—there is not a shred of evidence in the now decade-long time frame the 4(d) Rule has been in existence that it has done anything to help conserve the species. Indeed, as the Service’s own peer reviewers emphasized, the agency cannot point to a single concrete instance in which the 4(d) Rule has prompted the “voluntary” conservation measures it was purportedly designed to foster. Accordingly, notwithstanding the Service’s plea for deference, this is an unusual situation in which the empirical facts on the ground belie the rule’s rationale and undercut any argument that it is facilitating the “conservation”—i.e., recovery—of the Lark on agricultural lands.

The Service’s response also completely sidesteps the fact that the 4(d) Rule allows conversion of grass seed to other forms of agriculture (e.g., routine agricultural activities) that provide no benefit to the Lark. To the contrary, and as repeatedly acknowledged by the Service, such conversion is a prime cause of destruction of the Lark’s habitat.

Given these failures, this Court should remand the Threatened Determination to the Service and order it to revisit, within one year of the Court’s order, whether the Lark warrants listing as an endangered species. In addition, the Court should partially vacate the 4(d) Rule’s blanket exception for routine agricultural activities.

ARGUMENT

I. The Service’s Failure to List the Lark as Endangered Ignores the Primary Threat Small Population Size Poses, Lacks a Substantial Basis in Fact, and is Contrary to the Opinions of the Service’s Own Experts.

The basis of the Service’s determination that the Lark is threatened, and not endangered, is that the Lark allegedly “retains multiple populations in high and moderate condition across all representative regions, [that] those populations occur in a variety of habitat types, and [that] no threat at its existing or imminent level could plausibly change that state of affairs.” AR00331.

However, the Service failed to address whether the extreme threat that very small population size

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in and of itself poses to the Lark warrants the bird's listing as endangered rather than threatened. This led the Service's Lark expert, Mr. Bob Altman,¹ to comment that "the absence of small population size as a primary stressor is a glaring omission[,]" which "invalidates any conclusions that do not recognize the multiple potential consequences of population declines or extirpations that are either enhanced in likelihood or exacerbated in rate with small populations." AR08054. The Service's determination of what constitutes "high" and "moderate" condition also lacks a substantial basis in the record, and the Service failed to meaningfully consider the best available science showing that the Lark's rangewide population is trending downward.

A. The Service's Threatened Determination Minimized the Primary Threat of Small Population Size.

Small population size, in and of itself, poses a dire threat to the species as rangewide populations decline and Larks are isolated in small local populations. As the Service recognized in the Draft Recovery Plan for the Lark, threats "such as low genetic diversity or the increased impact of predation," AR00060, and reduced recruitment, AR00065, are "consequences of ... small and isolated local populations across the species' range." AR00060. Small populations are also "at risk of random environmental events ... such as ice storms and flooding ... that could have catastrophic consequences." AR00042. Additionally, "genetic effects ... plague small populations, collectively known as small population effects[,]" which "can include genetic drift, founder effects (over time, an increasing percentage of the population inheriting a narrow range of traits), and genetic bottlenecks leading to increasingly lower genetic diversity, with consequent negative effects on adaptive capacity and reproductive success." AR00325.

¹ Mt. Altman is one of, if not the, foremost experts on the Lark, having studied the species since the mid-1990s, *see* AR00190, leading the Service to "recognize [his] expertise with the species, its habitat, and the threats facing [Larks] throughout its range." AR08058.

These threats resulting from small population size led the team writing the Draft Recovery Plan to conclude that “[c]urrent threats to the lark *are mainly those associated with small population[.]*” AR00065 (emphasis added). Ultimately, reflecting on the Lark’s resilience, the Service found that “the loss of even a single breeding individual can negatively influence the resiliency of ... small or declining local populations at airports[.]” AR00257.

The Service argues that it recognized the threats inherent in very small populations, Defs.’ Cross-mot. for Summ. J. and Mem. In Supp./In Resp. to Pls.’ Mot. for Summ. J. (“Resp. Br.”), ECF 26, at 22, but it points to nowhere in the agency’s decision document where the Service squarely addressed whether this severe threat warranted listing the Lark as endangered. To the contrary, despite its findings in the Draft Recovery Plan and the opinions of its experts, the Service sidelined the threat posed by small population size in its Threatened Determination, labeling it “synergistic” rather than “primary.” But as Mr. Altman commented, the Service’s labeling “was used ... to diminish the importance of small population size as a principal stressor on [L]ark populations.” AR08042.

The Service also failed to consider small population size when assessing the Lark’s *current status*—the primary inquiry the Service itself says it must engage in to determine whether the Lark is an endangered species. *See* Resp. Br. at 15 (noting that the primary distinction between an endangered species and a threatened species is a temporal one). Rather than demonstrate where in the Threatened Determination the Service addressed whether extremely small population size is a *present* primary threat supporting an endangered listing, the Service refers to the SSA’s analysis. *Id.* at 22–23. “However, the SSA is not a decisional document. It contains the science that the agency considered, but it cannot explain why the decision maker relied on one study over another[.]” or one expert over another, “in making the

Listing Decision.” *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 488 F. Supp. 3d 1219, 1227 (S.D. Fla. 2020). That reasoning must be provided and considered when making the Threatened Determination itself. *See* AR00229 (“This SSA report does not result in a decision by the Service on whether this taxon should be proposed for listing as a threatened or endangered species under the Act. . . . The listing decision will be made by the Service after reviewing this document and all relevant laws, regulations, and policies.”).

Regardless, a close reading of the SSA reinforces the Service’s failure to adequately consider whether the effects of small population size support endangered status. For instance, the Service points to the SSA’s statement that “the synergistic effects of climate change and small population size” are a “main factor[] influencing the future viability of [Larks.]” Resp. Br. at 23 (quoting AR00281). But this statement is in a section addressing “Future Factors Influencing Viability”—not current factors. AR00281. Regarding the Lark’s current status, the statement cites to Table 6 of the SSA, summarizing stressors currently impacting the Lark’s status. There, small population size and climate change are conspicuously absent. *See* AR00265. Nor can small population size be found in the Service’s subsequent statement of threats negatively affecting “[t]he resiliency of the rangewide [Lark] population.” *See* AR00265–66.

The Service tries to cover up its lack of analysis by noting a two-paragraph section in the Final Rule addressing “Small Population Size,” which briefly notes the “[v]arious effects of small population size,” and finds that “[a]ny local population of [L]arks with very low abundance that does not interbreed with other local populations will be at more risk in the future due to small population effects.” *See* AR00325. This passing reference to the adverse effects of small population size, not even contained in the Service’s analysis of the Lark’s current condition, does not adequately explain (indeed, does not explain at all) why this threat does not

warrant an endangered listing—an especially glaring omission in the face of the Service’s own Lark expert stressing small population sizes as a primary stressor. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011) (finding that the Service’s failure to “mention[] or cite[]” a relevant study in its analysis of factors affecting the grizzly bear’s continued existence rendered the Service’s determination arbitrary and capricious).²

The Service attempts to cast its sidelining of the threat of small population size as merely the Conservation Groups’ “competing view about policy and science[,]” and asserts that the Service is due deference in such instances. Resp. Br. at 22, 25. But the core problem is that the Service failed to explain its view on whether populations of such miniscule size warrant the highest level of Endangered Species Act (“ESA”) protection (and, if not, why not). Further, the Conservation Groups highlighted the concerns raised by the Service’s *own* chosen Lark expert—Mr. Altman. And “[a]lthough the Court must defer to an agency’s expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.” *Def. of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997) (citing *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988)).³

² The Service argues that it is “unclear what else [it] could have done[.]” Resp. Br. at 25. The answer is that it could (and should) have addressed whether the current negative effects of populations as small as ten breeding pairs are, based on the best available science, sufficiently grave to warrant listing as endangered.

³ The Service asserts that it “seriously considered” Mr. Altman’s comments. Resp. Br. at 24 (citing AR08057–08058). The Service’s response, however, merely reiterated the Service’s finding, without further explanation, that it “consider[ed] small population size to be a byproduct of other stressors influencing the population and a synergistic factor influencing the condition and resiliency of many local populations of [the Lark.]” AR08058. The Service’s did not reconsider its analysis in response to the critique of its own expert or explain how its position had changed since the agency’s prior analysis in the Draft Recovery Plan.

Ultimately, the Service cannot “brush[] the small population size/low genetic diversity issue aside[.]” *Defrs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1006 (D. Mont. 2016); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 246 F. Supp. 3d 1272, 1281 (N.D. Cal. 2017) (setting aside the Service’s determination that the coastal marten did not warrant listing because the Service “failed to recognize that the evidence showed a small and declining California marten population”). The Service’s failure to “connect the dots,” *Greater Yellowstone Coal.*, 665 F.3d at 1027 n.4—to analyze whether the *current* negative genetic and other effects associated with very small Lark populations, the majority of which are less than 10 breeding pairs, warrants endangered status—“fail[s] to consider an important aspect of the problem[.]” *State Farm*, 436 U.S. at 43.

B. The Assumptions Underlying the Service’s Threatened Determination are Contrary to the Best Available Science and the Agency’s Own Record.

Although the failure to consider small population size is a sufficient basis for remand, the Service’s assertion that the Lark “retains multiple populations in high and moderate conditions across all representative regions,” AR00331, is also devoid of support in the record. The Service argues that it is owed deference on its determination, but “[e]ven when an agency is acting within its area of expertise, [courts] need not defer to the agency when the agency’s decision is without substantial basis in fact.” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (internal quotation marks and citation omitted). As the Conservation Groups detailed in their opening memorandum, the Service’s resiliency determinations do not stand up to scrutiny because the Service failed to ground them in the record or the best available science, and instead relied on arbitrary premises and conclusions. *See* Pls.’ Mot. for Summ. J. and Mem. in Supp. (“Op. Br.”), ECF 23, at 20–28.

The Service argues that the Conservation Groups were wrong to focus on abundance as a primary factor of resiliency, and that it is instead only one aspect of it, measured along with several other factors. But the Service's own definitions of resiliency use population size as the primary metric for resiliency, which fundamentally concerns a population's ability to withstand stochastic disturbance. *See, e.g.*, AR00230 (“Resiliency means having sufficiently large populations for the species to withstand stochastic events[.]”); AR06541 (“Generally speaking, populations need abundant individuals within habitat patches of adequate area and quality to maintain survival and reproduction in spite of disturbance.”). This not only makes intuitive sense but also aligns with the opinion of the Service's own expert, Mr. Altman, who succinctly explained that “the smaller the population size the lower the resiliency (or viability)[.]” AR08042, and that there can be “no confidence in [the] sustainability (i.e., no resiliency)” of any population with less than 10 pairs in the South Puget Lowlands, 10 pairs on the Pacific Coast and the Lower Columbia River, or 15 pairs in the Willamette Valley. AR08045 (referring to the Draft Recovery Plan's population targets for a population with moderate resiliency, *see* AR00070).

The arbitrariness of the Service's approach to resiliency is illustrated by the agency's counterintuitive labeling of nearly extirpated populations as highly resilient. As an example, the Service found that the Sandy Island population of Larks has “high” resiliency because “Sandy Island is managed for [Larks].” AR00275. But the Sandy Island population has low abundance, a flat population trend, and limited connectivity. AR00274. In 2019, the Sandy Island population numbered just *four* breeding pairs. AR00241.

Mr. Altman critiqued the Service's determination that such depleted populations have “high” resiliency, explaining that he did not “know how the assertion can be supported with data or reasoning how a small population of larks[,] say 5-10 pairs[,] is immune to the potential

vulnerability of that size[,]” and that Larks, “like other birds[,] are subject to increased vulnerability to extirpation with small population sizes.” AR08042. Nor does the fact that the Sandy Island population has managed to persist undermine its highly imperiled status because “[b]asic understanding of the small population paradigm recognizes that the smaller the population the greater the likelihood of extirpation/extinction[,]” which “can be the consequence of one or two down years.” AR08045. “For example, it is highly questionable that a population of say 6-7 pairs”—more than Sandy Island—“would have much resiliency from annual natural variability, let alone stochastic events which is the criteria for resiliency in the SSA.” AR08045.

Tellingly, the Service does not respond to the Conservation Groups’ argument that the Corvallis Municipal Airport population is the only population large enough to actually have “high” resiliency, as evidenced by its ability to withstand the loss of approximately 67 breeding pairs following a severe winter weather event—losses no other population could endure. AR00243–44. As the Service’s Lark expert makes clear, there is no basis in the record for finding that other, much smaller populations that the Service has defined as having “high resiliency” could sustain similar losses. *See* AR08045 (Mr. Altman noting that all of the other populations the Service labels as “highly resilient” would be extirpated under similar circumstances). Lacking a supportable basis in the record or the best available science, the Service’s primary justification for finding that the Lark is threatened rather than endangered throughout its range falls away.

The Service argues that it was justified in measuring abundance and resiliency using the population targets set forth in the SSA’s matrix, AR00271, because they were set forth in the Draft Recovery Plan. Resp. Br. at 27. But the Recovery Plan team set those numbers not to measure the resiliency of any given local population, but “to establish *regional* population

goals[.]” AR00066. In other words, if *all* of the local populations in a region met those targets, the regional population would have moderate or high resiliency. This provides no basis for using these same numbers to assess any individual population’s resiliency in isolation.

The Service also asserts that the Draft Recovery Plan’s population targets are “associated with the *recovery* of the species, not those needed to avoid imminent extinction[.]” suggesting that a population’s failure to meet these targets does not necessarily mean that it is in danger of extinction. Resp. Br. at 27. But as Mr. Altman, a member of the Draft Recovery Team, notes in his peer review of the SSA, “the terms viable and resilient” were used interchangeably in the Draft Recovery Plan and the subsequent SSA “to avoid any suggestion that the recovery objectives in the DRP are not the same as the resiliency objectives in the SSA—they were both developed with the same biological purpose in mind to meet the same goals. And by definition, the key concept of all these words—resiliency, viability, sustainability, persistence—is ‘the ability to withstand.’” AR08044.

As explained in the Conservation Groups’ Opening Brief, Op. Br. at 22–23, the Service’s resiliency determinations are also contrary to the best available science in the record that the “effective population size necessary to avoid inbreeding depression in the short-term” is more than 100 animals, and that more than 1,000 are needed to “maintain evolutionary potential in perpetuity.” AR00543.⁴ In response, the Service does not deny the study’s applicability to the Lark—which would be hard to dispute as the study was produced in response to the Service’s call for “input on potential recovery goals, especially related to population size.” AR00539.

⁴ Again, the *only* surveyed site with evidence of local populations greater than 100 birds is the Corvallis Municipal Airport population. See AR00239–40 (estimated Lark number in the South Puget Lowlands), AR00241–42 (estimated Lark numbers in the Pacific Coast and Lower Columbia River), AR00243 (estimated Lark numbers in the Willamette Valley).

Instead, the Service asserts, without citation or explanation, that the study is not the best available science on the record. Resp. Br. at 29. But it is the *only* study in the record positing an effective population size to avoid inbreeding depression in the short-term. And the Service “cannot ignore available biological information.” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d at 1060 ; *see also Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016) (“Where the information is not readily available, we cannot insist on perfection: The best scientific data *available*, does not mean the best scientific data *possible*.”) (cleaned up).

At the very least, the Service must explain why it did not rely on the study in the listing decision itself. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d at 1068–1069 (finding the Service ignored the best available data showing that arctic grayling populations were decreasing and failed to explain why another study was superior). It cannot do so now in briefing after the fact. *Greater Yellowstone Coal.*, 665 F.3d at 1027 n.4 (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself, not post-hoc rationalizations.”). Regardless, the Service’s attempt to distinguish the study—that it is a generally applicable study and not specifically about Larks—is hardly sufficient given that the Service’s own expert agrees that the vast majority of the Lark populations are far too small to be deemed resilient. *See* AR08045.

Similarly, the Service cannot arbitrarily dismiss survey data showing that the Lark is declining across its range. Specifically, the Service’s effort to downplay the Breeding Bird Survey data showing rangewide population declines fails to “provide[] a reasonable explanation for adopting [the Service’s] approach” and to “disclose[] the limitations of that approach.” *Alaska Oil & Gas Ass’n*, 840 F.3d at 679. As noted in the Conservation Groups’ Opening Brief, Op. Br. at 24–25, the Breeding Bird Survey data “indicates a 6.52 percent decline for the subspecies between 2005 and 2015.” AR00318. This, as Mr. Altman noted in his comments on

the SSA, “indicates a large and statistically significant annual decline[,]” and although “[i]t can be difficult to achieve statistical significance with small sample sizes, ... the fact that the [L]ark trend is significant, and large, suggests a higher degree of confidence in the trend than say a declining trend that was insignificant or lower in annual percent.” AR08049–50. These data analyze population change information for birds every ten years, so another update to the data would not be expected until 2025 at the earliest. AR03532. Therefore, this is, in fact, the best available data concerning overall population trends.

The Service’s reasoning in the record for discarding this data was that the Lark was listed in 2013 and the Breeding Bird Survey data *may* not reflect recovery efforts that have taken place since listing. AR00318. In its brief, the Service also argues that it “was able to draw important information from the survey data collected at occupied sites[,]” and that “[t]he number of breeding pairs at regularly monitored sites increased from 198 to 383 between 2013 ... and 2019[,]” leading the agency to conclude that the rangewide population has remained relatively unchanged since listing. Resp. Br. at 19, AR00268.

But these rationales are, at best, misleading. To start with, the SSA also noted recent monitoring efforts but stated that “the majority of the Willamette Valley has not been monitored *and [Breeding Bird Survey] data indicate a declining trend in this regional population.*” AR00268 (emphasis added). Additionally, the Service’s allegation that the number of breeding pairs at regularly monitored sites increased from 198 to 383 misrepresents what the record actually shows, which is that far more sites (13 more) were surveyed in 2019 than in 2013. *See* AR00239–43 (recording 24 surveyed sites in 2013 compared with 37 surveyed sites in 2019). As the Service itself notes, little can be drawn from this purported “increase” because the increased numbers could easily have resulted from an increase in survey efforts since listing. Resp. Br. at

18–19. Indeed, the available evidence suggests that the number of Larks has declined dramatically. When the Service averaged the number of observed Larks per region compared to the number of sites surveyed, the “mean number of pairs detected” in the Willamette Valley in 2013 was 48 in 2013, but only 18.3 in 2019. AR00246–47.

Skewing, or at least selectively presenting, the available data to reach a desired result—as the agency evidently has here—is arbitrary and capricious and violates the best available science standard. The Service similarly attempted to reject information showing that populations were declining in *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018). There, the Service found that the arctic grayling did not warrant listing despite a report that found that the number of breeding fish was decreasing in a key population, contradicting the data on which the Service relied for its not-warranted determination. *Id.* at 1068. The Ninth Circuit found “that in ignoring available data [the Service] acted in an arbitrary and capricious manner[.]” and rejected the Service’s argument that there was “more current data[.]” *Id.* The panel held that while such information could be a reason for rejecting the earlier report, the Service failed to include an “adequate explanation and support for its determinations.” *Id.* at 1069. So too here, where the Service failed to meaningfully address the Breeding Bird Survey data, which Mr. Altman found “[c]learly ... indicates a current condition of range-wide population decline in the last 5-7 years” at the time of the SSA’s drafting. AR08050.

The Service also argues that by focusing on the Breeding Bird Survey data and the Lark’s low population numbers rangewide, the Conservation Groups dismissed the other factors the Service relied on for assessing resiliency, such as connectivity. Resp. Br. at 30–31. But the Conservation Groups’ Opening Brief explained how none of the Service’s bases for its resiliency determinations were grounded in the record. *See Op. Br.* at 24–28. For instance, the Conservation

Groups critiqued the Service’s assessment of connectivity, noting that the evidence in the record found that although Larks “can move between sites, and there are a few instances of detections at previously unoccupied locations, ... recolonization appears *very low* and difficult to predict.” AR00331 (emphasis added).

Indeed, the *only* evidence of the Lark recolonizing new areas is anecdotal evidence of Larks colonizing the Clatsop Spit on the Oregon Coast at the mouth of the Columbia River in 2019 and 2020. *See* AR00238 (noting that the observed “birds were the first individuals observed on the Oregon coast in over thirty years”). But this sole incident hardly contravenes the best available science demonstrating that dispersal is extraordinarily uncommon. AR00331. For instance, Larks “have not recolonized new sites in the South Puget Lowlands region despite 20 years of prairie restoration and intensive monitoring, suggesting recolonization is site-specific and difficult to predict.” AR00280.

Next, the Service misconstrues the Conservation Groups’ argument regarding the available survey data for local populations in the Willamette Valley. The Conservation Groups do not argue, as the Service contends, that that the agency should have ignored available survey data in the Willamette Valley. Resp. Br. at 31. Rather, the problem is that said survey data ignores the Lark’s status on private lands in the Willamette Valley—where the majority of the population occurs—and instead focuses on a small unrepresentative group of survey sites where there has been intensive monitoring and efforts to protect nests. AR00193.

By effectively ignoring the nearly 70 percent of the Lark’s rangewide population that occurs on private lands in the Willamette Valley, where “the current rate of land use change indicates the quantity and quality of habitats used by [L]arks w[ill] decrease as habitat is lost to development, as well as changes to crop types grown on individual farms[,]” AR00284, the

Service ignored an important aspect of the problem. In essence, the Service assumed that the Lark's population on private lands in the Willamette Valley were at the very least stable, even though "limited surveys of accessible sites may not accurately reflect the trend in the whole region," *see* AR00318, and there is no basis for presuming that these sites are representative. But the Ninth Circuit has clearly held that "[i]f the science on population ... trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence." *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009). Yet that is exactly what the Service did here.

Despite the Service's efforts to rehabilitate its analysis of the Lark's resiliency, on which the agency grounds its determination that the Lark is threatened rather than endangered throughout all of its range, the Service's determination is arbitrary and capricious, and contrary to the best available science, in violation of the ESA. The record reveals that the Service effectively ignored critical considerations, such as the Lark's tiny remaining population sizes and the best available data demonstrating an overall decline in the rangewide population, when making its unlawful decision not to list the species as endangered. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d at 1068 ("[I]n ignoring available data [the Service] acted in an arbitrary and capricious manner.").

II. The Service's Finding That the Lark is Not Endangered in a Significant Portion of Its Range is Arbitrary and Not Supported by the Best Available Science.

In answer to the question of whether the Lark is in danger of extinction in a portion of its range, the Service concluded that "*there is no portion of the range where there is currently a concentration of threats relative to other areas in the range.*" AR00332 (emphasis added). As a result, because, according to the Service, "there are no portions of the species' range where the species has a different status from its rangewide status, no portion of the species' range provides

a basis for determining that the species is in danger of extinction in a significant portion of its range.” AR00332. To reach that answer, however, the Service needed to have actually analyzed whether “there is currently a concentration of threats relative to other areas in the Lark’s range”—something it failed to do. *See Op. Br.* at 29–33. Regardless, the record demonstrates that the threats facing the species vary from region to region in both type and intensity, and that there are concentrated threats that imperil the Lark’s continued existence in each region.

In response, the Service argues that its “significant portion of its range” analysis incorporated the analysis the Service undertook to determine whether the Lark is endangered or threatened throughout all of its range. However, applying the plain language of the ESA, the inquiry of whether a species is endangered or threatened “throughout all” of its range is separate and distinct from the question of whether a species is endangered or threatened in a “significant portion of its range,” and it is unlawful for the Service to conflate the two findings. *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001).

Instead, the Service must separately analyze whether a species is facing threats in a portion of its range that render it endangered in that particular area—in this case, the Willamette Valley, Pacific Coast and Lower Columbia River, and the South Puget Lowlands. Its failure to do so conflates the Service’s “throughout all” inquiry with its “significant portion of its range” inquiry. And the Service failed to engage in that separate analysis for any of the Lark’s regions.

The Service argues that the Conservations Groups’ failure to identify only one specific region that the Service failed to analyze “proves the Service’s point” that the Lark is threatened throughout all of its range. *Resp. Br.* at 36. But this is circular reasoning. Without meaningfully considering the unique threats that each region faces, the Service could not rationally determine whether the Lark is endangered, rather than merely threatened, in any significant portion of its

range. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 488 F. Supp. 3d at 1232 (rejecting a nearly identical conclusory finding for failing to address evidence of “non-uniform” threats when making a significant portion of range determination).

For instance, the Service argues that it considered habitat loss when analyzing whether the Lark is endangered in the Willamette Valley, and that “[w]hile the causes of this habitat loss may differ across the range . . . , the differences do not change the risk of extinction.” Resp. Br. at 35. But the record shows that the Lark faces unique threats in the Willamette Valley of both type and scale. These include the fact that “96 percent of the Willamette Valley is privately owned,” that the Willamette Valley is “densely populated,” and that it is the fastest growing area in Oregon, with a population expected to double in the next 50 years. AR00252. The SSA makes no note of similar growth rates in other regions. Similarly, the SSA noted that the grass seed farms the Lark uses as both breeding and wintering habitat in the Willamette Valley are being lost to agricultural conversion to crops incompatible with the Lark but made no mention of other regions experiencing such impacts. AR00253.

As such, the SSA details a significant “concentration of threats relative to other areas in the range.” AR00332. But the record contains no analysis of how these threats affect the Lark’s status in the Willamette Valley except for the Service’s non-region-specific statement that it considered numerous “influence factors” including “conversion of suitable habitat into unsuitable habitat through changes in land use[.]” and “changes in agricultural practices from crops that mimic preferred habitats to crops that diminish habitat suitability[.]” AR00331–332.

This conclusory analysis runs afoul of Ninth Circuit precedent requiring the Service to “at least explain [its] conclusion that the area in which the species can no longer live is not a ‘significant portion of its range.’” *Def. of Wildlife v. Norton*, 258 F.3d at 1145. Lacking a

“substantial basis in fact,” and failing to make “a rational connection between the facts found and the determinations made[,]” the Service’s significant portion of its range analysis is arbitrary and capricious, and contrary to law. *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2009); *see also Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 488 F. Supp. 3d at 1232 (rejecting a similar significant portion of its range analysis as insufficient even though it also incorporated a generalized list of threats impacting the species rangewide).

The Service commits the same error with the other regional populations. For instance, the SSA noted that small population size presents a particular threat in the South Puget Lowlands, which “have lower fecundity and nest success,” AR00263, and “a declining female population trend.” AR00240. Ultimately, the SSA stated that “[t]he combination of low genetic variability, small and rapidly declining local populations, high breeding site fidelity, and no observed migration into the South Puget Lowlands regional population” could result in the Lark’s regional extirpation. AR00264. Yet the agency failed to analyze whether these especially acute threats warranted an endangered finding for this portion of the range.

The Service responds to this criticism by arguing that the Lark was listed as threatened due in part to the threats in the South Puget Lowlands. Resp. Br. at 36. However, its argument misses the point: the problem is that the Service did not specifically assess the threats uniquely facing the South Puget Lowlands population such as “a declining female population” trend, which experts Ilai N. Keren and Scott F. Pearson noted “is particularly worrisome given the importance of females to population recruitment and ultimately population growth.” AR01816–17. Ultimately, those experts called on the Service “to reevaluate ... our overall conservation strategy for this region, and the potential need for more frequent surveys.” AR01817.

Finally, the Service failed to consider the unique threats facing the Pacific Coast population—an incredibly fragile population with only ten to eleven pairs *total* observed during the most recent surveys, AR00241, which the Service found is “currently considered unstable.” AR00274. As the Service recognized, the Pacific Coast population’s outlook is not encouraging “due to the effects of climate change[,]” with “[s]ea-level rise, increased coastal erosion, and more severe weather events,” AR00325, resulting in “greater wave and wind action from storms” imperiling nesting Larks. AR00261. The Service also noted that Eurasian beachgrass, an invasive species, has “reduced the available nesting habitat” at several nesting sites and is likely the reason why Larks have been largely extirpated from the Oregon Coast. AR00320. As a result, “[w]ithout management ... invasive beachgrasses will continue to influence *current* and future local populations of [Larks] and reduce suitability of these habitats, *particularly* in the Pacific Coast and Lower Columbia River regions.” AR00320 (emphasis added). The Service found that these threats are having “significant effects” on Lark “habitats on the coast.” AR00325.

Despite these “significant effects,” the Service concludes, without further explanation and without addressing the threat of invasive beachgrass at all, that the Pacific Coast population’s resiliency is not decreasing. AR00332. The Service, however, never explains how the Pacific Coast population—which contains only one population with moderate resiliency, four populations with low resiliency, and two populations that are already extirpated, AR00274–75—is not in danger of extinction now. The fact that the situation is not getting any worse does not equate to a justified finding that the Pacific Coast population is not in danger of extinction now.

By not analyzing these unique threats, which vary in type and intensity across the regions, the Service failed to meaningfully analyze whether the threats facing the Lark are in fact concentrated in any portion of its range sufficient to change its status from threatened to

endangered in that portion. This lack of analysis leaves this Court “unable to conclude whether the agency considered ‘an important aspect of the problem.’” *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 488 F. Supp. 3d at 1232; *Def. of Wildlife v. Norton*, 258 F.3d at 1146 (finding the Service’s “omission with respect to a significant legal issue[,] ... raised by the factual circumstances [is] itself ... a sufficient basis for remanding th[is] case”).

III. The Service’s 4(d) Rule Does Not Provide for the Conservation of the Lark and is Arbitrary, Capricious, and in Violation of the ESA.

The Service has discretion to issue a 4(d) Rule for the Lark, but this “discretion ... is limited by the requirement that” the 4(d) Rule “must provide for the *conservation* [i.e., recovery] of threatened species.” *Sierra Club v. Clark*, 755 F.2d 608, 612–13 (8th Cir. 1985). If it does not, then the 4(d) Rule violates the plain language as well as the overriding purpose of the ESA. The 4(d) rule at issue here—allowing for the wholesale destruction of Larks and nests on all agricultural lands with *zero* mitigation measures or compensating benefits—flunks this test.

The Service issued the 4(d) Rule, first in 2013 and again in 2022, purportedly to “promote the conservation of the [Lark] by encouraging management of the landscape in ways that meet the conservation needs of the subspecies.” AR00333. Specifically, the Service said it sought the “maintenance and continued farming of ... private agricultural lands (*primarily grass seed farms*) in the Willamette Valley[,]” that create suitable habitat conditions and are “therefore crucial to maintaining the Willamette Valley [Lark] population.” AR00334 (emphasis added).

The Service argues that its exception for routine agricultural practices is a “critical element of providing for the conservation of the Lark” because, without it, landowners would be incentivized to convert their lands away from these suitable habitats to avoid Section 9 liability. Resp. Br. at 40–41. The 4(d) Rule allegedly “minimize[s] these negative incentives for landowners” and puts “in place a rule that encourages the continuation of land management

practices which are beneficial to the [L]ark.” Resp. Br. at 41. In other words, the rule somehow “encourages” practices that are “beneficial” to Larks by literally doing nothing to change a status quo that was already harmful to Larks. This rationale made little sense when first proffered but, in any event, cannot be sustained based on the actual record evidence now at hand.

The record contains significant evidence of the harm such agricultural practices have on the Lark. *See* Op. Br. at 34–35 (detailing that agricultural practices harm and kill adult Larks, destroy nests, and crush eggs and newborn larks, and when there is conversion to other crops, destroy their habitat altogether). The Service stated that it acknowledged these harms. Resp. Br. at 41. That is not the point. The point is that, given these harms, the Service must have a rational, factually-supportable basis for its assertion that excepting these activities from Section 9’s prohibition on take provides for the conservation of the species—i.e., helps the species recover by balancing out the known harms that are occurring.

The fatal flaw for the agency, as made clear by the Service’s brief, is that there is *no* evidence in the record that the 4(d) Rule has made any progress in accomplishing this goal. Indeed, the number of acres devoted to grass seed farms in the Willamette Valley has continued to decline since 2013. Over 50,000 acres of suitable habitat have disappeared due to the conversion of grass seed to other crops, a decline that the Service attributes to “the variable economics of agricultural markets[.]” AR00321; *compare* AR00050 (approx. 420,000 acres of grass seed in the Willamette Valley in 2013) *with* AR00321 (approx. 364,355 acres in 2019).

In response, the Service essentially admits that, despite having a decade to come up with *some* evidence to support its premise that doing nothing to change the status quo in the Willamette Valley would somehow benefit Larks, the Service cannot “*prove* that the 2013 4(d) Rule prevented the conversion of lark-suitable cropland.” Resp. Br. at 42. Instead, the agency is

relegated to pointing to generic statements, divorced from the situation here, that the threat of Section 9 liability *can* discourage “landowners from engaging in activities that are beneficial to the species[.]” *Id.* at 41. But those abstract assertions do not begin to demonstrate that the 4(d) Rule has had the effect (or will have the effect) of having any impact whatsoever on “activities that are beneficial to the species.” The reality is that there is *no* evidence in the record that the 4(d) Rule has accomplished its asserted purpose, while the record is replete with the harm the exception causes for the Lark and the continued loss of suitable habitat in the Willamette Valley.

Compounding the rule’s arbitrariness is that the 4(d) Rule does not prohibit the very thing it is intended to incentivize: the conversion of grass seed farms to other crops that do not provide suitable Lark habitat. Instead, the 4(d) Rule irrationally applies to all “[a]gricultural (farming) practices,” AR00338, which exempts the conversion of crops providing suitable habitat to incompatible crops. The Service offers no explanation for why it did not, at minimum, limit the exception to agricultural practices associated with Lark habitat, such as grass seed and conifer farming, to incentivize farmers to not convert to other crops.

The Service argues that it was not legally required to tailor its 4(d) Rule because grass seed farming “is not the only type of agriculture that can be beneficial to Larks.” Resp. Br. at 42, n.13. This is a non-response. The record does indeed provide evidence that recently planted conifer farms with extensive bare ground and wetland mudflats or “drown outs” also provide habitat for the Lark. AR00334. But the record provides no evidence that the Service considered limiting the 4(d) Rule’s exception to *those* agricultural activities that promote Lark habitat.

Most importantly, the Service provides no explanation for why exempting *all* routine agricultural activities—including the conversion of grass seed farms “to other commodities, such as wheat, stock for nurseries and greenhouses, grapes, blueberries, and hazelnuts[.]” which “do

not have the low-statured vegetation and bare ground preferred by” the Lark, AR00253— “promote[s] the conservation of the [Lark] by encouraging management of the landscape in ways that meet the conservation needs of the subspecies.” AR00333. Absent such an explanation or any evidence that it has been successful at all, the 4(d) Rule is arbitrary and capricious. *See State Farm*, 463 U.S. at 47–48 (holding that the agency acted arbitrarily and capriciously where, in deciding whether to employ a measure, the agency ignored evidence regarding its effectiveness).

IV. This Court Should Remand and Set a Deadline On Remand for a New Final Listing Determination for the Lark and Partially Vacate the 4(d) Rule to Address the Agricultural Practices Exception.

The Service offers only a cursory response to the Conservation Groups’ requested relief. Resp. Br. at 43–44. This Court should therefore grant the Conservation Groups’ request for a remand without vacatur of the Threatened Determination, order the Service to issue a new listing determination for the Lark within one year of this Court’s order, and issue a partial vacatur of the 4(d) Rule eliminating the exception for routine agricultural practice. *See Op. Br.* at 39–40.

The Service does not contest the Conservation Groups’ request for remand without vacatur but does request that the Court refrain from ordering a specific remand period. Resp. Br. at 43. Absent an order directing the Service to publish a new final determination by a date certain, however, this Court’s remand acts as “in effect, an indefinite stay of the effectiveness of the court’s decision[,] and agencies naturally treat it as such” because the agency has no incentive to act in a reasonable timeframe. *NRDC v. Env’tl. Prot. Agency*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring); *see also EME Homer City Generation, L.P. v. Env’tl. Prot. Agency*, 795 F.3d 118, 132 (D.C. Cir. 2015) (“[R]emand without vacatur creates a risk that an agency may drag its feet and keep in place an unlawful agency rule.”). Additionally, the Service should not need more time because its SSA, which allegedly already gathered the best available science, is not even two years old and the Service has stated that its “intent is for this Combined Reply in Support of Summary Judgment and Opposition to Defendants’ Cross-Motion for Summary Judgment, Case No. 3:23-cv-00150-AN

SSA report to be easily updated.” AR00228. Finally, the ESA itself contemplates the issuance of a final rule only 90 days after the publication of a proposed rule. *See* 16 U.S.C. § 1533(b)(5). “As the legislative history of the ESA and its subsequent amendments demonstrate, Congress ... recognized that timeliness in the listing process is essential” if the Act’s vital objectives are to be accomplished. *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 839 (9th Cir. 2001).

The Service also opposes the Conservation Groups’ request for a partial vacatur of the 4(d) Rule addressing the exception for routine agricultural activities, arguing that the Conservation Groups fundamentally misunderstand Section 4(d). Resp. Br. at 44. The Service is correct that Section 9’s prohibition on take does not apply to threatened species unless extended to them through a 4(d) Rule. Resp. Br. at 44. The agency is incorrect, however, that the Service only “partially extended those prohibitions.” *Id.*

Instead, the 4(d) Rule makes it generally “unlawful for any person ... to commit, attempt to commit, to solicit another to commit, or cause to be committed ... [t]ake” of the Lark. *See* 50 C.F.R. § 17.41(a)(1)(ii); AR00337–38. In essence, the Service fully extended Section 9’s prohibition on take to the Lark. The Service then excepted from that complete prohibition, “[t]ake incidental to an otherwise lawful activity caused by ... [a]gricultural (farming) practices implemented on farms in accordance with State laws on non-Federal lands in Washington and Oregon.” 50 C.F.R. § 17.41(a)(2)(iv)(C) (detailing “Exceptions from prohibitions”).

The Conservation Groups have not challenged the 4(d) Rule’s general prohibition on take or any of the other exceptions from take. Partial vacatur is thus appropriate because the challenged provision—the exception for agricultural practices—can be vacated while leaving the rest of the rule intact.

The Service argues that such a remedy would require an injunction, but the Supreme

Court has stated that partial vacatur is the preferred recourse if sufficient to address the complained-of injury. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy (*such as partial ... vacatur* of [an agency’s] decision) was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted.”); *see also NRDC v. Wheeler*, 955 F.3d 68, 81–82 (D.C. Cir. 2020) (“As the Supreme Court has explained, when a court encounters statutory or regulatory text that is ‘invalid as applied to one state of facts and yet valid as applied to another,’ it should ‘try to limit the solution to the problem’ by, for instance, enjoining the problematic applications ‘while leaving other applications in force.’” (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006))).

CONCLUSION

For the foregoing reasons, this Court should grant the Conservation Groups’ Motion for Summary Judgment.

Dated this 12th day of January 2024.

Respectfully submitted,

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