



C.L. "BUTCH" OTTER
GOVERNOR

September 8, 2015

Neil Kornze, Director
BLM Washington Office
1849 C Street NW, Rm. 5665
Washington, DC 20240

Tom Tidwell, Chief
U.S. Forest Service
1400 Independence Ave., SW
Washington, DC 20250

Sent via e-mail; hard copy to follow

RE: Consistency Review Appeal to the Director of the Bureau of Land Management and Chief of the U.S. Forest Service regarding: Idaho and Southwestern Montana Sub-regional Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement (80 Fed. Reg. 30,711, May 29, 2015)

Dear Director Kornze and Chief Tidwell,

I write to appeal, under 43 CFR § 1610.3-2(e),¹ the Bureau of Land Management's ("BLM") August 6, 2015 response and rejection of the recommendations contained in the Governor's Consistency Review of the Idaho and Southwestern Montana Sub-regional Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement ("Proposed Plan"). See Governor Otter's Consistency Review (filed July 29, 2015) ("Consistency Review") (Attachment 1). Simply put, the Proposed Plan stands in stark contrast to the State of Idaho's laws, policies and programs, especially Idaho Executive Order 2015-04.

The State Director's cursory response in no way resolves the numerous and material inconsistencies outlined in the July 28, 2015 Consistency Review. See State Director's Response to Governor Otter's Consistency Review (August 6, 2015) ("BLM Response") (Attachment 2). Such rejection creates an "unreasonable" imbalance between

¹ As directed on page 10 of State Director Murphy's August 6, 2015 letter, "[p]lease note that you have the opportunity to appeal this response to the Director of the BLM pursuant to 43 CFR 1610.3-2(e). Such appeal must be filed within 30 days of your receipt of this letter, by September 8, 2015."

national interests and the State's interests and violates 42 U.S.C. § 1712(C)(9). *See* 43 CFR § 1610.3-2(e). I respectfully request the BLM Director and Chief Forester² to conclude that such an imbalance exists and return the Proposed Plan back to the State Director/Regional Forester with instructions to meaningfully resolve these inconsistencies, or in the alternative, adopt the recommendations outlined in the remedy section of this Consistency Review Appeal with the appropriate public participation. Failure to do so violates the BLM's consistency obligations pursuant to section 202 of the Federal Land Policy and Management Act ("FLPMA"), and the U.S. Forest Service's ("Forest Service") coordination obligations outlined in § 219.3(a) of the National Forest Management Act ("NFMA") Minimum Requirements Rule.

To briefly summarize our current status, for much of the past three years, my Administration, along with the tremendous local support of your agencies, were poised to deliver another significant natural resource milestone, similar to the Idaho Roadless Rule. That collaborative framework was abandoned in late 2014/early 2015 in favor of a top-down "uniform" solution to the sage-grouse issue. This national direction was highlighted by the internal and post-DEIS U.S. Fish and Wildlife Service ("FWS") memorandum ("Ashe Memo"), and based on this memorandum, the agencies' misguided decision to designate 3 million acres of Idaho as so-called Sagebrush Focal Areas ("SFAs"). My opposition to the SFA habitat zone and the many other overly restrictive and last minute management recommendations is no secret.

Yet, despite repeated attempts to reconcile these material inconsistencies (*See* June 18, 2015 letter to Secretary Jewell (Attachment 3)), the BLM has done little to meaningfully resolve these concerns to the "maximum extent" as required by § 202(c)(9) of FLPMA. Instead, we are advised that no flexibility exists, because modifying this new fourth SFA habitat zone along with the uniform lek buffers and the new "net conservation gain" mitigation standard will lead to a positive listing determination under the Endangered Species Act ("ESA"). Ironically, and as outlined in the Consistency Review, this push for "uniformity" by the FWS is incongruent with and ignores that agency's previous position largely endorsing the Governor's Plan as consistent with the Conservation Objectives Team Report. *See* U.S. Fish and Wildlife Serv., Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives: Final Report (2013) ("COT Report").

² There is little doubt the Forest Service has been an integral part of the preparation of the Proposed Plan. As such, the agency must participate in a consistency review of the Proposed Plan. The Forest Service cannot have it both ways – namely, that it will receive the benefits from being a Cooperating Agency partner with the BLM and Idaho throughout this entire process only to abandon its consistency obligations in the capstone exercise to this unprecedented land-use planning effort. This is especially important because the FEIS is misleading, stating that "[c]hapter 2 separates the Forest Service Proposed Plan and the BLM Proposed Plan. This is because the Forest Service has different guidance for writing planning language; however, the actions are *basically the same* for both the BLM and FS under the Proposed Plan." FEIS 2-4. As the Consistency Review demonstrated, that statement is patently untrue; and is inequitable that the Forest Service should reap the benefits of the plan amendments without fulfilling its responsibility of conducting a comprehensive review of the Governor's Consistency Review. Governor Otter strongly urges Chief Tidwell to respond to the issues identified in both the Consistency Review and this Appeal.

As evidence of this now unilateral Federal process, I exercised my right under § 202 of FLPMA providing the BLM an 82-page Consistency Review, with multiple appendices, thoroughly detailing how each relevant portion of the Proposed Plan was and still is inconsistent with the “plans, policies, or programs” of the State of Idaho and local governments. The Consistency Review discussed in great detail how the Governor’s Plan³ appropriately balances the BLM’s multiple-use mandate with the conservation needs of greater sage-grouse as outlined in the section titled, “*The Governor’s Plan, not the Proposed Plan, represents a balanced solution and is a perfect fit to meet the needs of the species in Idaho*”. Consistency Review at 65. Unfortunately, after the significant effort and resources expended to achieve a true planning partnership, the BLM provided – in just 6 business days – a 12-page form letter only somewhat tailored to Idaho’s concerns,⁴ and summarily denying all of the Consistency Review’s recommendations.⁵ This denial exacerbates the multiple legal issues in the Proposed Plan rendering it *per se imbalanced* and arbitrary and capricious.

The imbalance stems from the BLM’s contention that Idaho’s sage-grouse policy embodied in Executive Order 2015-04, without any analysis or explanation, does not comport with BLM’s legal obligations under the agency’s Special Status Species Manual 6840 (“Manual 6840”), and BLM’s Instruction Memorandum 2012-044 (“IM 2012-044”). BLM Response at 3. At no point in this process has the Bureau notified Idaho that the Governor’s Plan does not meet the provisions in Manual 6840. If that had been the case, the BLM would have rejected the Governor’s Plan, in the Draft Environmental Impact Statement (“DEIS”) as an “alternative considered but eliminated from detailed analysis” under the National Environmental Policy Act (“NEPA”). But rather than legitimately grapple with these difficult issues, this post-hoc rationalization only serves to paper over the agencies’ failure to analyze or explain (i.e., take the requisite “hard look” pursuant to NEPA) how the Proposed Plan better meets these legal obligations or the conservation needs of the species as compared to the Governor’s Plan. In short, the BLM’s Response is wholly inadequate under FLPMA.

At bottom, the agencies’ course of action over the past several months fail to honor Idaho’s rights pursuant to § 202(c)(9) of FLPMA and as a cooperating agency under NEPA, as well as the many commitments two Secretaries of Interior have promised my State. The underlying record demonstrates that the Governor’s Plan is consistent with the stated purpose of BLM’s planning effort, which is to “identify and incorporate appropriate conservation measures in LUPs to conserve, enhance and/or restore GRSG habitat by reducing, eliminating, or minimizing threats to that habitat.” BLM Response at 3. My sincere hope is the agencies will recognize it is in the long-term benefit of the species to correct the imbalance by diligently working with my Administration to resolve these issues through this appeal process.

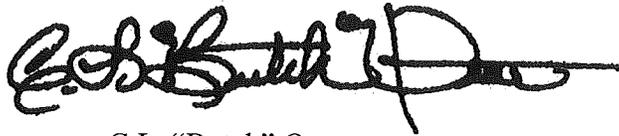
³ The “Governor’s Plan” includes Idaho Exec. Ord. 2015-04 and the associated appendices.

⁴ Identical language can be found in BLM’s Consistency Review responses to at least Governor Herbert (Utah) and Governor Sandoval (Nevada).

⁵ In the letter from State Director Timothy Murphy to Governor Otter, dated August 6, 2015, Director Murphy did agree to “work with” the State of Idaho to refine BLM’s approach to prioritizing grazing permit renewals in Sagebrush Focal Areas.

Thank you in advance for your positive consideration of this Consistency Review Appeal. As you know, this process provides the final opportunity to achieve and preserve a meaningful state-federal partnership, contemplated by FLPMA, on this important issue. My Administration is fully prepared to resolve the identified inconsistencies with the BLM and Forest Service, as required by federal law and regulation. Please contact Cally Younger at 208-334-2100 with any questions or concerns.

As Always – Idaho, “Esto Perpetua”

A handwritten signature in black ink, appearing to read "C.L. Butch Otter". The signature is stylized and includes a long horizontal line extending to the right.

C.L. “Butch” Otter
Governor of Idaho

Cc: Idaho Congressional Delegation
Idaho Sage-Grouse Task Force
Tim Murphy, State Director, Idaho BLM
Nora Rasure, Regional Forester, Intermountain Region of USFS
Mike Carrier, State Director, FWS

I. THE AGENCIES FAILED TO MEET THEIR CONSISTENCY OBLIGATIONS TO IDAHO UNDER FLPMA

Congress determined that federal land use planning is not the sole province of the United States. Section 202(c)(9) of FLPMA directs the Secretary of the Interior to coordinate the land use planning process with State and local governments and that the resulting federal land use management plans must substantially reflect this consultation and coordination. 43 U.S.C. § 1712(c)(9). The BLM Response fails to achieve the full planning partnership envisioned by Congress to protect the interests of state and local governments, especially those like Idaho, whose custom, culture and way of life are inextricably intertwined with decisions made on federally-managed lands. These obligations are not perfunctory in nature. *See American Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923, *affirmed* 714 F. 2d 962 (9th Cir. 1983). The below sections identify the following errors with the State Director's response.

A. BLM has failed to ensure that the LUPAs are consistent to the “maximum extent” with State direction.

As noted above, the BLM failed to follow section 202(c)(9) of FLPMA and its implementing regulations. Section 202(c)(9) requires consistency to the “maximum extent.” 43 U.S.C. § 1712(c)(9) (Land use plans of the Secretary under this section shall be consistent with State and local plans to the *maximum extent* he finds consistent with Federal law and the purposes of this Act) (emphasis added). Further, Congress directed the Secretary to “assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands,” and “assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans.” *See Consistency Review* at 8.

This direction is reaffirmed in BLM's regulations, which direct the Secretary to develop federal land use plans that are consistent with those State and local plans and satisfy the purpose of FLPMA and other federal laws:

Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian Tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal law and regulations applicable to public lands....

43 C.F.R. 1610.3-2(a). It is clear that Congress envisioned land use planning decisions to be made in concert with states, through consultation and collaboration, and not merely as an inconvenience for federal agencies that excludes meaningful input from states at critical junctures, as was the case here.

The BLM's interpretation of how to evaluate Land Use Plan Amendments (“LUPAs”) for consistency involves a two-step process: (1) determine if there is an actual inconsistency with an

officially approved state plan, policy or program; and (2) if such an inconsistency exists, whether a recommendation addresses that inconsistency and provides for a reasonable balance between the national interest and the State's interest. *See* Notice of BLM Director's Response to an Appeal from the Governor of New Mexico Regarding the Resource Management Plan Amendment for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties, 70 Fed. Reg. 3550, 3552 (January 25, 2005); *see also*, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683 (10th Cir. 2009). This is the framework that Governor Otter expected, at a minimum, out of this Consistency Review process. However, the response Governor Otter received demonstrates that the Department of Interior is more concerned with meeting an arbitrary settlement deadline with environmental groups than complying with its statutory obligations to the state.

Specifically, several factual circumstances surrounding this Consistency Review indicate that FLPMA's maximum extent directive was not followed. For example, the amount of time that BLM took to respond to Governor Otter's Consistency Review was insufficient and lacked meaningful evaluation of the points raised in the document. Also, the BLM Response did not follow the general framework for Consistency Review responses, glossing over a vast majority of material inconsistencies identified by the Governor, and completely failing to address the second prong "balance of interests" analysis as outlined above.

In his response, the State Director states that, "the BLM generally only responded to issues that [Governor Otter] identified as being inconsistent with [his] State's (or other local and tribal) plans and not issues of disagreement [sic] with portions of the Proposed Land Use Plan Amendment/Final Environmental Impact Statement." BLM Response at 4. Importantly, Governor Otter's Consistency Review outlined multiple areas of inconsistency – not just disagreements – with his plan in the conspicuously titled section, "THE PROPOSED PLAN IS MATERIALLY INCONSISTENT WITH THE GOVERNOR'S PLAN." Consistency Review at 10. Throughout that section, the Consistency Review cited to specific portions of the Governor's Plan and the LUPAs. The BLM's failure to address the approximately fifty-one (51) pages of inconsistencies contained in this section, and selecting only a portion of the issues to address, simply does not meet its consistency obligations.

Moreover, the BLM did not accept *any* of the Governor's recommendations for resolution of the inconsistencies. The promise to "continue to work with the State to further refine our approach for prioritizing the review of grazing permits/leases and the processing of grazing permits/leases in SFAs to better reflect the prioritization approach adopted in the Idaho State Plan for CHZs," found in the State Director's response, hardly constitutes an acceptance of a recommendation contained in the Governor's Consistency Review and is of little solace to Idaho. *See* BLM Response at 9. Likewise the addition of language "to include state-implemented conservation measures or protections as an alternative to consider in the application of RDFs," is likewise not an acceptance of the Governor's recommendation. *Id.*

Based on these circumstances, it is clear the BLM failed to meet the "maximum extent" threshold for consistency reviews and reduced this important process to a check-the-box exercise for the agency. This Appeal represents the last opportunity for the Director to rectify this error, and accept the Governor's recommendations that are outlined below.

B. BLM erroneously relied on Manual 6840 to avoid its responsibilities under NEPA and FLPMA.

Where the State Director does address issues of inconsistency in the Proposed Plan, he begins with the faulty premise that the Governor's Plan is inconsistent with the purposes, policies, and programs of federal laws applicable to public lands. *Id.* at 3. The BLM Response attempts to justify this position by stating that the agency must "manage public lands for *multiple-use and sustained yield*, taking into account the long-long term needs of future generations for renewable and non-renewable resources – including fish and wildlife – and to seek achievement and maintenance in perpetuity of renewable resources." *Id.* (citations omitted). BLM goes on to describe Manual 6840, and IM 2012-044, initiating the BLM National Greater Sage-Grouse Land Use Planning Strategy.

Multiple-use is "a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, including but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and uses serving natural scenic, scientific, and historical values." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (citing 43 U.S.C. § 1702(c)) (internal quotations omitted). But multiple-use in this context does not mean that the agencies can subordinate all uses in favor of a single use and unlisted species (e.g. sage-grouse). *See The Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) ("Congress has consistently acknowledged the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that the national forests were...to be set aside for *non-use*." (emphasis added)).

This is precisely what BLM is recommending with this Proposed Plan pursuant to the direction contained in the self-described "new paradigm" of the National Technical Team (NTT) Report. And in fact, that is why the agency itself developed a modified-NTT alternative in the DEIS (Alternative D) because BLM recognized that implementing the full-blown NTT Report is "blatantly illegal" and materially inconsistent with its multiple-use mandate. *See Consistency Review* at 72-3 (noting that Governor Otter personally reviewed several NTT FOIA documents, he wrote the Secretary the following: "Even more shocking is the absence of anything in the scientific record warranting these draconian measures. In fact, one email reveals a career BLM employee expressing the following concern in the late stages of this process: '*But does the NTT really want to recommend something that is blatantly illegal?*'"). Yet despite this acknowledgment, the Proposed Plan stands at odds with the agencies' multiple-use mandate and exceeds their delegated authority from Congress.

Even more to the point, the State Director's interpretation of FLPMA implies that the BLM's policy on special status species trumps its multiple-use requirement. Several times in the BLM Response, the agency declines to adopt the Governor's Recommendation because "it is not consistent with the purposes, policies, and programs of federal laws and regulations applicable to public lands." *See e.g.*, BLM Response at 5 (BLM does not adopt Governor's recommendation on SFAs). In declining to adopt the Governor's recommendations, BLM fails to provide any reference to the specific laws, or any meaningful analysis, supporting its denial. They do,

however, cite on multiple occasions the BLM's Sage-Grouse Strategy, and the Special Status Species Policy as justification for not accepting the Governor's recommendation in the Consistency Review. *Id.* (in light of BLM's Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of the GRSG and its habitat...). As mentioned above, this is the first instance where BLM notified the State that the Governor's Plan is not consistent with Manual 6840, and the underlying record and the NEPA process simply do not support this premise. Moreover, this implies that the Special Status Species policy and the NTT Report are in incompatible with the COT Report. As you are aware, the U.S. Fish and Wildlife Service affirmed that the Governor's Plan met the COT Report's objective of strategic conservation. *See* Consistency Review at 3; Consistency Review Appendix 4 (Letter from U.S. Fish and Wildlife Serv. to Governor C.L. "Butch" Otter (August 1, 2012)). At bottom, it is the Proposed Plan that is incompatible with the agencies' legal and policy obligations not the Governor's.

The net result of this pretense is that the public shielded from the opportunity to comment on the Governor's reasonable recommendations. This violates 43 C.F.R. §1610.3-2(e) which states, "[i]f the written recommendation(s) of the Governor(s) recommend changes in the proposed plan or amendment which were not raised during the public participation process on that plan or amendment, the State Director shall provide the public with an opportunity to comment on the recommendation(s)." At a minimum, the Director must correct the State Director's error and allow the public an opportunity to comment on the Governor's recommendations.

C. The BLM failed to consider the unreasonable imbalance between Idaho and federal interests.

The BLM regulations require the agency to accept the Governor's recommendations when they "provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R § 1610.03-2(e). In the Governor's Consistency Review, a section titled "FAILURE TO ADOPT GOVERNOR OTTER'S PLAN WOULD CONSITUTE AN UNREASONABLE IMBALANCE BETWEEN NATIONAL AND STATE INTERESTS" was ignored by the State Director in his response, and must be addressed prior to executing the Record of Decision and the final LUPAs. *See Id.* at 64-81. This rejection creates an unreasonable imbalance by demonstrating: (1) the Governor's Plan, not the Proposed Plan, strikes the appropriate federalism balance and is the perfect fit to meet the needs of the species in Idaho; (2) the Proposed plan is legally infirm and by definition imbalanced; (3) the Proposed Plan rejects collaboration in favor of top-down management; and (4) the Proposed Plan overrides the state's sovereign authority over its wildlife. *Id.*

Idaho BLM did not address the Governor's contention that the Proposed Plan does not strike a reasonable federalism balance. Consistency Review at 64. The Governor's Plan meets the Purpose and Need statement, is based on the best available science, appropriately addresses the key threats in Idaho, and provides for achievable implementation. *Id.* at 65.

Nor does Idaho BLM deny, or respond to the fact that they have improperly delegated authority to the FWS by permitting that agency to effectively veto land use management

decisions for an unlisted species. At nearly every critical juncture in the Proposed Plan, BLM failed to fulfill its own independent legal obligations at the behest of the FWS. Namely, BLM created Areas of Critical Environmental Concern (ACECs) without the proper regulatory process by accepting the SFA recommendation (*see Id.* at 77-79), adopted an unnecessary project-level disturbance cap not based on sound science, and effectively gave FWS veto authority over exemptions in Idaho's CHZ. These legal flaws, among others, render the Proposed Plan *per se* imbalanced, and compel the Director to make that imbalanced finding and remand the Proposed Plan back to the State Director/Regional Forester to fulfill the agencies' legal obligations.

The Director/Chief Forester must respond to these concerns in his reply to this Consistency Review Appeal prior to the signing of the Record of Decision.

II. THE AGENCIES MUST RECONSIDER THE RECOMMENDATIONS THAT WERE REJECTED.

A. Sagebrush Focal Areas (SFAs)

In the BLM Response, the State Director denied Governor Otter's request to exempt Idaho from the SFAs and its draconian regulatory measures. As noted at the outset, the designation of 3 million acres of so-called SFAs is of particular concern to Idaho and is procedurally, scientifically, and substantively flawed. *See e.g., Id.* at 13-15. BLM's denial states that the agency "declines to adopt [the Governor's] recommendation because it is not consistent with the purposes, policies, and programs of federal laws and regulations applicable to public lands." BLM Response at 5. Rather than legitimately grapple with these concerns, BLM attempts to provide a timeline describing when the states were notified of the Ashe Memo and the other last minute national direction. Again, it is important to note that the BLM Response does not offer details of why the Governor's three-tiered habitat and management continuum approach is inconsistent with federal laws and policies. *Id.* at 5-6.

As to the timeline, the BLM Response claims the states were notified of the SFA designation through a November 2014 conference call. *Id.* at 5. However, this is only partially accurate and in no way satisfies the commitments made by two Secretaries of the Interior to Governor Otter.

While Idaho and the other states were made aware of the Ashe Memo in late October 2014, nothing in the memo or the attached maps put the State of Idaho on notice that this was a precursor to the agencies proposing a fourth habitat zone with its unnecessary management recommendations, such as a sweeping proposal for mineral withdrawal and no surface occupancy ("NSO") for fluid mineral development across approximately 3 million acres in Idaho. *See Ashe Memo* (identifying and recommending a subset of "strongholds" with the "strongest levels of protection," but making no mention of SFAs, withdrawals, NSO, or prioritization). In fact, at the time of the Ashe Memo's release, Idaho had no reason to believe that the Governor's Plan was inconsistent with a "best of the best" approach. This assumption was reinforced by the previous correspondence from FWS, and Idaho was confident that the Governor's Plan provided the "highest degree of protection" as recommended in the Ashe Memo

because of the conservation measures in the Core Habitat Zone. However, that reasoned assumption was undermined by subsequent actions by the agencies:

- In late October 2014, the states were notified by the Interior Department that FWS would like to designate priority areas within the Priority Areas for Conservation (PACs) identified in the COT. Interior officials referred to this designation as “superPACs.” *See* Email from Sarah Greenberger, Counselor to the Secretary, Office of the Secretary, Department of Interior, to Virgil Moore, Director of Idaho Department of Fish and Game, Dustin Miller, Administrator of the Office of Species Conservation, Executive Office of Governor C.L. “Butch” Otter, (“OSC”) Cally Younger, Associate Counsel to Governor C.L. “Butch” Otter, et al (October 28, 2014, 12:10 MDT) (Attachment 4).
- On October 30, 2014, Idaho received a subsequent email from Jim Lyons, Deputy Assistant Secretary for Land and Minerals Management, describing the similarity between these “super-PACs” and ACECs. In this email Jim Lyons stated that ACEC designations were “one of the approaches that the FWS has suggested for identifying and describing the management actions relevant to the ‘superPACs’.” *See* Email from Jim Lyons, Deputy Assistant Secretary, Lands and Minerals Management to Dustin Miller, Administrator, OSC (October 30, 2014 10:37 AM MDT) (Attachment 5) (stating that ACECs were one of the approaches that the FWS suggested for identifying and describing the management actions relevant to ‘superPACs’). Further, he stated that ACECs were not a substitute for wilderness but were “a means to identify and develop management direction for areas of special value and significance.” *Id*; *See* Governor’s Consistency Review at 77-79 (pointing out that SFAs are *de facto* ACECs that did not undergo the requisite analysis and process for such a designation). The email made no mention of the fact that BLM analyzed and rejected a large-scale ACEC designation in the DEIS.

Notwithstanding these emails, the State of Idaho was repeatedly told that the Ashe Memo was largely for other states, and that the Governor’s Core Habitat Zone was Idaho’s version of a superPAC. Again, this is consistent with FWS’s previous correspondence with the Governor, the selection of Alternative E as a co-Preferred Alternative, and at that point, the ongoing interagency and stakeholder refinement process.

- On November 6, 2014, there was a conference call between Interior and the states with members of the Governor’s staff attending in person. Following the conference call, there was also an Idaho specific meeting that same day to further discuss “superPACs.” Interior officials again discussed the idea of an ACEC designation and the State appropriately and emphatically rejected that approach. Interior stated that no management changes were necessary and the Core Habitat Zone in the Governor’s Plan simply needed a more descriptive name in their effort to identify areas of special value and significance to sage-grouse. The three staff members that attended that meeting have no recollection of discussing additional management criteria within superPACs at that meeting. *See* Letter

from Idaho Fish and Game Director Virgil Moore to Dustin Miller, Administrator, OSC (September 8, 2015) (Attachment 6).

- This lack of consultation and coordination is further evidenced by the fact that Interior officials downplayed SFA designations and new management criteria at the next several Secretary's Sage-Grouse Task Force Meetings. *See Secretary's Sage-Grouse Task Force Meeting Notes for January 2015 (Attachment 7) and March 2015 (Attachment 8)* (only discussing the NSO stipulations for new oil and gas leases in the January 2015 meeting, and in March 2015, addressing concerns from states about locatable mineral withdrawals, but never providing the full picture of the measures associated with SFA designations).
- It wasn't until late January/early-February that the BLM provided the full picture of SFAs and associated management actions to Idaho and began to discuss the State's significant issues with this top-down approach. *See Email from Jonathan Beck, Greater Sage-Grouse Planning Lead for the Bureau of Land Management to Dustin Miller, Administrator, OSC (February 4, 2015 4:48 PM MST) (Attachment 9).*

It was not until late January 2015 that Idaho became aware that "superPACs" were renamed "Sagebrush Focal Areas" and its associated ruleset. *See Secretary's Sage-Grouse Task Force Meeting Notes, January 2015.* Idaho and other states adamantly opposed this new designation, culminating in a meeting in Washington, D.C. in April 2015 with Interior officials¹ and governors' staff from Idaho, Utah, Nevada and Colorado. In this meeting, the states discussed their concerns with the new national direction and provided recommendations for resolving these issues. Notwithstanding these recommendations, the states were advised it was too late for any meaningful management changes and that FWS not only needed the agencies to propose mineral withdrawals, but that a "not warranted" decision would be based on the withdrawals actually occurring. This simply does not meet the agencies' obligations to consult and coordinate with the states as partners in this process.

In May 2015, Idaho was given a very brief (10 day) opportunity to provide comments on the administrative draft proposed plan (ADPP) with the State continuing, with no avail, to voice its opposition to SFAs and the other material inconsistencies created by the last minute national direction. *See Letter from Dustin Miller, Administrator, OSC, to Jeff Foss, Interim Dir., Idaho BLM (May 13, 2015) (Attachment 10)* (stating that the SFAs stand to "diminish the work completed by the Governor's [Task Force], the State of Idaho, and our local federal partners.").

The BLM Response clearly attempts to convey the notion that the State had ample opportunity to respond to this national direction, but that is no substitute for the consultation and coordination obligations owed to Idaho or the commitments from the Secretary to the Governor. As a cooperating agency, and consistent with § 202(c)(9) of FLPMA, SFAs should have been vetted not only through the Governor's Task Force but also subject to public scrutiny in a SEIS.

¹ From Interior, National BLM Director Neil Kornze, Deputy Asst. Secretary for Lands and Minerals Jim Lyons, Counsel to the Secretary Sarah Greenberger, Michael Bean, Ed Roberson, Steve Ellis, and Amy Luders

Instead, the State was notified of the SFAs with scant detail of the actual management implications until there was no meaningful opportunity or flexibility to make adjustments, or even consult with the state agency legally charged with managing the species. Now this fatally flawed problem will be further amplified as the Secretary has informed Idaho and the other states that the sweeping and unprecedented mineral withdrawal process under § 204 of FLPMA is imminent. Such an ill-advised decision is an unnecessary diversion of resources (also not addressed in the Consistency Review), will require Idaho to participate in another costly and time consuming process premised on a legally flawed document, and will pose an immediate and irreparable injury to Idaho and mining claimants across the region that will face certain forfeiture of those claims. This irretrievable commitment of resources and the cumulative impacts of such a proposal has not been analyzed or disclosed under NEPA. These issues do not even include the burdensome ESA listing process. Before the Secretary sets back collaborative collaboration across the West for decades, she should ask the Court or Congress for more time and develop a reasonable path forward.

B. Disturbance Caps:

On page 20 of the Consistency Review, the Governor stated, “the recommendation for a uniform project-level [NTT-level] disturbance cap is not based on the best available science, and that his plan adequately addresses concerns about disturbance.” Again, BLM’s Response denying Governor Otter’s recommendation to eliminate the project level disturbance cap does not address the issue. As noted in the Consistency Review, the Governor’s Task Force was willing to accept a Conservation- Area level (or BSU-level) disturbance caps in the spirit of collaboration and interagency refinement. This was in addition to, Alternative E’s adoption of project level caps for fluid mineral development based on Wyoming’s DDCT strategy. *See* Consistency Review at 36 (The Governor’s Plan only adopts a project-level disturbance cap for fluid mineral development.).

For Idaho, the record is clear that a project level [NTT-level] cap was introduced for the first time in the Proposed Plan. Yet instead of analyzing the Governor’s specific concern, BLM treats all disturbance caps the same and bizarrely suggests it was the State’s idea to include a project-level cap in the Proposed Plan. “Through collaborations with the state of Idaho, BLM modified the disturbance cap concept using the best available science...to develop a disturbance cap strategy that would incorporate the Degradation of Threats presented in Appendix G of the FEIS.” BLM Response at 6. The Governor requests that the Director review the Governor’s Task Force recommendations of April 2014 where this collaborative group explains why the Conservation Area disturbance caps better meet the needs for sage-grouse than the NTT Report’s recommendation.

Consistent with the agency’s own direction in Appendix G, implementing and enforcing a project level disturbance cap is unnecessary in Idaho. Moreover, the formula for determining whether the cap has been exceeded is extremely confusing and unworkable. Further, the BLM Response offers no rebuttal to the fact that project level disturbance caps are based almost exclusively on BLM’s misapplication of one study by Dr. Steve Knick that never used the term. *See* Consistency Review at 20 (Dr. Knick’s study “has very little to do with disturbance caps and in fact, never uses that term in the study”).

None of these concerns are addressed in Idaho BLM's response. In fact, Idaho BLM only provided three short paragraphs in response to Governor Otter's recommendation that project level disturbance caps be eliminated. There is no explanation for the necessity of a cap at such a fine scale in Idaho other than to suggest that FWS desired "uniformity". Thus, given the lack of response from Idaho BLM, the Director must reconsider Governor Otter's recommendation to remove project level disturbance caps from the Proposed Plan.

C. Net Conservation Gain Standard

Beginning at page 21 of the Consistency Review, Idaho notes that the State's strategy "is in many ways in and of itself a mitigation plan." The zonal structure and management continuum encourage development outside of the CHZ, and to a lesser extent IHZ, to ensure a high level of conservation for the best habitat and the highest concentration of bids." Despite that approach – largely consistent with other states' approach to mitigation – the BLM without any real explanation or analysis shifted from a "no net loss" standard in the DEIS to a "net conservation gain" standard in the FEIS. Nor does BLM explain or analyze how this new standard meets or modifies the existing statutory standard for mitigation under § 1732(b) of FLPMA – the unnecessary or undue degradation standard. Without disclosing this information, BLM again exceeds its delegated statutory authority under FLPMA and likely violates the Administrative Procedure Act.

As reflective of all of the BLM's Response to Governor Otter's recommendations and concerns, the agency's discussion of this new standard is both confusing and unpersuasive. At every opportunity, Idaho questioned the "no net unmitigated loss" standard for vagueness. Rather than better defining this standard or analyzing any reasonable range of alternatives, the mitigation standard was changed without notice. BLM's Response offers no additional guidance on how this new standard will be implemented other than to simply throw up its hands and suggest that it will be fleshed out in the Regional Mitigation Strategy. This is an abdication of BLM's independent legal obligations under NEPA.

On page 6, the Response states, "...the BLM will require and ensure mitigation that provides a net conservation gain to the species including accounting for any uncertainty associated with the effectiveness of such mitigation." But that simply restates the LUPA language; it does not answer any of the concerns or inconsistencies raised in the Consistency Review (e.g. how this standard differs from the one analyzed in the DEIS). This confusion is further compounded by the BLM Wyoming's response to Governor Mead. On page 5, Wyoming BLM states its approach to this standard is somewhat different than Idaho BLM, "[f]urther, the BLM's standard for 'net conservation gain' for compensatory mitigation is *consistent* with the State of Wyoming's standard of maintaining a landscape scale result that is beneficial to sage-grouse. There is no specifically identified inconsistency between the State of Wyoming's mitigation standards, as outline in EO 2015-4 and BLM's net conservation gain standard." So which is it: a) the framework [state plan] itself works to achieve a net conservation gain; b) only the compensatory mitigation component is a new standard; or both? These are questions that should have been addressed and analyzed in the FEIS and not addressed in piecemeal fashion or on an ad-hoc basis.

To this end, BLM claims that the public was on notice of this directional shift based on FWS' 2014 GRSG Mitigation Framework to "be strategically designed to result in net overall positive outcomes for sage-grouse." Again, this mitigation framework was released after the DEIS, and BLM provided no notice that it would be adopting this approach. Reflective of BLM's last-minute changes, the agency simply shirked its own independent legal responsibility under NEPA because FWS desired more "certainty." Accordingly, BLM must analyze these issues in a SEIS.

D. Livestock Grazing

The BLM Response fails to address the numerous issues raised in the Consistency Review related to livestock grazing. *See* Consistency Review at 49-56. Again, the BLM Response relies heavily on *post hoc* rationalization (i.e. IM 2012-044 and Manual 6840) in their decision to disregard the Governor's recommendations. BLM Response at 7. Yet, the agency fails to describe how the Governor's Plan for livestock grazing is inconsistent with any of the BLM's statutory and regulatory obligations, especially in light of the fact that the 2010 "warranted but precluded" listing determination² ("2010 Finding") by FWS and the COT Report treat improper grazing as a secondary threat.

While Idaho is somewhat encouraged that the BLM is considering actions to place improper livestock grazing in the appropriate context as a secondary threat, this contemplated action cannot amount to a meaningful resolution of these important issues given the limited agency decision space between the FEIS and the ROD. *See id.* (stating the BLM will "make clear that appropriately-managed livestock grazing is not a threat and may continue under the plans."). Only a supplemental EIS can cure this defect. Below are three of the significant issues that were not addressed, or inadequately addressed, in the BLM Response related to livestock grazing. Again, the Governor's Consistency Review represents a complete and exhaustive analysis of the State's concerns with a list of appropriate recommendations that is incorporated here by reference.

First, the BLM continues to obfuscate and defend their decision to include livestock grazing in the SFA regime. As stated in the Consistency Review, this is not only inconsistent with the Governor's Plan, but also belies the notion that the BLM did not inappropriately elevate livestock grazing to primary threat status. *See* Consistency Review at 52. The federal agencies' elevation of livestock grazing in the SFA's is also arbitrary and capricious because, prior to the national direction, the FWS was very supportive of the Governor's livestock strategy. *See Id.* (quoting FWS letter that the livestock strategy is a "wise approach for regulating the appropriate conservation action for the secondary threat of improper grazing..."). The Governor's Plan, including its livestock strategy, adequately maintains "strong, durable, and meaningful protection" without the need for additional, and costly management actions. *See* BLM Response at 7.

² *See* Endangered and Threatened Wildlife and Plants; 12-Month Findings for the Petitions to List the Greater Sage Grouse as Threatened or Endangered, 75 Fed. Reg. 13,910 (proposed Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17)/

Second, the BLM Response does not adequately address the inconsistencies identified in the Proposed Plan's habitat standards. *See* FEIS at RM-17. The Proposed Plan includes vague and subjective language such as "specific management thresholds" and "one or more defined responses" that without clarification or adequate explanation will arbitrarily constrain agency discretion and result in unnecessary default responses, such as seven inch stubble height, without regard for localized conditions. *See* Consistency Review at 52. The Governor's Plan aligns with the COT report and its requirement for habitat objectives recognizing that the ecological site potential may alter these desired habitat conditions. *See Id.*; COT Report at 45. In short, the Proposed Plan undermines the fundamental premise in the Governor's Plan to incentivize *rather than punish* livestock producers for strong populations and quality habitat.

Third, another concerning aspect of the BLM Response is its specious assurance that "current grazing management will not change as a result of the SFA designation." BLM Response at 8. While Idaho and livestock operators indeed hope this to be true, the analysis in the Proposed Plan and the BLM Response provides little support for this statement. *See e.g., Id.* ("This approach provides the FWS with the *certainty* that the BLM will take prompt action when any range-use is not meeting or moving towards meeting, a GRSG habitat objective or land health standard.") (emphasis added). Moreover, the BLM's analysis validates the presumption that grazing will be reduced in the SFAs by unlawfully suggesting that an SEIS is unnecessary because a greatly reduced or no grazing alternatives were analyzed (and rejected) at the DEIS stage; thus, the impacts to grazing from the adoption of SFAs have been analyzed. FEIS at 2-2; *see also* FEIS 4-192 (describing no real additional impact from including grazing in the SFA regime). Notwithstanding the NEPA errors in this conclusion, BLM's position only serves to reinforce the notion that including grazing in the SFA regime is really a subterfuge for elevating the activity to primary threat status. In short, these declines were not adequately analyzed in the FEIS owing to the fact that they were an about-face from the agencies' previous positions. And if this presumed reduction in livestock grazing across sage-grouse habitat comes to fruition, the ensuing economic ripple-effect will be felt at the State and local government levels.

Again, the Governor's Strategy is wholly consistent with the Idaho Rangeland Health Standards, the COT Report, and the 2010 Finding; as well as Manual 6840 and IM 2012-044 and, as such, must be adopted. *See* 43 C.F.R. § 1610.3-2. The Proposed Plan's approach is imbalanced.

E. Lek Buffers

The justification in the BLM Response for rejecting the Governor's recommendation to remove all post-DEIS uniform lek buffers is two-fold. First, the agency contends that lek buffers will not be determined until a project level site-specific NEPA analysis is completed, which will make the Proposed Plan consistent with the Governor's Plan. BLM Response at 8. Second, the BLM again defaults to its obligations under Manual 6840, IM 2012-044, and the need to provide regulatory certainty for FWS. Again, there is no analysis or explanation as to why the Governor's Plan with its management continuum approach is inconsistent with this guidance or how it now suddenly fails to provide the requisite and appropriately-tailored regulatory certainty.

At the outset, it is important to note that the BLM Response does not respond to the Governor's claim that the USGS Report represents a significant change post-DEIS that should have been publicly disclosed and vetted through an SEIS. *See* Consistency Review at 10, 60. Until such time that the public has been afforded the opportunity to review and vet the USGS Report, it cannot stand as the best available science for lek buffers.

The agency's first claim that site specific NEPA is necessary before determining lek buffers does not obviate the agency's need under section 1610.3-2(e) to adopt the Governor's recommendation if it provides a "reasonable balance." The Governor's Plan recognizes the value and need for reasonable lek buffers within Core, and to a lesser extent Important, (PHMA and IHMA) Habitat Zones; however, the Governor's Plan eliminates land-use level uniform lek buffers in the General habitat. *Id.* at 58. The agencies' promise of variances from uniform lek buffers is simply illusory. *Id.* at 59. Also, the Governor's Plan's tiered management continuum places emphasis on providing greater protections where they are needed the most (*i.e.*, Core and Important Habitat), instead of the BLM's blanket standard that applies equally, regardless of habitat quality, in General Habitat (5% of the population) as it does in Core (Priority) Habitat (73% of the population). *See* Idaho Exec. Ord. 2015-04; Consistency Review at 59.

Secondly, as discussed, *supra*, the BLM Response claiming that the agency is obligated under their internal guidance to deny the Governor's recommendations does not pass muster. The Governor's Plan, which includes requirements for lek buffers, is inherently consistent with Manual 6840 because the Governor's Plan is *specifically* tailored to address the conservation needs of sage-grouse in Idaho based on actual on-the-ground information. Absent an analysis of how or why the Proposed Plan is even incrementally better for sage-grouse than the Governor's Plan, this argument cannot stand. Further, IM 2012-044 simply guides development of conservation plans for sage-grouse in this process. In fact, this IM actually encourages science-based collaboration with the states and is consistent with the Governor's Plan. The IM states:

"These goals and objectives are a guiding philosophy that should inform the goals and objectives developed for individual land use plans. However, it is anticipated that individual plans may develop goals and objectives that differ and are specific to individual planning areas." *See* IM 2012-044.

For these reasons, the Director must reconsider Governor Otter's recommendation to adopt the Governor's Plan and abandon the Proposed Plan's implementation of lek buffers.

F. Required Design Features in all Habitat Types:

In the "The Governor's Plan for Large-Scale Infrastructure is Commensurate with the Threat Level in Idaho and Provides an Adequate Regulatory Mechanism," section of the Consistency Review, Governor Otter points out that the required design features (RDFs), among other issues, contained in the Proposed Plan "blurs the distinction between habitat zones and renders the state's extensive mapping exercise effectively moot." *See* Consistency Review at 23-24. Specifically, "application of the net conservation gain standard, lek buffers, and RDFs in GHZ" renders GHZ as a *de facto* avoidance area. *Id.* Further, Governor Otter points out that

there are “significant differences between the [best management practices] required by the Governor’s Plan and the RDFs required in the agencies Proposed Plan,” and that “specific RDFs either in conflict directly with the Governor’s Plan or are inconsistent because they are not contained within the Governor’s Plan.” *Id.* at 26. In many instances, the Consistency Review provides a list of the RDFs contained in the Proposed Plan that are omitted from the Governor’s Plan. *See, e.g., Id.* at 27.

BLM’s Response denial of the Governor’s recommendation to remove the RDFs that are not contained in the Governor’s Plan is only a partial response to the issues raised in the Consistency Review. The first issue is that there are significant differences between the RDFs proposed on the various types of infrastructure in the Proposed Plan and the Governor’s best management practices (BMPs). The BLM argues that they have “flexibility inherent in the application of RDFs” making the inconsistency minimal between the two plans. BLM Response at 9. If the inconsistency is minimal as the BLM contends, then adopting the Governor’s BMPs as the RDF framework would meet the “maximum extent” requirement in FLPMA.

Notably, the BLM fails entirely to address the specific inconsistencies identified by the Governor in the infrastructure specific portions of the Consistency Review. For example, in the travel management section, the Consistency Review identifies RDF 2 which states that shall be no repeated or sustained behavioral disturbance within 2 miles of a lek, where the Governor’s Plan BMP says one kilometer from the perimeter of a lek. *See Consistency Review* at 43. Additionally, the Consistency Review identified RDFs that were intentionally omitted from the list of BMPs in the Governor’s Plan. *See e.g., Fluid Mineral Development RFDs not contained in the Governor’s Plan at Consistency Review* page 43. The BLM’s failure to even acknowledge these significant inconsistencies does not meet the high standard required of the agency by FLMPA and BLM implementing regulations.

The BLM further argues that “RDFs are designed to respond to recommendations identified in the [COT Report] and will assist in meeting the primary objectives in the BLM Special Status Species policy.” BLM Response at 9. As mentioned in nearly all phases of this NEPA process, the Governor’s Plan, including the BMPs contained therein, gained concurrence with the COT Report, as acknowledged by FWS.³ Certainly, if the BLM wishes to rely on the COT Reports recommendations to provide the certainty that FWS requires, then this concurrence with the Governor’s Plan should be sufficient.

Finally, the BLM argues that “[i]n light of the BLM’s Greater Sage Grouse Conservation Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of GRSG and its habitats so as to potentially reduce the need to list the species, the BLM finds it is essential to include RDFs for the GRSG in all habitat types.” BLM Response at 9. Again, the BLM has not adequately explained why their plan accomplishes the goals of certainty and conservation while the Governor’s Plan does not. Simply siting to policy guidance

³The FWS did ask for clarification on how the Implementation Team/Commission operates to determine exceptions to development in CHZ, and IHZ, as well as mitigation of impacts, but stated that “[t]he specific action in the infrastructure element are consistent with the COT report...” *See Kelly letter* at page 6.

does not provide sufficient justification for BLM to ignore their FLPMA consistency requirements.

The Director must reconsider Governor Otter's recommendation to adopt the BMPs contained in the Governor's Plan, eliminate the RDFs from the Proposed Plan, and apply the BMPs in a manner that is consistent with the Governor's Plan.

III. THE AGENCIES MUST ACCEPT THE REMEDY PROPOSED BY GOVERNOR OTTER

Governor Otter has provided the below recommendations to rectify the errors in Idaho BLM's analysis, and bring the agency in compliance with § 202(c)(9) of FLPMA. This Appeal represents the last opportunity in the administrative process for the Director to achieve a meaningful planning partnership with Idaho on this important issue. Lack of time is not a legitimate excuse to avoid negotiations with the Governor. Indeed, FLPMA's regulations provide such an opportunity – namely that, “[t]he Director *shall* accept the recommendations of the Governor(s) if he determines that they provide for a *reasonable balance* between the national interest and the State's interest. The Director shall communicate to the Governor(s) in writing and publish in the Federal Register the *reasons for his/her determination to accept or reject such Governor's recommendations.*” 43 C.F.R. 1610.3-2(e) (emphasis added).

A. Adopt the Governor's recommendations in the Consistency Review

The Governor's Consistency Review raised actual and significant inconsistencies between the Governor's Plan and the Proposed Plan. Only a few of these were addressed in the BLM Response, and where the State Director addressed the raised inconsistencies, the justification for denial was insufficient and unpersuasive. Moreover, the BLM Response entirely ignored the federalism balance of interest section. As it stands, the record demonstrates that the Governor's Plan represents a reasonable balance between the national interest and the state interest, including the agencies' multiple-use mandates, and meeting the conservation objectives outlined in the COT Report, while the Proposed Plan fails to demonstrate a reasonable balance standard.

As stated in the Governor's Consistency Review at 9, substantial weight must be given to Governor Otter's recommendations; otherwise the agencies will fail to comply with their consistency obligations under FLPMA and NFMA, effectively undermining their duties to cooperate with state governments “to the maximum extent,” and invalidating the BLM's own statement that “[t]he Governor's consistency review is an important part of the [BLM's] land use planning process.” BLM Response at 1.

The Governor's Recommendations are as follows:⁴

⁴ These recommendations were included in the Governor's Consistency Review beginning at page 61. Contrary to the agency's obligations under FLPMA, BLM did not adopt *any* of the Governor's recommendations.

Adopt Alternative E. The agencies must immediately withdraw the Proposed Plan and adopt Alternative E. The Governor’s Plan is science-based and collaborative, striking a reasonable balance between federal and state interests. It is the perfect fit to meet the needs of the species in Idaho. The Proposed Plan, by contrast, is per se imbalanced because it is inconsistent with federal law as discussed above.

Adopt Alternative E with modifications. Alternatively, and in the spirit of further collaboration, the agencies should withdraw the Proposed Plan, and adopt Alternative E with some of the changes agreed to in the interagency refinement process.

In October 2013, Governor Otter wrote a memorandum to Secretary Jewell outlining a process whereby the stakeholders, and based in part on the DEIS comments, could bridge the remaining differences between the Preferred Alternatives. Memorandum from Governor C.L. “Butch” Otter to Secretary Jewell (Oct. 23, 2014) (Otter DC Memo). The Governor noted in the memo that, “you [Secretary Jewell] understand the significance and exemplary model of collaboration embodied in the Idaho Roadless Rule.” Otter DC Memo, at 3. And in that vein, the memo quoted the COT Report to illustrate the need for the federal government to promote, rather than diminish, the findings in the FWS’s concurrence letter: “Due to the variability in ecological conditions and the nature of the threats across the range of the sage-grouse, developing detailed, prescriptive species or habitat actions is not possible at the range-wide scale. Specific strategies or actions necessary to achieve the following conservation objectives must be developed and implemented at the state or local level, with the involvement of all stakeholders.” Otter DC Memo, at 2; *see also*, COT Report at 31.

This was not an illusory or hypothetical offer from Governor Otter. Following this meeting, the Governor instructed his Task Force to examine a few specific items to determine whether it was possible to reach consensus on a modified-Alternative E. In April 2014, the Task Force provided recommendations to the Governor on some refinement issues, such as modifications to the map; consideration of a Conservation Area-level disturbance cap (the Task Force rejected a project- or NTT-level disturbance cap); and a more clearly-delineated exemption process in the CHZ. (FEIS, Appendix G). On July 18, 2014, OSC Administrator Dustin Miller wrote to BLM State Director Tim Murphy signaling the Governor’s willingness to adopt some of these Task Force recommendations.

Given that these efforts provided a constructive path forward for a modified-Alternative E, the last-minute National Direction stands in direct contradiction to the COT Report, the underlying record, and the collaborative process. The agencies should immediately withdraw the Proposed Plan, open a constructive dialogue with the Governor Otter’s Administration, and submit the outgrowth of that process for public review and comment.

To be acceptable, these modifications would require the following changes to the Proposed Plan:

- Elimination of the SFA proposal and associated management restrictions.
- Significant changes to the livestock grazing section with the explicit recognition that improper grazing is a secondary threat.

- Removal of the project-level disturbance cap, uniform lek buffers, and the undefined net conservation gain mitigation standard.
- Clarification or removal of certain aspects of the adaptive management construct.
- Adopt the recommendations in the Governor’s Plan to fully protect valid and existing rights.

Provide Idaho an Exemption from the SFAs. The designation of SFAs is inconsistent with the Governor’s Plan because it creates a fourth habitat zone. Although the BLM Response addressed this recommendation, it did not adequately clarify why it does not consider the designations of SFAs to be a fourth tier of habitat. The Governor’s Plan designated habitat zones based on certain, consistent restrictions to be applied to subsets of GRS habitat. Thus, the BLM Response that the designation of SFAs adds additional restrictions to a subset of habitat seems to simply define an additional habitat zone.

Further, in the Wyoming 9-Plan Proposed LUPA, the state is exempted, at least in part, from the onerous provisions of the SFA management regime. Wyoming 9-Plan; ES-12, 13. More specifically, the 7 million acres identified for “super core” designation in the Ashe Memo has been substantially reduced to 1.2 million acres. Wyoming 9-Plan; ES-4.

Issue a Supplemental EIS. Notwithstanding the Governor’s strong opposition to the Proposed Plan, and if the agencies are indeed committed to this imbalanced solution, the Federal government must publicly vet the last-minute and significant National Direction through a Supplemental Environmental Impact Statement.

B. The Director should, at a minimum, follow federal regulations prior to issuing the Record of Decision, and submit the Proposed Rule to the Office of Management and Budget (OMB).

Submit the Proposed Rule to OMB. Similarly, because the last-minute direction in the forthcoming Regional Records of Decision will likely have a staggering impact on the economies of western states and local communities, the agencies must submit this “significant” rule to OMB. Under Executive Order 12866, OMB must conduct a cost-benefit analysis of this significant rule. 80 Fed. Reg. 30,711.

C. The BLM can remand the Consistency Review to the State Director to fulfill BLM’s consistency obligations.

Remand the Consistency Review to the State Director. The BLM’s uncharacteristically fast and woefully inadequate, cursory, and incomplete response to Governor Otter’s Consistency Review conclusively demonstrates that the BLM did not comply with its consistency obligations by meaningfully considering, analyzing and resolving the inconsistencies to the “maximum extent” as identified in the Consistency Review and Protest Letter duly filed by Governor Otter. This pattern also seems to apply to other western governors. As such, the Director must make a finding that the Proposed Plan is imbalanced and remand the consistency review process with directions to the State Director to resolve the identified inconsistencies as instructed by FLPMA.

CONCLUSION

The State Director's Response did not comport with the agency's obligations under § 202(c)(9) of FLPMA. This error, if left unchecked, will create several immediate and irreparable harms to Idaho. Governor Otter's Administration stands ready to work through the issues identified in the Consistency Review and this Appeal.