C.L. "Butch" Otter
Governor

July 28, 2015

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Bureau of Land Management
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Boise, Idaho 83709

Ms. Nora Rasure, Regional Forester
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RE: Idaho Governor C.L. "Butch" Otter's Consistency Review: Idaho and Southwest 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 State Director Murphy and Regional Forester Rasure:

I appreciate the opportunity to make Consistency Review comments, pursuant to the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1712(c)(9); 43 CFR § 1610.3-2, on the Idaho and Southwest Montana Sub-regional Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement (Proposed Plan). While the U.S. Forest Service is not governed by the same consistency obligations as the Bureau of Land Management, the agency under the National Forest Management Act (NFMA), 16 U.S.C. § 1604(a); 36 CFR § 219.4(b)(1), is required to review state and local planning and land use policies and attempt to identify and resolve conflicts and inconsistencies between its own proposed plan and those of applicable state and local governments. My comments are specific to the Proposed Plan's significant impacts on Bureau of Land Management- and Forest Service-managed lands in Idaho.

This is not a typical consistency review. As you are aware, western governors were invited by the Federal government to develop state-specific plans for inclusion in this unprecedented land-use planning effort. We collectively believed these plans could both meet the needs of the Greater Sage-grouse (sage-grouse), while also respecting our respective states' economic development, custom, culture and way of life. This invitation was and is in conformance with FLPMA's consistency obligations to states as well as its multiple-use mandate. Given that the Proposed Plan impacts over 15 million acres in Idaho (11 million of which is considered sage-grouse habitat), I accepted this invitation – and by and through my Sage-Grouse Task Force – submitted a collaborative, science-based sage-grouse conservation plan for inclusion in this process (Alternative E). My Administration along with the tremendous local support of your agencies – for much of the past three years – were poised to deliver another significant natural resource milestone in Idaho.

To elaborate further, the U.S. Fish and Wildlife Service (FWS) determined that significant portions of our plan were consistent with that agency's acknowledged goalposts; thus, providing the catalyst for selection of Alternative E as a co-Preferred alternative in the draft environmental analysis. That important decision opened a pathway for a constructive interagency and stakeholder refinement process. Yet this collaborative process did not win the day.

The enclosed responsive comments, unfortunately, identify numerous and significant points of inconsistency between the Proposed Plan and Alternative E and other state laws, plans, policies, and programs. Some of these inconsistencies may be attributable to a lack of clarity in the language of the Proposed Plan. But most stem from the last-minute national direction – after the public comment period had closed – that significantly altered and materially disrupted the core components of my plan. That last-minute national direction is also inconsistent with the agencies' legal obligations.

As my June 18, 2015 letter to Secretary Jewell and subsequent Protest Letter reflect (attached), the following last-minute changes infect the entire Proposed Plan and are unacceptable:

- Designating approximately 3 million acres of so-called Sagebrush Focal Areas;
- Rendering Idaho's scientifically-based map moot by imposing unreasonable lek buffers, new mitigation standards and other onerous project-level restrictions across the entire planning area regardless of the quality of sage-grouse habitat;
- Relying on a previously undisclosed threat aggregation scheme to elevate secondary threats such as livestock grazing and mining to a primary focus;

- Departing, or at minimum convoluting, Idaho's adaptive management construct by delinking habitat and population objectives, altering the process itself, and creating overreaching management responses;
- Diverting precious agency resources away from the primary threats in Idaho (i.e., wildfire and invasive species) to the detriment of the species; and
- Failing to fully protect valid and existing rights.

As the Governor's Consistency Review is the capstone to this unprecedented land-use planning process, it represents the final opportunity for the Federal government to achieve a meaningful partnership with Idaho – a full planning partnership that would undoubtedly benefit the sage-grouse and those who live, work and recreate on these lands. I would invite you to seriously consider these points of inconsistency and make the necessary course corrections to reach a mutually agreeable solution on this important issue.

According to FLPMA and its regulations such an opportunity exists. The Bureau of Land Management is *required* to accept the Governor's recommendations if they "provide for a reasonable balance between the national interest and the State's interest." 43 CFR § 1610.3-2(e). Given the multiple violations of law and policy, the stark departure from FWS's consistency determination for Idaho, the potential irreparable damage to the better path of collaborative conservation, and the subordination of the state's sovereign authority to manage sage-grouse, the Proposed Plan is per se imbalanced.

I have provided a suite of recommendations to resolve this imbalance and will briefly highlight two for your immediate consideration. First, the Secretary must ask the U.S. Congress or the court for more time to fully analyze and meaningfully resolve the likely voluminous set of consistency reviews and protests from my fellow western governors. Given that the Federal government *believes* this planning process is a necessary prerequisite for FWS's forthcoming ESA listing determination, there is simply no other way the agencies can comply with their consistency obligations without a reasonable extension.

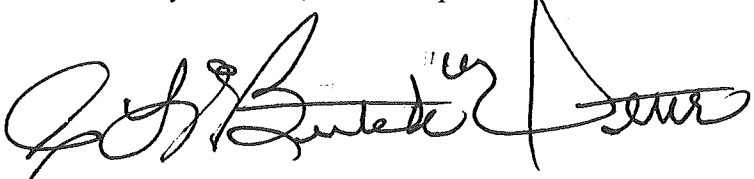
Second, and according to Executive Order 12866, the agencies must submit the Proposed Plan to the Office of Management and Budget to perform a cost-benefit analysis. This step has not been followed. Given that the agencies are planning to combine these sub-regional environmental analyses into two regional Records of Decision, the cumulative economic impact of these "significant" new measures across the West has not been adequately analyzed nor disclosed by the Federal government. The size and scope of the restrictions in the SFA proposal alone (e.g., No Surface Occupancy for fluid mineral development; recommended mineral withdrawals; and enhanced livestock conservation

measures), adversely affects the economies of western states and clearly warrants this important review.

In closing, this is not a case of the State failing to provide for the needs of this iconic species. This is a case of excessive and overreaching governmental regulation imposed through a flawed process that, without meaningful modification, will drive stakeholders to their respective corners, unduly harm the economic vitality of Idaho, and ultimately fail to achieve the purported goal of this process to maintain a viable population of sage-grouse.

Thank you for the opportunity to submit this Consistency Review. 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"



C.L. "Butch" Otter
Governor of Idaho

Governor C.L. “Butch” Otter’s Consistency Review of the Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement

July 28, 2015

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I. INTRODUCTION

In 2010, the U.S. Fish and Wildlife Service (FWS) found the Greater Sage-Grouse (sage-grouse) was "warranted, but precluded" for listing as a threatened or endangered species. *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) (2010 Finding). Of the five listing factors provided in Section 4(a)(1) of the Endangered Species Act (ESA), the FWS determined that Factor A, "the present or threatened destruction, modification, or curtailment of habitat or range," and Factor D "the inadequacy of regulatory mechanisms" posed a threat to the species now and in the foreseeable future. With regard to Factor D, the 2010 Finding particularly focused on lands managed by the Bureau of Land Management (BLM) as those represent about 50% of the known sage-grouse habitats. *See* 2010 Finding, at 13,920. (noting that "[t]he Federal Land Policy and Management Act…is the primary Federal law governing most land uses on BLM-administered lands, and directs development and implementation of Resource Management Plans which direct management at a local level.").

Soon after the species was placed on the federal list of candidate species, the Obama Administration entered into a settlement agreement with environmental groups formalizing a schedule for making listing determinations on over 250 candidate species nationwide, including the sage-grouse. The Administration further agreed to take immediate action on the listing status of sage-grouse, even though the species received a Listing Priority Number (LPN) of 8 out of 12 (*i.e.*, threats to the species are moderate), by the end of September 2015. *See* 75 Fed. Reg. at 14,008 (describing that "…we [FWS] assign each candidate an LPN of 1 to 12, depending on the magnitude of the threats, immediacy of the threats, and taxonomic status of the species…") (internal citations omitted). In response to the court settlement, the U.S. Department of the Interior announced it would amend some 88 Resource Management Plans (RMPs) through the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* to include sage-grouse specific direction by September 2014. *See* Bureau of Land Mgmt., Dep't of Interior, Instruction Memorandum 2012-044, BLM National Greater Sage-Grouse Land-Use Planning Strategy (2011).

Concurrent with the National Strategy announcement, the BLM established the National Technical Team (NTT) to serve as an "independent, technical and science-based team to ensure the best information related to greater sage-grouse management is fully reviewed, evaluated and provided to the BLM for consideration in the land use planning process." *See* IM 2012-044, Appendix 1. On December 21, 2011, the NTT released "A Report on National Greater Sage-Grouse Conservation Measures," (NTT Report) a self-described "new paradigm" for dictating sage-grouse activities on BLM-managed lands. *See* NTT Report at 6 (stating that "[t]hrough the establishment of the National Sage-grouse Planning Strategy, the Bureau of Land Management has committed to a *new paradigm* in managing the sagebrush landscape") (emphasis added).

Invitation of Secretary Salazar and the Governor's Sage-Grouse Task Force

That same month, then U.S. Secretary of the Interior, Ken Salazar, invited western governors, consistent with the requirements of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, to follow the example of Wyoming and develop state-based conservation plans and adequate regulatory mechanisms aimed at precluding the need to list the sage-grouse under the ESA.[1] Secretary Salazar along with the western governors believed this planning effort could both address the conservation needs of the species, while also preserving the economic development, custom, culture and way of life across the West. *See* E.O. 2012-02 (Mar. 9, 2012).

Along with the invitation itself, [2] there were a couple of key aspects to a state's involvement: (1) that a state-developed plan would be incorporated into and analyzed in the National Sage-Grouse Planning Strategy; and (2) if the FWS concurred with all or portions of a state plan, that state could request exemption from the BLM's interim guidance for sage-grouse. *See* Bureau of Land Mgmt., Dep't of Interior, Instruction Memorandum 2012-043, Greater Sage-Grouse Interim Management Policies and Procedures (2011) (stating that BLM field offices do not need to apply the measures contained in this IM if "a state and/or local regulatory mechanism has been developed for the conservation of the Greater Sage-Grouse in coordination and concurrence with the FWS"). Relying on the Secretary's assurances, Governor Otter issued Executive Order 2012-02 establishing a Sage-Grouse Task Force charged with developing recommendations on actions to serve as the basis for a state-wide adequate regulatory mechanism to preclude the need to list the species under the ESA. The Task Force was a thirteen member group comprised of representatives from local sage-grouse working groups, conservation interests, state and local officials, and industry. *See generally* E.O. 2012-02.

In March through May 2012, the Task Force met eight times in various locations across the state. Each meeting was open to the public and provided an opportunity for public comment on sage-grouse conservation in the state. Additionally, the Idaho Department of Fish and Game (IDFG) hosted a web page displaying the times and locations of Task Force meetings, agenda, meeting notes, and presentations made during the meetings. The Task Force was committed to conducting an open and transparent information-gathering and decision-making process. *See* E.O. 2015-04, App. 1-2. After much deliberation and discussion, the Task Force on June 15, 2012 – aided by the technical expertise of IDFG (including Dr. Jack Connelly and Don Kemner), FWS, and other relevant state and federal agencies – delivered its recommendations to Governor Otter.

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[1] *See* Interior press clippings (Appendix 2).

[2] The Office of the Governor and other state agencies are also cooperating agencies under NEPA. The NEPA states "…it is the continuing policy of the Federal government, *in cooperation with State and local governments*, and other concerned public and private organizations…to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. § 4331(a) (emphasis added). So the agencies in this context owe both consistency and cooperating agency obligations to the Governor and State of Idaho.

On June 29, 2012, Governor Otter released a draft of his Alternative and provided a 30-day public comment period. During that period, the Governor sent a letter to the FWS requesting affirmance on a couple of key aspects of his plan – namely, a) whether the management framework – based on a thematic habitat continuum and population metrics – outlined in his Draft Alternative represents a sound policy that should move forward; and b) whether or not the habitat zones, especially the Core Habitat Zone and Important Habitat Zone, are consistent with the U.S. Fish and Wildlife Service's understanding of the most important sage-grouse habitats in the State. Letter from Governor C.L. "Butch" Otter to U.S. Fish and Wildlife Serv. (July 13, 2012); Appendix 3. The FWS responded favorably and concluded that "[t]he Service believes the management framework that [Governor Otter] has developed provides a sound policy outline from which to build upon to meet the long-term conservation goals of greater sage-grouse. The thematic approach based on conservation objectives that are monitored in an adaptive management construct that your framework incorporates, are fundamental attributes of the Service's own approach to strategic conservation." *See* Letter from U.S. Fish and Wildlife Serv. to Governor C.L. "Butch" Otter (August 1, 2012); Appendix 4.

After analyzing the public comments, and receiving the approving review from the FWS, Governor Otter submitted his Alternative to the Secretaries of Interior and Agriculture on September 5, 2012. Consistent with Secretary Salazar's invitation, the BLM and U.S. Forest Service included the Governor's Alternative into the Idaho and Southwestern Montana Sub-regional planning process as Alternative E. *See* U.S. Bureau of Land Mgmt., U.S. Dep't of the Interior & U.S. Forest Serv., U.S. Dep't of Agric., Idaho and Southwestern Montana Greater Sage-Grouse Draft Land Use Plan Amendment and Environmental Impact Statement (2013) (DEIS).

FWS Concurrence Process

As another outgrowth of the December 2011 meeting, the western governors and the Director of the BLM created a Sage-Grouse Task Force to best advance a coordinated, multi-state, range-wide effort to conserve the sage-grouse, including the identification of conservation objectives to ensure the long-term viability of the species. *See* U.S. Fish and Wildlife Serv., Greater Sage-Grouse (*Centrocercus urophasianus*) Conservation Objectives: Final Report (2013) (COT Report). The Sage-Grouse Task Force enlisted the assistance of the FWS Director to develop range-wide conservation objectives for the species to define the degree to which threats need to be reduced or ameliorated to conserve sage-grouse so that it is no longer in danger of extinction or likely to become in danger in the foreseeable future. *Id. at* 3. As part of this effort, the FWS "[r]ecogniz[ed] that state wildlife agencies have management expertise and management authority for sage-grouse, the FWS created a Conservation Objectives Team (COT) of state and FWS representatives to accomplish this task." *Id.*

On March 22, 2013, the FWS released the COT Report. The COT Report emphasizes the importance of state-based plans in this planning effort noting that "[t]he development of this report reflects a truly collaborative federal-state effort designed to provide a clearer picture of

objectives that, if met, will ensure the long-term, robust persistence of this iconic western species. Achieving these conservation objectives *will require* our continuing collaboration." *Id. at* Cover Letter (emphasis added). Rather than dictate a one-size-fits-all regulatory model, like the NTT Report, the COT Report invites individual states to best package the management practices, with monitoring and implementation, to address state- and site-specific issues. Accordingly, the FWS encourages planning agencies to defer to state approaches where conflicts arise. On page 36 it states:

> Conservation of sage-grouse habitats outside of the PACs should be closely coordinated with each state. For those states with sage-grouse management plans, or similar documents adequately addressing the conservation of sage-grouse that have been developed in coordination with FWS, decisions on management of those areas should defer to those plans.

The COT Report further states on pages 47, 49, 50, and 51 that for restoration and threat management efforts, state management plans with effective strategies should be implemented.

After submitting the Alternative to the BLM in September 2012, Governor Otter's office worked with FWS to continue refining certain aspects in an effort to obtain "concurrence" from the agency consistent with the requirements in BLM's IM 2012-043. In March 2013, and after making revisions consistent with FWS's direction, Governor Otter submitted a concurrence request to FWS. *See* Concurrence Request from Governor C.L. "Butch" Otter to the U.S. Fish and Wildlife Serv. (March 14, 2013), Appendix 5. Governor Otter highlighted in the concurrence request that Secretary Salazar had recently reiterated his commitment that "the BLM has every intention of taking actions to conserve the Greater Sage-Grouse in a manner that is *consistent with its multiple use mission* and with due regard for site specific on-the-ground considerations."[3] *Id.* The Governor concurred with the agreed-upon framework stating, "[y]our point [about targeted revisions] was taken in the spirit of collaboration, and I believe that in addition to the September 2012 Alternative, the attachment below resolves these outstanding issues, and thus provides the path for Service concurrence consistent with Secretary Salazar's policy directive." *Id.*

On April 10, 2013, the FWS responded positively to Governor Otter's concurrence request. "The Service remains impressed with and supportive of the science-based adaptive conservation strategy for GRSG you have created collaboratively in Idaho, for Idaho-specific

[3] Secretary Salazar's comment originated from U.S. Congressman Hastings' (R-WA) and ten other members of the House of Representatives concern regarding BLM's National Instruction Memoranda, especially the adoption of the NTT Report as interim guidelines. *See* Concurrence Request Response from Secretary Salazar to Governor C.L. "Butch" Otter (December 18, 2012); Appendix 7. Attached to the Secretary's response was an "Independent Review of Conservation Measures" that criticized the NTT Report. These critical comments spurred the Office of Species Conservation (OSC) in January 2013 to take the unusual step of requesting the administrative record to the NTT Report. OSC FOIA Request; Appendix 8. Following a threat of litigation, the BLM in May 2013 finally released some 2018 pages of responsive records to OSC's request. BLM FOIA Response; Appendix 9 (responsive records on file with OSC).

needs. In brief, the foundation of the Strategy and most of the specific elements that complete it, are solid and are grounded in scientific concepts and approach important to both the Service and Department of the Interior." *See* Concurrence Letter from the U.S. Fish and Wildlife Service to Governor C.L. "Butch" Otter (April 10, 2013) (FWS Concurrence Letter); E.O. 2015-04, App. 2. More specifically, the FWS found the four foundational elements, livestock grazing management and large-scale infrastructure components consistent with the COT Report. Of particular note, the agency found that "[t]he thematic approach, conservation areas, adaptive triggers, and population objectives are *consistent with the COT Report* and the Service strongly supports these aspects of the State's strategy." *Id. at* 4 (emphasis added). Certainly, the FWS conditioned some of its consistency analysis upon reviewing future administrative actions by the state, including "a clearer understanding of how the Implementation Team/Commission operates to determine exceptions to CHZ development, development in IHZ, and how referenced mitigation of impacts will work." [4] *Id. at* 6.

Despite the fact that much of the Governor's Alternative was deemed consistent with the COT Report, the BLM, in May 2013, declined to exempt the State from either some or all of IM 2012-043. State Director Ellis stated, "[w]e are unable to dedicate staffing to complete the new NEPA necessary for adopting these portions as interim management without impacting our ability to complete the EIS and RMP amendments by 2014." *See* State Director Steve Ellis Letter (May 2013); Appendix 10.

Co-Preferred Alternative

Based on the strength of the Governor's collaborative, science-based conservation Alternative, the BLM and Forest Service selected Alternative E and Alternative D as co-Preferred Alternatives. DEIS at 2-45. Sensing that the differences between the co-Preferred Alternatives would need to be resolved prior to the issuance of the Proposed Land Use Plan Amendment and Final Environmental Impact Statement, Governor Otter requested a meeting with Secretary Jewell to outline a potential path forward. In October 2013, Governor Otter wrote a memorandum to Secretary Jewell outlining a process whereby the stakeholders, 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, 2013) (Appendix 11). The Governor noted that based on Secretary Jewell's letter, "you [the Secretary] understand the significance and exemplary model of collaboration embodied in the Idaho Roadless Rule." *Id.* at 3. Lastly, the memo quoted the COT Report highlighting 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

[4] This aspect of the Governor's Alternative was completed in a July 1, 2013 letter to then BLM State Director, Steve Ellis. The Governor's Office of Species Conservation Administrator, Dustin Miller wrote, "[i]n our continuing commitment to multi-agency collaboration, we have attached thorough explanations to the questions you asked us in May 2013. Some measures that may have appeared vague or incomplete have been refined and clarified along with additional actions needed to proactively deal with wildlife within sage-grouse habitat." *See* Letter from Administrator Dustin Miller (July 2013); Appendix 12.

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." *Id.* at 2; *see also* COT Report at 31).

Moreover, this was not an illusory or hypothetical offer from Governor Otter. Following the close of the DEIS-comment period, and with the State duly filing comments, Governor Otter 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 cap); and a more clearly-delineated exemption process in the CHZ. U.S. Bureau of Land Mgmt., U.S. Dep't of the Interior & U.S. Forest Serv., U.S. Dep't of Agric., Idaho and Southwestern Montana Greater Sage- Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement, App. G (2015) (FEIS). On July 18, 2014, OSC Administrator, Dustin Miller, wrote to State Director Tim Murphy signaling the Governor's willingness to adopt some of these Task Force recommendations. As indicated in the Governor's cover letter, he believed the State and the federal government were poised to deliver another collaborative natural resource milestone, similar to the Idaho roadless model.

Post-DEIS National Direction

Notwithstanding Interior's bi-lateral commitments to Governor Otter, the western states noticed in early 2015 a concerted push for "uniformity" by regional and national FWS staff in the National Planning Strategy. That desire for uniformity was crystallized in February 2015 with the public release of an October 2014 (post-DEIS) internal memorandum from FWS Director Dan Ashe titled, "Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes" (Ashe Memo) (Appendix 13). In a significant shift in approach and a retreat from collaboration, the Ashe Memo recommended some 16.5 million acres of so-called Sagebrush Focal Areas (SFAs) where the FWS, contrary to its own COT Report, was recommending the "highest level of protections." [5]

In a February 2015 U.S. Senate Natural Resources Committee Hearing, U.S. Senator Risch (R-Idaho) admonished Secretary Jewell that the designation of a fourth habitat zone in Idaho would "move the goalposts," and threatened to undermine the collaborative work in the Idaho. Secretary Jewell reaffirmed Interior's commitment to the COT Report and assured

[5] The SFA's sweeping conservation measures (MA-10) are virtually identical to the agencies' description of an Area of Critical Environmental Concern (ACEC) for sage-grouse. As noted in the Imbalance section, the ACEC proposal was rejected in the DEIS. And for that reason, BLM cannot simply paper over the ACEC label, without conducting a new analysis, and resurrect the same flawed policy in the FEIS without issuing a Supplemental EIS. Moreover, the SFA proposal looks very similar to Secretarial Order 3310: "*Requirement to Conduct and Maintain Inventory Information for Wilderness Characteristics and to Consider Lands with Wilderness Characteristics in Land Use Plans*." BLM cannot circumvent Congress to achieve this end in the National Planning Strategy. Governor Otter is steadfastly opposed to this ill-conceived policy and supports Congress' decision to cut off funding to implement. *See* IM 2011-154.

Senator Risch that "we've moved a long way since the letter you referenced."[6] It is a stark inconsistency from Secretary Jewell's reassurance given that the Governor's Plan – considered a co-preferred alternative at the DEIS stage – to its jettisoning in favor of 3 million acres of SFAs in Idaho and other unnecessary and excessive conservation measures.

Despite the Governor's grave concern regarding the unilateral imposition of SFAs, he remained committed to implementing Idaho's Alternative, and on May 28, 2015, the Governor issued Executive Order 2015-04 with attachments (collectively and hereinafter referred to as the "Governor's Plan"). This Executive Order followed the Idaho Land Board's and The Oil and Gas Conservation Commission's unprecedented move to adopt a conservation strategy for the species on state endowment lands. *See* E.O. 2015-04. Accordingly, the Governor's Plan has an all-lands approach to sage-grouse conservation.

On May 29, 2015, the BLM and Forest Service (collectively, the agencies) released the Notice of Availability of the Great Basin Region Greater Sage- Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement for the Sub-Region of Idaho and Southwestern Montana, 80 Fed. Reg. 30,711 (Proposed Plan or FEIS). Notwithstanding the incalculable resources dedicated by the Otter Administration to this process, the Proposed Plan and FEIS expressly disregarded the initial invitation by the Secretary to work with the state in developing sage-grouse conservation plans. *See* FEIS at 2-5 ("The identification of the co-Preferred Alternatives in the Draft LUPA/EIS *did not constitute a commitment* or decision in principle, and there is no requirement to select either of the co-Preferred Alternatives…as the Proposed Plan.") (emphasis added). Unfortunately, the Proposed Plan is replete with inconsistencies above-and-beyond the designation of SFAs with a vast majority of those inconsistencies originating from last-minute National Direction that lacked the proper NEPA process.

After repeated attempts to reconcile these differences, and with no indication of meaningful progress, Governor Otter wrote Secretary Jewell on June 18, 2015 stating that he "will be exercising my [his] right to file a protest pursuant to 43 C.F.R. § 1610.5-2, as well as [his] right to complete a Governor's Consistency Review in accordance with 43 C.F.R. § 1610.3-2(e). It is my sincere hope that we can work towards resolving these remaining issues with you and you staff over the next few weeks prior to the end of the consistency review period; however, I need a genuine commitment from you regarding your willingness to make this happen." (Appendix 14). Consistent with that letter, Governor Otter filed a formal Protest Letter to the Proposed Plan on June 29, 2015. And with no substantive progress, Governor Otter hereby exercises his right under FLPMA § 202(c)(9) and its implementing regulations to file this Consistency Review on behalf of the State of Idaho.

[6] *See* Phil Taylor, Senator says FWS Memo 'Moves the Goal Post' on Grouse Listing, E&E NEWS (Feb. 24, 2015), http://www.eenews.net/eenewspm/2015/02/24/stories/1060013956.

II. THE AGENCIES' CONSISTENCY OBLIGATIONS

Congress has 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 coordination with state and local governments. 43 U.S.C. § 1712(c)(9); *see* 43 C.F.R. § 1610.3-2 (e). To implement this direction, FLPMA requires BLM to ensure that federal land use plans are consistent with applicable state and local land use plans and policies "to the maximum extent" consistent with federal law and the purposes of FLPMA. Further, the Secretary must "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." *Id.*

And FLPMA section 202(c)(9) carves out a specific statutory role in the federal land use planning process for state governments:

> Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within each State and with respect to such other land use matters as may be referred to them by him.

In enacting this provision of FLPMA, Congress recognized the unique expertise of state and local governments in land use planning and the scope of the States' long-established police powers over land use and wildlife management.

This state-federal coordination under FLPMA is not merely aspirational. BLM's regulations at 43 C.F.R. § 1610.3-2 implement the section 202(c)(9) State Consultation and Consistency Requirement by reaffirming that the Secretary must develop federal land use plans that are consistent with those State and local plans and satisfy the purposes 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…"

Further, under BLM's Land Use Planning Handbook, "BLM's plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law." U.S. Bureau of Land Mgmt., U.S. Dep't of Interior, Rel. 1-1693, BLM Manual H-1601-1 – Land Use Planning Handbook, I.E.1 (2005). These provisions were "designed to protect the interests of local governments whenever federal agencies develop or implement federal land use plans." *Yount v. Salazar*, 2013 WL 93372, at *14 (D. Ariz. 2013).

Application of FLPMA's Consistency Requirements to the Governor's Plan

As stated in the above section, Secretary Salazar's December 2011 invitation to western governors complied with the section 202(c)(9) requirement to coordinate the land use planning process with state governments. The development of state-based plans necessarily involved furnishing advice of the type contemplated by the statute. Indeed, and throughout the vast majority of this process, the BLM and other federal agencies have complied with FLPMA's consistency mandate through the collaborative development of the COT Report, selection of the Governor's Alternative (Alternative E) as a co-Preferred alternative, and the subsequent stakeholder refinement of that alternative at the local level with the federal government. Hence, there is little doubt that Alternative E complies with federal law, and indeed, the Governor's Alternative received approving review by FWS and BLM as it was being developed. Therefore, these consistency requirements must apply with greater force to Governor Otter's Plan for sage-grouse in Idaho.

But as noted at the outset, the Department seriously departed from these consistency mandates by proposing to adopt this last-minute National Direction, such as imposing the SFA regime. And with this seriously misguided decision, it is the federal Proposed Plan that is materially inconsistent with requirements of several federal and state laws, policies and programs. As such, just as Secretary Salazar complied with section 202(c)(9) to begin this process, so too must Secretary Jewell immediately withdraw the Proposed Plan and adopt Alternative E to comply with these coordination requirements pursuant to FLPMA

This Consistency Review provides the Secretary with an opportunity to reconcile the below issues and develop a genuine federal/state planning partnership (e.g., Idaho Roadless Rule) to conserve the sage-grouse and its habitat while recognizing the economic development, customs, culture and way of life in Idaho. In fact, BLM's regulations require a reasonable balance between national and state interests noting that, "the Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R. § 1610.3-2(e). The Governor's Plan, embodied in Alternative E and E.O. 2015-04, App. 1, provides the required "reasonable" federalism balance. It is the Proposed Plan that does not.

If through this required reconciliation process, the written recommendations of Governor Otter would require changes in the Proposed Plan or amendments 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)." 43 C.F.R. § 1610.3-2. So should the Secretary simply withdraw the Proposed Plan and adopt Alternative E, that alternative would not need further public review. Alternatively, should the Secretary act on any of the Governor's new recommendations, as a matter of law, that decision would trigger another public comment period.

Forest Service Consistency Requirements

Although the Forest Service is not required to ensure maximum consistency with state and local plans, 36 C.F.R. § 219.4(b)(3), the agency is required to coordinate its planning efforts

with equivalent efforts of state and local governments.[7] 16 U.S.C. § 1604(a). During this coordination process, the Forest Service is required to review state and local planning and land use policies, and attempt to identify and resolve or reduce conflicts and inconsistencies between its own land use policies and those of applicable state and local governments. 36 C.F.R. § 219.4(b)(2). Like FLPMA, these coordination requirements were intended to "help identify multiple uses in the plan area, resolve conflicts, and facilitate the forward movement of effective land management activities." 77 Fed. Reg. 21,162, 21,177 (Apr. 9, 2012).

Disappointingly, the Forest Service, with the Idaho Roadless Rule as one of its great collaborative achievements, failed to exercise its own independent legal authority and adopt either Alternative E or the modified-Governor's Plan, as described in the Recommendations section. Nevertheless, given that the Forest Service was a coordinating agency with the BLM, and was part of selecting the Governor's Alternative as a co-Preferred alternative, the Forest Service should also withdraw the Proposed Plan and adopt Alternative E.

III. THE PROPOSED PLAN IS MATERIALLY INCONSISTENT WITH THE GOVERNOR'S PLAN

At first blush, the Proposed Plan purports to adopt the three-tier habitat structure and accompanying management continuum advanced by the Governor's Plan.[8] But the post-DEIS National Direction, including among other measures, the SFAs, uniform lek buffers, new mitigation standards, changes to the adaptive management construct and livestock grazing section, presents a vastly different sage-grouse plan than contemplated by either Alternative E or the other co-Preferred Alternative. These last-minute changes create a serious misalignment between the severity of threats in Idaho and the necessary and appropriate measures designed to conserve the species. Therefore, the Proposed Plan is materially inconsistent with the Governor's Plan for sage-grouse direction in this state.

Even setting aside the multiple and significant inconsistencies with the Governor's Plan, as discussed below, the Proposed Plan is in direct conflict with other federal and state laws,

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[7] There is little doubt that the Forest Service has been an integral part of the preparation of the FEIS. And as such, it must participate in a consistency review for 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, but then abandon its consistency duty 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 below demonstrates, this 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 consistency review.
Based on the numerous inconsistencies, and the fact that the Forest Service did not follow the appropriate process to designate a zoological area, see 36 C.F.R. § 294.1, Governor Otter insists that the Forest Service would meaningfully participate in the consistency review.

[8] For purposes of this Consistency Review, the recommendations, policies and programs embodied in Governor Otter's Executive Order 2015-04 (under state law an Executive Order has the force and effect of law), will be collectively referred to as the "Governor's Plan." Reference to the "agencies" is defined as the BLM and Forest Service.

policies, and programs, such as NEPA, the General Mining Law of 1872, FLPMA's and NFMA's multiple-use mandate, and the Taylor Grazing Act. Based on the below section, the agencies have no other legal choice than to work with Idaho to resolve these material inconsistencies.

A. The SFA and the Aggregation and Elevation of Secondary Threats in the Proposed Plan Represents Unnecessary and Excessive Regulation

The agencies' proposed adoption of approximately 3 million acres of SFAs in Idaho represents the single most deleterious change made from the selection of the Preferred Alternatives in the DEIS to the Proposed Plan. FEIS at 2-2, 2-10, 2-14. The last-minute inclusion of SFAs materially and dramatically disrupts the core components of Governor Otter's plan. This new fourth habitat zone, comprised of these so-called "stronghold" areas, is being portrayed as similar to the PHMA with the following additional management: 1) recommended for withdrawal from the General Mining Act of 1872; 2) NSO without waiver, exception, or modification for fluid mineral leasing; and 3) prioritized for management and conservation actions including livestock grazing permits/leases. *See, e.g.*, FEIS at MA-10. As discussed infra, the SFAs constitute a radical departure post-DEIS that was not properly vetted with the Governor's Task Force or the public.

The principal design of the SFAs allegedly stem from the Ashe Memo. That memo identified some 16.5 million acres across the species' range that translates to "a subset of priority habitat most vital to the species persistence, within which we recommend the *strongest levels of protection*." Ashe Memo at 1; FEIS at 2-2, 2-10 (noting that this recommendation is "essential to conservation and persistence of the species … and in some cases are adjacent to protected areas that serve to anchor the conservation importance of the landscape"); FEIS at ES-7 (stating that the SFAs were derived from the "stronghold" areas identified in the Ashe Memo).

The National Direction and the Ashe Memo, which includes SFAs, the attached maps, and the recommended new conservation actions, was not made available to Governor Otter until February 2015. The utter failure of the agencies to withhold this critical information for a full three months at such a critical juncture in the process does not comport with the agencies' obligations either as a NEPA cooperating agency or under section 202 of FLPMA. Even more telling, is the fact that the agencies selectively released the Ashe Memo to other western states and provided an opportunity to comment on the SFA proposal.[9] Idaho was not provided such an opportunity nor was our IDFG – the state agency with over 40 years of experience monitoring the species' in the State's most important sage-grouse habitats – consulted on the designation of these areas and the corresponding change to Idaho's sage-grouse map.

[9] *See, e.g.*, Letter from Wyoming Governor, Matt Mead, to U.S. Fish and Wildlife Director, Dan Ashe, (Nov. 20, 2014) (expressing deep concern with the Ashe Memo's recommendation to designate over 7 million acres of core areas in Wyoming as "super core") (Appendix 16).

Moreover, even when Idaho officials pressed the Secretary for more information regarding this dramatic and significant shift in direction, the Department did not respond until *after* the Proposed Plan was released. *See* Letter from Idaho U.S. Senator, James E. Risch, to Secretary of Interior, Sally Jewell (Feb. 27, 2015) (Appendix 15) ("I would like to receive from you at your earliest opportunity the most recent and complete written description of the management proposals for these sage-grouse focal areas and how that management would differ from management already proposed for Priority Habitat Management Areas in the draft Idaho sage-grouse resource management plan.") (Secretary Jewell did not respond to the Senator until June 16, 2015). These actions of omission and failure to fully disclose key, fundamental information deeply offends FLPMA's direction to the Secretary to "assist in resolving…inconsistencies between federal and non-federal government plans." 43 C.F.R. § 1610.3-1.

As noted, in the Imbalance section (section V), the failure to properly disclose this last-minute National Direction also warrants the issuance of a Supplemental Environmental Impact Statement (SEIS) under NEPA.

i. SFAs materially disrupt the foundational elements of the Governor's Plan.

Along with the post-DEIS information itself, the SFA designation and the associated conservation actions constitute as significant departure from the Preferred Alternatives. These SFA actions undermine the foundational elements in the Governor's Plan. Even more to the point, this unexplained shift directly contradicts with the FWS's April 2013 concurrence letter to Governor Otter and the COT Report. E.O. 2015-04, App. 2. Each one of these foundational elements (e.g., the map, habitat zones, population objectives and adaptive construct) will effectively be superseded by the inclusion of SFAs in the Proposed Plan. In particular, SFAs conflict with the Governor's maps and represent a *de facto* fourth habitat zone that was never discussed or fully analyzed in the DEIS.

To illustrate, the SFAs subsume a significant amount of the CHZ, but also include, without explanation and consultation with the state wildlife experts, areas not previously identified by the state or federal agencies as priority sage-grouse habitat.[10] These additions alter the maps that were collaboratively developed by IDFG, the Task Force, and further refined with the federal agencies following the release of the DEIS.[11]

The inclusion of the SFA scheme also directly conflicts with the Governor's three-tiered management continuum, which "includes at one end, a relatively restrictive approach aimed at

[10] MA-10 states, "Areas of non-PHMA mapped within the SFA boundary will not be managed as SFA, except for Donkey Hills ACEC and three Forest Service Parcels in the Lost River Range, Idaho (Borah Peak, Big Flat Top Mountain, and Copper Basin Knob." These designations make little biological sense as, for example, Borah Peak is Idaho's tallest mountain at 12,668 ft. and sage-grouse do not exist in this area. This is simply illustrative of the fact that the agencies' failed to consult with the State, consistent with their obligations under FLPMA and NEPA.
[11] Task Force agendas, locations of meetings, and meeting minutes are available at http://fishandgame.idaho.gov/public/wildlife/?getPage=310 (last visited July 25, 2015).

providing a high level of protection to the species within the CHZ [PHMA], and on the other end, a relatively flexible approach for the GHZ [GHMA], allowing for more multiple-use activities." E.O. 2015-04, App. 1 at 5. In an attempt to veil their significant departure, the agencies claim that the Proposed Plan adopts the "important aspects" of the Governor's Plan, including the three-tiered habitat map. FEIS, at ES-12. However, as demonstrated below, the Proposed Plan clearly adopts a fourth habitat zone with its own additional management actions and prioritization scheme. This is not a minor variation to the Governor's Plan. Likewise, with the addition of a new zone, the Proposed Plan does not explain how this change will impact the carefully-crafted adaptive construct in the Governor's Plan. Based on the inconsistencies identified in the adaptive management section below, theses change destabilize a central pillar in the Governor's Plan.

The adoption of SFAs makes little sense because the Governor's Plan provides an outcome-based adaptive approach across three habitat zones that provide a high level of conservation benefit to at least 90% of the active sage-grouse leks in Idaho. E.O. 2015-04. In fact, the tiered habitat management zones in Idaho represent the best available science and are "consistent with the [Conservation Objectives] related to Priority Areas for Conservation (PACs) in the COT Report." *Id*., App. 2 at 4. Considering that the Governor's Plan already provides substantive conservation measures aimed at protecting more than 90% of the population and habitat, it is overly restrictive and scientifically indefensible to adopt the SFAs, which will provide little, if any, additional conservation benefits to sage-grouse.

ii. The SFAs are a major post-DEIS variation and are not a proportionate response to the threats to the species in Idaho.

None of the additional and targeted conservation measures in the SFA scheme rise to the level of a primary threat in Idaho. The last-minute and arbitrary elevation of these activities in the "focal" area proposal signals a significant shift in the agencies' approach to this issue. As discussed in the Imbalance section, the lack of proportionality in the Proposed Plan subordinates all human and multiple-use activity to the "new paradigm" of sagebrush conservation.

In the 2010 Finding, the FWS identified the threats to sage-grouse across its western range. The primary threat in the species' western range, including Idaho, is habitat fragmentation from fire and invasive weeds. 75 Fed. Reg. at 13,957; *see also*, FEIS, at 1-13 (stating that the primary threats in Idaho include "habitat loss and fragmentation due to increased occurrence of wildfire, expansion of invasive species, human development and infrastructure."). Whereas, energy development is the primary threat in the eastern portion of the species' range. COT Report at 11; 75 Fed. Reg. at 13,954, 13,957. Secondary threats in Idaho, include, *inter alia*, fluid mineral development, mining, and improper livestock grazing. FEIS, Table 1-3.

Notwithstanding the underlying record regarding the secondary threats, and the assurance in the COT Report that uniform and national sage-grouse measures are unnecessary, the Proposed Plan arbitrarily elevates the threat level associated with fluid mineral development in

Idaho, hardrock mining, and livestock grazing by including drastic management actions for those activities that are not commensurate with the threat level in Idaho. *See* FEIS, MA-10. The agencies admit that potential impacts from energy development within PHMA are minimal to non-existent. *See Idaho Facts and Figures for BLM-USFS Conservation Plans for Greater Sage-Grouse* (Appendix 17) ("Facts and Figures"); *see also* FEIS Appendix G-14 (noting that the Preferred Alternatives did not include a disturbance cap since disturbance was not identified as a major concern causing loss of habitat in Idaho…").

For example, within the agencies' Facts and Figures, they consider 100% of the PHMAs (which includes SFAs) to be "low potential" for oil and gas development (regardless of whether that is stale data). *See* Facts and Figures. In light of these projections, it reflects a complete overreach for the agencies to propose NSO without waiver, exemption, or modification across the range of SFAs for a threat that, according to them, is not a top priority. And even if there was a substantial uptick in fluid mineral development and interest in Idaho, the CHZ protections for sage-grouse regarding fluid mineral development more than obviates the need for this excessive regulation.

A nearly identical comparison exists for hard rock mining potential because the agencies state that potential impacts are extremely low within SFAs, as well. *See Id*. (stating that "[a]pproximately 99% of hard rock mining locations within the state occur outside of federal lands and minerals within SFAs.").[12] Given that hardrock mining already has adequate and existing regulatory mechanisms – see mining section below – and even though this data represents an incomplete analysis, any unexpected and potentially impactful development is constrained by the Governor's Plan and the existing federal regulations' unnecessary or undue degradation (UUD) standard. Again, the SFA proposal is an overreach.

For a complete analysis of the agencies' unfounded elevation of improper livestock grazing to a primary threat, see the Livestock Grazing section below. Again, livestock grazing has an adequate and existing regulatory mechanism – the Idaho Rangeland Health Standards (IRHS), which along with the Governor's Plan, is more than sufficient to address the needs of the species.

The list of BLM and Forest Service conservation actions that refer to SFAs as well as other post-DEIS National Direction evinces that the SFA proposal permeates the entire Proposed Plan. *See* Appendix 26 (listing more than 80 BLM and USFS conservation measures that refer to SFAs, and are therefore inconsistent with State law, policies, and programs). The agencies cannot have it both ways – claiming on the one hand that the SFAs constitute a "minor variation" from the preferred Alternatives, but then their inclusion in the Proposed Plan and descriptions such as "stronghold," "conservation anchor," and "super core" belie the agencies' representation that the regime constitutes a small recalibration.

[12] See the below Mining section describing how the BLM's own database demonstrates that the projected impact from hardrock mining is de minimus.

Perhaps just as important, the SFAs divert resources away from the real primary threats in Idaho (i.e., wildfire and invasive species). It is telling that in Secretary Jewell's belated response to Senator Risch that she mentions the agencies' limited resources (stating "It is important to note that with regards to grazing that while the SFAs will be prioritized for permit renewals and reviews as a way in which to effectively *allocate limited resources*, permittees will be held to the same standards as those throughout sage-grouse habitat."). *See* Letter from Secretary Jewell to U.S. Senator Risch (June 16, 2015) (emphasis added) (Appendix 15). Yet, the agencies make no attempt to disclose the increase in agency resources to complete these enhanced livestock measures and costly withdrawal process under FLPMA. The agencies have not appropriately analyzed the cumulative impacts of this significant last-minute change.

iii. The Proposed Plan arbitrarily aggregates all the threats to sage-grouse in Idaho without justification.

After examining the rationale for such overreaching proposal, Idaho cannot find any scientific or other substantive justification for the SFAs. The only aspect of the FEIS that may remotely explain this shift is buried in Appendix G. In Appendix G, the BLM aggregates the 18 threats identified in the 2010 Finding into three measures: sagebrush availability, habitat degradation, and density of energy and mining. FEIS at G-4. The FEIS represents the first time the threats have been grouped in this way. Aggregating 18 threats of varying severity is never mentioned in the COT Report or the DEIS. Further, it appears from the FEIS that these three measures are given equal weight. This strategy requires BLM to direct limited resources towards threats that may not impact sage-grouse in any measurable way, instead of focusing resources towards primary threats that could devastate sage-grouse habitat and population. There is no scientific reason for elevating secondary threats to primary threat status, and perhaps just as important, the agencies' cannot simply walk away from their responsibilities to execute Secretary Jewell's direction on wildfire, see e.g. Secretarial Order 3336 because they have utilized precious agency resources in a counter-productive fashion.

The Proposed Plan does not provide justification for its decision to aggregate every threat to the species. Inexplicably, the BLM is proposing nearly 3 million acres for mineral withdrawals in Idaho. Such a proposition requires the Secretary of Interior to initiate a formal process to withdraw those acres, which can take years and exhaust incalculable resources and time to confront a virtually non-existent threat in Idaho. The Governor's review of this document finds no justification for aggregating these threats, and particularly for treating secondary threats as primary threats.

B. The Proposed Plan Significantly Disrupts other Foundational Elements of the Governor's Plan

Along with the inclusion of the misguided SFA proposal, other last-minute National Direction either directly conflicts, convolutes, or misapplies the direction in the Governor's Plan. While all aspects of the Governor's Plan are part of an integrated outcome-based strategy within

an adaptive management construct, and therefore essentially for securing a broad-base of collaborative support, the below components are central pillars to supporting the overall structure and design framework of the Governor's Plan. Unfortunately, the Proposed Plan fails to recognize the integrated nature of the Governor's Plan and jettisons many key details without adequate justification or explanation.

i. Adaptive Management

The Governor's Plan provides a comprehensive and innovative adaptive management construct that embraces the uncertainty of how primary threats, especially wildfire, manifest themselves on the landscape and affect the species over time. This construct also provides an opportunity for the state, based on its particular expertise, to prioritize and focus resources on the optimal sage-grouse populations and habitat.

To support this adaptive construct, the Governor's Plan relies on a science-based integrated plan design that divides sage-grouse habitat in several important ways. *See* DEIS at 2-79 – 2-81 (for a description of the adaptive management construct). First, the Governor's Plan designates a Sage-Grouse Management Area that includes the entire known sage-grouse population and subdivides the SGMA into four individual Conservation Areas (CA). DEIS at 2-77. Each of these CAs are divided into three habitat management zones: Core (CHZ), Important (IHZ), and General (GHZ) representing a management continuum. The CHZ and IHZ constitute approximately 95% of Idaho's sage-grouse population across 7.5 million acres of federally-managed lands. DEIS at 2-77.

The adaptive triggers were designed to serve as a regulatory backstop largely to deal with the uncertainty of wildfire and apply to each Conservation Area in the following manner: First, IDFG collects annual sage-grouse population and habitat data and compiles it into useable forms to measure habitat and population trends; and second, habitat and population data are then utilized to determine change, and whether that change is significant enough to warrant a change in management, as compared against a 2011 baselines within each CA. DEIS at 2-80.

Using the appropriate data, the adaptive triggers were designed to focus on the most important habitat within each habitat zone, which according to IDFG, is nesting and wintering habitat. The state recognizes, as defined at G-1, that the Biologically Significant Units (BSUs) described in this Proposed Plan (AM-6), are all modeled nesting and delineated wintering habitats, which based on 2011 data, occurs within the CHZ (PHMA) and IHZ (IHMA) within individual CAs. Hence, the BSUs are a continual refinement of Idaho's modeled nesting habitat and delineated wintering areas; using the sage-grouse key habitat map to remove non-habitat and habitat acres lost (e.g. due to wildfire) or add acres gained (e.g. restored acres by conifer removal) as necessary.

The Governor's Plan utilizes two types of triggers to measure that significance. Soft triggers apply when there is a 10% loss in habitat or population in CHZ, or a 20% loss in IHZ

within an individual CA. A hard trigger applies when there is a 20% loss of habitat or population within CHZ within an individual CA. The population trigger is measured by calculating a finite rate of change between successive years for sage-grouse population within a habitat management area (CHZ or IHZ) within a Conservation Area.[13] Leks are found in sage-grouse nesting habitat, which are all within BSUs. The ratio of males counted in a pair of successive years estimates the finite rate of change at each lek site in that one year interval. These ratios can be combined across leks within a population for each year to estimate that finite rate of change for the entire population of a habitat zone within a conservation area. DEIS at 2-80.

The population is measured over a period of three years because small game populations typically fluctuate among years due to weather and other environmental variables. A finite rate of change for any given year is not very meaningful. However, a series of years where the finite rate of change remains at or above 1.0 indicates a stable to increasing population.

Soft triggers serve as an early warning signal for the agencies and the Implementation Task Force to observe habitat and population loss, determine casual factors, and evaluate whether action is necessary on an annual basis. The soft trigger does not mandate any particular management response. *Id*.

By contrast, the tripping of a hard trigger requires mandatory action. *Id*. When a hard trigger is "tripped" several actions are set in motion. Within the relevant CA, the IHZ nesting and wintering habitat is managed according to the management direction for the adjacent CHZ. *Id.* This action would primarily impact the ability to consider future infrastructure projects. As part of this process, the Implementation Task Force first analyzes whether a primary threat (i.e., wildfire, invasive species, or large-scale infrastructure development) was the causal factor and takes the mandatory action associated with that threat. Only after evaluating the primary threats, the Team evaluates secondary threats, such as improper livestock grazing to determine if additional management action is necessary. *Id.* at 2-81. This approach allows the agencies to address significant habitat and population loss in real time, and make focused decisions based on threats that are actually occurring, instead of speculating what *might* occur years down the road. *See* E.O. 2015-04, App. 2 (noting that the Governor's adaptive triggers are "consistent with the COT," and that "[t]he use of a "hard trigger" that, if tripped, requires IHZ to be managed as CHZ, with infrastructure development subject to the same standards in both zones. In essence, if applied to all Conservation Areas, the CHZ would almost double in size. This would add the conservation benefit of CHZ to IHZ until no longer necessary."). As evidenced by the foregoing,

[13] The Proposed Plan language potentially confuses these trigger definitions and the landscape scale over which these triggers are measured. For example, in AM-7 through AM-10, the Proposed Plan notes that the BSU measurement applies to habitat triggers (i.e., a 10% loss of key habitat within the BSU), while the Conservation Area scale seems to apply to population triggers (i.e. 20% decline…within a Conservation Area). While the state recognizes the need for both a habitat and population trigger, the Proposed Plan language needs to better clarify and provide a complete set of maps to properly evaluate whether the language is fully consistent with the Governor's Plan; otherwise this critical component is subject to individual interpretation and inconsistent application.

the adaptive construct is a critical piece of the Governor's Plan and must be precisely defined and applied to ensure continued stakeholder buy-in.

While the Proposed Plan purports to adopt Idaho's three-tiered habitat approach (MA-2), the Proposed LUPAs actually creates a fourth habitat zone with the designation of SFAs (MA-10). As noted above, the Governor's trigger strategy and its management responses are effective because of the three-zone approach, particularly where the IHZ can serve as a savings account in case of severe wildfires. However, the inclusion of the SFA zone adds a fourth management layer (the SFA overlay is not consistent with the CHZ), and complicates this approach. The Proposed Plan does not account for nor analyzes this last-minute change on the adaptive construct and is inconsistent with the Governor's Plan.

A fourth habitat zone, particularly when it includes non-CHZ areas and additional management criteria, could effectuate the creation of two buffer zones. Having two buffer zones minimizes the effectiveness of the overall strategy because it complicates the process for collecting usable data and delivering timely and appropriate management responses. As the State pointed out in its DEIS comments, Alternative D's map depicting the zones was problematic to the adaptive construct because the proposed PHMA was too large and the secondary buffer zone was too small to implement a meaningful management response. Again, the Governor's adaptive management construct is consistent with the COT Report because the on-the-ground information accurately categorizes the sage-grouse habitat providing for a more robust regulatory mechanism. With the inclusion of the SFAs, and the lack of explanation of how this fourth zone integrates with the Governor's Plan, the Proposed Plan repeats the flaw in Alternative D and leaves this critical question open to subjective interpretation.

Next, both the process and management responses articulated in the Governor's Plan have been altered. AM-11 seems to be consistent by suggesting that at the soft trigger level, the Implementation Team "would evaluate casual factors and recommend potential implementation level activities." Some of these recommended responses (FEIS App. G at G-34); however, are inconsistent with the Governor's approach, such as not "allowing any new infrastructure development…*with no exceptions*." (emphasis added). Similarly, the adaptive response to livestock grazing recommends that management changes and "assessment of specific habitat metrics" will occur if grazing is "suspected to be a casual factor" at the soft or hard trigger level. This is inconsistent (or at least ambiguous) with the Governor's Plan and should be adjusted accordingly.

The Forest Service, on the other hand, exacerbates the ambiguity in GRSG-AM-ST-11, stating, "if a soft trigger is identified, *apply more conservative or restrictive implementation measures*," including "modifying seasons of use for livestock grazing." Nothing in the Governor's Plan requires a mandatory action at the soft trigger level.

This inconsistent approach also extends to the implementation of the hard triggers. Again, the Forest Service appears to dramatically depart from the expected analytical framework

in GRSG-AM-ST-10 by noting that "if a hard trigger is identified, immediate action is necessary to stop a severe deviation from GRSG conservation objectives…an appropriate component of a more restrictive alternative analyzed in the environmental impacts statement will be implemented." While the Governor's Plan requires the appropriate and mandatory defined management response, this language is so ambiguous that prevents meaningful consistency analysis. For example, does the Proposed Plan language imply that IHZ will be managed as CHZ, or something more drastic like a Zoological Area designation or a 25% cut to all livestock grazing will be imposed? This language must be adjusted prior to the issuance of the ROD. As to the BLM, AM-12 does not follow the adaptive process outlined in the Governor's Plan. The Proposed Plan states that when a hard trigger is tripped, "the Implementation Team would evaluate casual factors and recommend additional potential implementation level activities." This language is inconsistent with Appendix G-29 outlining that "[o]nly where the monitoring information indicates the cause(s) of the decline is not a primary threat will the Sage-Grouse Implementation Task Force analyze the secondary threats to the species…."[14] The Proposed Plan does not explain why this important step in the process is omitted and treats all threats equally, contrary to the Governor's Plan and the COT Report.

This adaptive process is not only highly important from a sage-grouse perspective, but if it is misapplied or not clearly defined, the adaptive responses could also materially impact the livelihoods of Idaho citizens. To be clear, economic development was not the motivating factor for the Task Force. But, to deviate from the Governor's Plan, without appropriate justification, does little to further the cooperative relationship between the federal agencies and the Task Force. Moreover, as cooperating agencies, there is no excuse for the agencies to have different approaches to this important aspect of the Proposed Plan or lack internal consistency with their own documents. Without curing these issues before executing the Record of Decision, the Proposed Plan's approach to adaptive management will be fatally defective under FLPMA as a collaborative outcome.

ii. Disturbance Caps

As stated above, one of the principle objectives of the Governor's Plan is to help the agencies prioritize limited agency resources and focus those resources on addressing Idaho's primary threats to sage-grouse. Although large-scale infrastructure development is a primary threat range-wide, the Governor's Plan places this threat in the appropriate site-specific context and provides opportunity for high value projects. The exemption criteria for the CHZ, and the project-level screens for the IHZ, can appropriately be viewed as creating a series of hurdles a project proponent must satisfy before obtaining a permit from BLM or the Forest Service. This exemption and screening process allows the Implementation Team to review a project application, and if the criteria are not satisfied, it can recommend to the Governor not to move forward with the project. With additional detail regarding the Implementation Team, the FWS found the Governor's approach to large-scale infrastructure consistent with the COT Report.

[14] Additionally, as noted in the livestock grazing section, the adaptive response in G-35 is highly objectionable and needs additional clarification.

Based on this approach, and the fact that infrastructure disturbance "was not identified as a major concern causing the loss of habitat in Idaho," neither of the Preferred Alternatives in the DEIS included disturbance caps. FEIS, Appendix G-14. In fact, Alternative D specifically noted that due to the actual threat level, and the implementation of the mitigation standard "no net unmitigated loss," that disturbance caps were not necessary. *Id.* Alternative B, based on the NTT Report, did include a 3% project-level disturbance cap. However, as the Governor stated extensively in his DEIS comments, the NTT Report is a fatally flawed document and should not be applied in Idaho. The team that developed the NTT report did not include the two leading greater sage-grouse biologists, and the scientists involved had less than fifteen years of experience studying the species. The NTT Report was not peer reviewed and the science panel that did review it was very concerned about its recommendations. *See* State of Idaho DEIS Comments, Appendix 18.

Despite the agencies' conclusions and the overall framework in the Governor's Alternative, the FWS nevertheless "indicated that inclusion of such a disturbance threshold *was necessary* in order for USFWS to have the assurance and certainty necessary when assessing GRSG listing." FEIS App. G at G-14. Inclusion of a project-level disturbance cap in the Proposed Plan (AD-1) is based almost exclusively on one study. *See¸ Knick* et al. (2013). The Proposed Plan admits as much noting that the BLM used the findings of Knick et al (2013) to "inform management at a broader scale that would help determine management actions based on disturbance evaluations." *Id*. However, Knick et al (2013) has very little to do with disturbance caps and in fact, never uses that term in the study. Dr. Knick's study "identified environmental characteristics that varied least at locations where a species occurs and mapped a habitat similarity index relative to the multivariate model of ecological minimums for the western portion of the sage-grouse range." *Id.* Further, there were numerous other studies that were more relevant to disturbance caps. In fact, Dr. Knick points out that his results were "based solely on lek locations" and that "other seasonal use areas and habitat requirements may be equally limiting to sage-grouse populations." *Id.* Accordingly, the Governor believes the recommendation for a uniform project-level disturbance cap is not based on the best available science, and that his plan adequately addresses concerns about disturbance.

Even so, the Proposed Plan's project-level cap is confusing and unworkable. *See* FEIS App. G at G-13 for the formula. Given that BLM admitted that with a low threat level and "its measurement and applicability was not defined and deemed highly problematic to implement in a meaningful way," there is no rational explanation to overly complicate this issue. Yet, that is exactly what the Proposed Plan does. For those with valid and existing rights, as explained in the infrastructure section below, the application of this unworkable formula will undoubtedly increase permitting costs and stymie project development through endless litigation. As such, the agencies need to revisit this formula and the need for a project-level cap before issuing the ROD.

iii. Mitigation

Governor Otter's strategy is in many ways in and of itself a mitigation plan. The zonal structure and management continuum encourage development outside of CHZ, and to a lesser extent IHZ, to ensure a high level of conservation for the best habitat and the highest concentration of birds. The Governor's Plan accomplishes this by creating either a general presumption of no new development with an exemption process in the CHZ, or by permitting the activity provided a series of hurdles or project screens can be met in the IHZ; accordingly, each zone progressively allows for more multiple-use activity as dictated by the overall habitat quality. *See generally* E.O. 2015-04. Another important aspect to this management continuum is the predictability it affords project developers. Recognizing the general prohibition in CHZ, and to a lesser extent the project screens in the IHZ, developers will recognize that the best course of action (provided it is feasible with the particular resource; if not, mitigation options are available) if possible may be to site their project in the GHZ. As more fully described in the Infrastructure section, the Proposed Plan is inconsistent with this approach.

Specifically, the CHZ exemption criteria requires that any proposed infrastructure development will not accelerate or cause a population decline. E.O. 2015-04; *see also* COT Report at 51-52 (noting that energy development in PACs do not necessarily need to be excluded from consideration). To proceed with the exemption process, a project proponent would submit their plan to the Governor's Implementation Task Force to review whether the project could meet the exemption criteria. The Implementation Task Force would submit its recommendation to the Governor for inclusion in the project-level NEPA analysis.

If the impacts cannot be sufficiently avoided or minimized in CHZ, the residual impacts must be mitigated consistent with the State's "in-lieu" of fee framework. DEIS 2-81. Where the project cannot meet the CHZ criteria, the Implementation Task Force would recommend to the proponent to modify their proposal and/or recommend to the Governor that the project not proceed. It is important to note that this state process is not a substitute for the agencies' obligations under NEPA. An applicant would still have to go through the normal permitting process with BLM or the Forest Service. The Task Force's approval is a recommendation that the proponent has satisfied the state's interests. Not only does it provide another regulatory mechanism to protect the best habitat, but it also places the threat of infrastructure development in the appropriate context. Mitigation can occur where it is needed.

The agencies throughout this planning process have disrupted and complicated this important mitigation aspect by: 1) failing to consistently articulate and define a mitigation standard; and 2) applying this undefined standard, along with a very rigid mitigation hierarchy, and other stringent project level screens across all habitat zones. The DEIS, and to some extent the COT Report, articulated the mitigation objective as "no net unmitigated loss." DEIS 2-74. In the State's DEIS comments, there was concern that this standard was not well defined and could lead to subjective interpretation and a lack of predictability for potential development. For purposes of the DEIS comments, it was assumed that "no net loss" would mean a 1:1 ratio of habitat, but also noted the difficultly in achieving this standard because restoration projects do not always produce expected and durable results.

The Proposed Plan exacerbates these concerns. In fact, the Proposed Plan obfuscates the issue (MIT-3) by requiring that "[i]n all GRSG habitat, in undertaking BLM management actions, and, consistent with valid, existing rights and applicable law, in authorizing actions that result in habitat loss and degradation…the BLM will require and ensure mitigation that provides a net conservation gain to the species…."[15] So rather than address the issues associated with the first standard, the agencies shift to a completely different standard without vetting it with the public or, more importantly, bringing it forward for fair negotiation with Idaho under FLPMA. In fact, the agencies do not provide any real justification for the shift except to state, at FEIS 2-4, that the "net conservation gain strategy is in response to the overall landscape-scale goal which is to enhance, conserve, and restore GRSG and its habitat." There is no further discussion of why the "no net loss" strategy does not adequately conserve sage-grouse, especially given that the agencies admit that infrastructure development is not a major concern in Idaho, or how the net conservation gain strategy will better reduce those alleged threats.

Related to this bizarre approach, the agencies failed to seriously analyze any alternative mitigation standard. This new mitigation standard was not identified in the DEIS or the COT Report, but rather in the FWS's Greater Sage-Grouse Range-wide Mitigation Framework. In that document, the FWS states it would not evaluate programs with a "no net loss" standard less protective of the species "because they are unlikely to positively influence the conservation status of the species." Framework, at 4. There was no environmental analyses or public review to support this statement. Additionally, in Table 2-11, the Proposed Plan states – and by so doing does not take the requisite "hard look" – the impacts of the Proposed Plan are the same as Alternative D. This is confusing, because the phrase "net conservation benefit" implies a higher standard and substantial cost increases for potential development, but yet this plan admits that its effectiveness will be the same as "no net loss." Accordingly, the agencies must analyze alternatives to this mitigation standard in a SEIS before adopting it in a ROD.

Second, aside from the standard itself, MIT-3 applies this undefined standard across all habitat, including the GHZ. This directly contradicts the Governor's Plan and will frustrate the zonal and management continuum approach. This shift will also contradict county siting plans as the Proposed Plan's mitigation standard in GHZ will push many project proponents to private land. *See* Letter from Owyhee County Commissioners (June 8, 2015), (Appendix 19) (stating that the recent permit renewal process in Owyhee County "segregated management of public lands and dictated the application of blanket management strategies on those … without regard to the impacts on intermingled or adjacent [land] ownerships.").

A supportable aspect of the Proposed Plan's mitigation approach is (MIT-2) where "[t]he BLM and Forest Service, in coordination with the GRSG Conservation Team would develop a Mitigation Strategy within one year of the issuance of the Record of Decision. In Idaho this strategy would be consistent with Idaho Mitigation Framework." Depending on the level of coordination, this could provide a level of certainty for developers as it may provide a better path forward than a project-by-project approach. However, because it is difficult to determine how effective mitigation projects will be implemented, potential developers will likely be required to

[15] The Forest Service's proposed language (GRSG-GEN-ST-005) does not clarify the issue, and states that "residual impacts to GRSG or their habitats are fully offset by compensatory mitigation projects that provide a net conservation gain to the species." That rigid approach to fully offset will likely be difficult to implement.

agree to compensatory mitigation and thus will likely pay double what they would under the "no net loss" standard. This policy is inconsistent with Idaho policy.

C. The Governor's Plan for Large-Scale Infrastructure is Commensurate with the Threat Level in Idaho and Provides an Adequate Regulatory Mechanism

Numerous elements of the Proposed Plan are inconsistent with and materially disrupt the Governor's Plan for permitting large-scale infrastructure development in sage-grouse habitat. As with the four foundational elements, the last-minute National Direction from the Department of the Interior largely eviscerates the Governor's pragmatic solution of conserving the species while also providing a meaningful and predictable opportunity for current and future development to occur on federally-managed lands. This section identifies the numerous and reoccurring inconsistencies that permeate all Management Actions (or LUPA language) in the infrastructure portion of the Proposed Plan, and demonstrate how these inconsistencies frustrate the purposes and objectives of the Governor's Plan.

The Governor's Plan in general, and large-scale infrastructure in particular, is based on a "flexible management continuum" – at one end of the continuum is a generally restrictive approach to ensure the conservation objectives in CHZ are met, while also providing a more flexible approach for project siting at the other end, particularly in GHZ. E.O. 2015-04, App. 1 at 5; *see also* E.O 2015-04, App. 1 at 55. Simply stated, the Governor's Plan functions as a broad-scale mitigation plan by removing land-use level project screens in certain habitat zones to maintain a high level of conservation benefit for the species in the habitat that is the most valuable to the bird. This approach utilizes the best available science to understanding the severity of threats in *Idaho* and provides a conservation approach commensurate with that threat level. Thus, the management continuum approach provides a reliable and durable benefit for the greatest amount of the birds in CHZ, and for developers, certainty and predictability in GHZ and the IHZ. E.O. 2015-04, App. 1 at 5. And just as important, it meets the requirements of federal agencies to provide for multiple-uses of federally managed lands, while allowing the agencies to prioritize limited resources on conserving the best sage-grouse habitat in Idaho.

More specifically, new infrastructure development in the CHZ is generally prohibited; except for valid existing rights and/or incremental upgrades or capacity increases of existing infrastructure subject to limitations. *Id*. at 33. Notwithstanding this general prohibition, the Governor's Plan provides a limited exemption process that focuses on ensuring the population objectives for that particular Conservation Area are being met. *Id. at* 34. In IHZ, new infrastructure is generally permitted subject to certain criteria similar to (but not a mirror image of) the BMPs required for proposing a project under the CHZ exemption process. *Id. at* 40. In GHZ new infrastructure is generally open for development with no special land-use planning level sage-grouse hurdles; thus, encouraging development in areas containing 5% of the State's population. *Id. at* 43, *see also* DEIS ES-15-16, FEIS 2-81-82.

The above-described National Direction is the primary disrupter for both the management continuum and the specific infrastructure provisions in several important respects. First, the designation of SFAs creates a *de facto* fourth habitat zone, including two significant and material changes to large-scale infrastructure development with: a) an unprecedented and unnecessary mineral withdrawal; and b) an NSO stipulation without exception or modification for fluid mineral development. *See* MA-10, GRSG-M-MM-ST-0102-Standard. The National Direction also imposes lek buffers and required design features (RDFs) (AD-6) in all habitat zones (FEIS at 2-33; and Appendix DD), and introduces the new and vaguely defined "net conservation gain" for exemption screening criteria in PHMA, and for mitigation generally even for in the GHZ (AD-4). Finally, the Proposed Plan does not clearly explain the disturbance cap at the biologically significant unit (BSU) level and introduced a new an unnecessary project-level disturbance cap (AD-1); and despite assertions to the contrary, does not adequately protect valid and existing rights. All told, this National Direction blurs the distinctions between the habitat zones and renders the state's extensive mapping exercise effectively moot.

In sum, the Proposed Plan for large-scale infrastructure eliminates the management continuum making it *per se* inconsistent with the Governor's Plan. The last-minute National Direction effectively forecloses any new development in CHZ, treats the areas within the IHZ like the Governor's proposal for CHZ, and only theoretically leaves the General Areas open for new development. But after application of the net conservation gain standard, lek buffers, and RDFs in GHZ, these areas are more fairly characterized as *de facto* avoidance areas. Accordingly, not only does the Proposed Plan's approach to infrastructure development differ radically from the Governor's Plan, but it also subordinates all uses to sage-grouse in contravention of FLPMA's multiple-use mandates.

Described below are the specific activity inconsistencies between the Governor's Plan and the Proposed Plan, divided into five primary categories: transmission lines and pipelines, mining, fluid mineral development, transportation, and renewable energy

i. Transmission and Pipelines (Lands and Realty)

The Governor's Plan considers high voltage transmission lines, major pipelines, highways and other large-scale anthropogenic features as large-scale infrastructure, while the agencies define these features in several different ways in the Proposed Plan. For example, there are two types of rights-of-way (ROWs) that BLM addresses in its Lands and Realty section. According to Table 2-2, ROWs can mean both high-voltage transmission lines and also "minor ROWs." FEIS at 2-16. However, after examining the LUPAs, BLM does not clarify which version of ROW it is applying to a particular management action. Moreover, the Proposed Plan occasionally specifies it is applying a Management Action to transmission lines specifically, without reference to a ROW. Despite this lack of clarity, this section will address linear features (e.g., high-voltage transmission lines, pipelines, and highways), and consider references to ROWs in the Management Actions of the Proposed Plan as applicable to these linear features.

The Governor's Plan for these linear features employs the above-described management continuum. The agencies' overall management approach found in the Proposed Plan for these linear features is inconsistent with the carefully crafted, three-tiered habitat approach found throughout the Governor's Plan. In fact, many of these inconsistencies stem from the overall presumption that any human activity will negatively impact sage-grouse and must be a subordinate use. This myopic and legally flawed view forces the adoption of rigid measures that fail to account for the importance of safe, reliable, and affordable delivery of energy services in Idaho. Additionally, these inflexible measures place many unnecessary hurdles on energy providers to maintain existing infrastructure.

The Governor's Plan for infrastructure, with its accompanying management continuum, presumes that new high voltage transmission lines and major pipelines are prohibited in the CHZ, except if developed pursuant to a valid and existing right or incremental upgrade and/or capacity increase subject to applicable best management practices (BMPs). E.O. 2015-04, App. 1 at 33. Notwithstanding this prohibition, there is a limited exception process outlined in Section (D)(4)(ii) of the regulatory language in the Governor's Plan. *Id. at* 34. This is a sensible approach that recognizes the need to conserve sage-grouse and maintain the State's population objectives in this important habitat, but does so in a way that does not impair the efficient delivery of electrical services.

Any reference to SFAs in the Lands and Realty section is both inconsistent with the stated intent of the Proposed Plan (MA-10; GRSG-M-MM-ST-102)(*i.e.* that the SFA designation only applies to hard rock mining, livestock grazing, and fluid mineral development), and the Governor's Plan because it creates a fourth-tier of habitat categorization. As such, any reference to SFAs in the Proposed LUPAs should be eliminated. Specifically, references in GRSG-LR-SUA-O-012, GRSG-LR-SUA-ST-013, GRSG-LR-SUA-ST-015, GRSG-LR-SUA-ST-016, GRSG-LR-SUA-ST-017, GRSG-LR-SUA-ST-018, GRSG-LR-SUA-ST-019, GRSG-LR-SUA-ST-020, GRSG-LR-SUA-GL-021, GRSG-LR-LOA-ST-022, GRSG-LR-LOA-GL-023, and GRSG-LR-LW-GL-024 are inconsistent with the Governor's Plan because of the reference to SFAs.

Additionally, the BLM's Proposed Plan at LR-1 indicates that PHMA is treated as avoidance for new ROWs, "consistent with AD-3 and subject to RDFs, buffers and seasonal timing restrictions." FEIS at 2-48. In the Forest Service section of the Proposed Plan at GRSU-LR-SUA-ST-013, new lands special use authorizations for infrastructure in PHMA, IHMA and SFA are restricted. *Id. at* 2-62. Exceptions to this presumption in the Forest Service section of the Proposed Plan "must be based on a rationale (e.g. monitoring, modeling, or best available science) that explicitly demonstrates that adverse impacts to GRSG will be avoided by the exception." *Id.*

While GRSG-LR-SUA-ST-013 and the portion of LR-1 dealing with PHMA appear to adopt the same approach as the Governor's Plan, after carefully examining the CHZ exemption criteria, the agencies' Proposed Plan is inconsistent. The BLM's exception criteria, as expressed

in LR-1, alters the Governor's Plan by requiring that the project-level disturbance cap is not exceeded within a BSU. *Id. at* 2-48 (*See also* AD-1 at FEIS 2-19, and GRSG-GEN-ST-004 at FEIS 2-59 discussing disturbance caps in this Consistency Review). By contrast, the Governor's Plan has a disturbance cap only for fluid mineral development, and does not apply this unnecessary and difficult to implement measure to transmission lines, roads, and pipelines; accordingly, AD-1 and GRSG-GEN-ST-004 are inconsistent with the Governor's Plan.

Setting aside the discussion about the propriety of a disturbance cap in Idaho, see above, the agencies are misapplying that conservation tool by calculating the disturbance of "linear features" as the ROW width instead of the direct footprint. *Id. at* 2-30. Using the entire ROW width to calculate the direct footprint of disturbance for power lines will inevitably over-estimate the amount of disturbance, and is even inconsistent with recent Idaho BLM decisions regarding direct impacts (*see, e.g.*, Gateway West Final EIS, Section 3.1.5 and Figure 3.1-2 looking at disturbance of specific actions within the ROW to calculate impacts and not assuming the entire ROW would be disturbed). GRSG-LR-SUA-ST-013-Standard is also inconsistent with the Governor's Plan because it fails to define the exemption criteria.

There are also significant differences between the BMPs required by the Governor's Plan and the RDFs/AD criteria required in the Proposed Plan. AD-3 includes the post-DEIS "net conservation gain" standard for sage-grouse, which is not found in the Governor's Plan nor the other co-Preferred Alternative. *Id. at* 2-32 (applying the "no net unmitigated loss standard"). Lek buffers, in the Proposed Plan are uniformly calculated at 2 miles (*See* FEIS App. DD at DD-1), which is inconsistent with the Governor's Plan requiring a buffer for this type of infrastructure to be set at .6 miles *See* E.O. 2015-04 at (II)(c)(ii)(2); and Idaho State Bd. of Land Comm'rs, Greater Sage- Grouse Conservation Plan at section 14.1.2 (2015).

Further, unlike in the Governor's Plan, the agencies do not provide appropriate considerations regarding the necessity of linear infrastructure maintenance. Utilities and citizens must be confident that the services they rely on will remain in place, uninterrupted. While AD-8 does make exceptions for emergencies, it fails to define "emergency" leaving this potentially helpful tool without meaningful application; and AD-9 does not explicitly allow for the maintenance of such infrastructure. FEIS at 2-34.

Specific RFDs also either conflict directly with the Governor's Plan, or are inconsistent because they are not contained within the Governor's Plan. For example, "[n]ew transmission lines . . . will be deemed co-located and/or permissible if construction occurs between July 1 and March 14 (or between July 1 and November 30 in winter concentration areas) and within one kilometer either side of existing 115kV or larger transmission lines to create a corridor no wider than two kilometers." E.O. 2015-04, App. 1 at 44. If a developer can demonstrate that a new transmission line will not cause declines in sage-grouse populations or if the activity reduces cumulative impacts and/or avoids other important natural, cultural or societal resources, a developer can construct outside of the two kilometer corridor. *Id.* Several of the RDFs proposed by the agencies conflict with this BMP. RDF 59 directs developers to consider co-locating

power lines, flowlines, and pipelines under or immediately adjacent to a road or adjacent to other pipelines first, before considering co-locating with other ROWs. FEIS App. B-7. Additionally, RDF 62 states "Place new utility developments (power lines, pipelines, etc.) and transportation routes in existing utility or transportation corridors. *Id*.

There are inconsistencies between timing restrictions between the Governor's Plan and the Proposed Plan with respect to activities and noise levels during lekking periods. Additionally the lekking periods are defined differently in the Governor's Plan BMPs and RDF 63, which incorporates the construction and development activities seasonal restrictions found in Appendix C. (*See* FEIS App. C at C-1 – Seasonal Timing Restrictions – during lekking periods, as determined locally (approximately March 15 through May 1 in lower elevations and March 25 through May 15 in higher elevations), project activities will be avoided to the extent possible within 1km of occupied leks between 6:00 pm and 9:00 am to avoid disturbance to lekking and roosting sage-grouse). The Governor's Plan keeps noise under 10dBA above ambient noise from 6:00 pm to 8:00 am during the initiation of breeding (March 1 through May 15). E.O. 2015-04, App. 1 at 45.

The specific RFDs required by the Proposed Plan, and omitted from the Governor's Plan, are:

- RDF 52 – burying distribution power lines and communication lines within existing disturbances;
- RDF 53 – seeding above-ground disturbance areas with perennial vegetation;
- RDF 54 – placing infrastructure in already disturbed locations where the habitat has not been fully restored;
- RDF 55 – clustering disturbances, operations and facilities as close as possible;
- RDF 60 – restricting the construction of tall facilities and fences to the minimum number and amount needed; and
- RDF 61 – using free standing structures where possible, to limit the use of guy wires.

These RDFs are inconsistent and should be eliminated.

The Governor's Plan for infrastructure in IHZ permits transmission line and pipeline development as long as certain criteria are met. E.O. 2015-04, App. 1at 40. By contrast, the BLM's Proposed Plan at LR-1 designates and manages IHMA as an "ROW avoidance area, consistent with AD-4 and subject to RDFs, buffers and seasonal timing restrictions." FEIS at 2-48. The Forest Service section of the Proposed Plan treats IHMA identically to PHMA and SFA; thus blurring the lines between the different habitat zones. *Id. at* 62. Because the language used by the agencies is nearly identical (with the exception of applying AD-4 instead of AD-3 in the BLM's Proposed Plan), all of the inconsistencies between the Governor's Plan treatment of CHZ, and the agencies treatment of PHMA mentioned above apply to this habitat categorization.

Moreover, because the agencies' Proposed Plan utilizes the same management criteria for PHMA as IHMA, it is inconsistent with the Governor's three-tiered approach. This disruption to the management continuum is unacceptable, and interferes with the Governor's pragmatic solution that conserves the species while also providing meaningful opportunity for current and future development to occur on these public lands.

The Governor's Plan for infrastructure in GHZ leaves open the possibility for development of high voltage transmission lines and major pipelines. E.O. 2015-04, App. 143. By contrast, the BLM's Proposed Plan at LR-1 designates and manages GHMA as open "subject to RDFs, buffers and seasonal timing restrictions." FEIS at 2-48. In the Forest Service section of the Proposed Plan at GRSU-LR-SUA-ST-014, new lands special use authorizations for infrastructure in GHMA "may be issued for infrastructure . . . if they can be located within existing designated corridors or ROWs and the authorization includes stipulations to protect GRSG and their habitats." *Id.* at 2-62. As noted in the mitigation section, the Governor's Plan itself is a mitigation plan that encourages development in GHZ, and does so to a lesser extent in IHZ. Placing these additional project screens in GHZ is inconsistent with this approach.

The BLM's Proposed Plan is also inconsistent with the Governor's Plan because it requires developers to comply with RDFs, buffers and seasonal timing restrictions across all habitat zones. The Governor's Plan only applies its Infrastructure BMPs to CHZ and IHZ. E.O. 2015-04, App. 1at 43. Similarly, the Forest Services' Proposed Plan is inconsistent with the Governor's Plan because it requires infrastructure to be located within existing designated corridors, which the Governor's Plan does not require. It is also unclear what "stipulations to protect GRSG and their habitats" might entail, and provides little to no certainty for developers.

Lastly, Idaho adopted the Idaho Emergency Operations Plan, Emergency Support Function Annex #12: Energy (ID-ESF #12) in May of 2015. "The purpose of the ID-ESF #12 is to: (a) coordinate the restoration and protection of Idaho's critical electricity, natural gas, and fuel supply delivery infrastructure; and (b) provide a systematic framework for managing energy emergencies and for preventing shortfalls from escalating to crisis situations whenever possible." Bureau of Homeland Sec., Idaho Emergency Operations Plan,ID-ESF #12 at 1. ID-ESF #12 aims to ensure that energy is reliably delivered to Idaho citizens and ratepayers. The agencies' Proposed Plan, materially disrupts the purpose of ID-ESF #12, and is therefore inconsistent.

AD-5 states that "[c]o-locating new infrastructure within existing ROWs . . . is preferred over the creation of new ROWs . . ." FEIS at 2-33. The term "co-location" is defined as "adjacent to current ROW boundaries . . ." *Id.* The Forest Service counterpart to BLM's AD-5 is GRSG-LR-SUA-ST-020-Standard directing developers to "co-locate new infrastructure with existing infrastructure to limit disturbance to the smallest footprint, or where it best limits impacts to greater sage-grouse or their habitats." FEIS at 2-63. These provisions fail to consider that certain electrical power lines require adequate separation from existing power lines for reliability and safety purposes and electrical utilities may not be able to locate power lines adjacent to current power line ROW boundaries to maintain reliable electric service. In other

words, without better clarification, these provisions frustrate the ID-ESF #12 purpose of protecting Idaho's critical energy infrastructure. Requiring energy infrastructure to be located immediately adjacent to existing infrastructure ROWs fails to consider or recognize reliability standards that may require a greater separation distance.

Another aspect of reliable service, and therefore part of the ID-ESF #12 is the ability to maintain transmission lines and pipelines. These objectives are frustrated by the agencies' Proposed Plans because of RDFs 3 and 4, found in Appendix B. RDF 3 requires avoidance of mechanized anthropogenic disturbance in nesting habitat during nesting season, and RDF 4 requires avoidance of mechanized anthropogenic disturbance in wintering areas. FEIS at App. B-2. Limitations of access in the Proposed Plan for transmission lines and pipelines put Idaho utilities and the citizens they serve at risk of major outages and are inconsistent with ID-ESF #12.

ii. Mineral Development in Idaho

a. Locatable Minerals

Mining under the General Mining Law of 1872 is not a primary threat to sage-grouse in Idaho, and as such, the Governor's Plan is consistent with state and federal law providing the adequate regulatory mechanisms for the species. Consistent with that approach, the Governor's Plan plainly states that "[n]othing in this Alternative [Plan] shall affect mining activities conducted pursuant to the General Mining Laws of 1872." E.O. 2015-04, App. 1 at 45. The reason for excluding mining activities conducted pursuant to the General Mining Law of 1872 from this planning effort is two-fold: 1) hardrock mining is a secondary threat according to the 2010 Finding; and 2) hardrock mining has adequate regulatory mechanisms commensurate with the threat level in Idaho. Again, it is the Governor's Plan that is consistent with federal law.

Mining is a Secondary Threat in Idaho

The COT Report, which is the FWS's acknowledged goalposts for this effort, does not provide a scientific basis for altering the Governor's Plan. In fact, the document indicates that mining is not a threat in four sage-grouse populations in Idaho (East Central, Snake-Salmon-Beaverhead, Sawtooth, and Weiser), and only a localized threat to the Northern Great Basin population. COT Report, Table 2 at 23-24; *see also* DEIS 1-28 (outlining the FWS's objective for mining "maintain stable to increasing GRSG populations and no net loss of GRSG habitat in areas affected by mining (USFWS 2013)).

Accordingly, mining under these federal planning documents is not characterized as a widespread threat to sage-grouse in Idaho. In fact, mining – based on the observation of the federal agency responsible for assessing anthropogenic threats to the species – is not a high conservation concern. As noted above, nothing in the FWS's evaluation directed Idaho to develop enhanced measures for addressing the threat of mining.

By contrast, the Proposed Plan is wholly inconsistent with this aspect of the Governor's Plan by proposing the designation of almost 3 million acres of SFAs now recommended for withdrawal from mineral entry; elevating what was believed by the FWS and State to be a secondary threat (without adequate justification); adding required design features and mitigation requirements without regard to the Governor's management continuum; diverting precious agency resources away from the real primary threats by entertaining a costly segregation process under FLPMA § 202; and infringing on valid and existing rights.

Despite the fact that neither co-Preferred alternatives as the DEIS stage recommended these sweeping recommendations, MA-10 and LOC-3 proposed that areas designated as SFAs be withdrawn from the General Mining Act of 1872, subject to valid and existing rights. FEIS 2-54. Moreover, for developers with such rights, LOC-2 will apply "reasonable and appropriate RDFs to locatable minerals consistent with applicable law to prevent unnecessary or undue degradation of sage-grouse habitat when a Plan of Operations is submitted for BLM or Forest Service approval, in accordance with 43 C.F.R. 3809.411(d)(2) or 35 C.F.R. 228.5(a)(3)." *Id.* Similarly, the Forest Service's Proposed Plan, GSRG-M-LM-ST-097 directs the agency to "only approve Plans of Operation if they include mitigation to protect GSRG and their habitat, consistent with the rights of the mining claimant as granted by the General Mining Act of 1872," in PHMA and IHMA. FEIS at 2-72. Lastly, GRSG-M-LM-ST-098 requires developers to keep disturbance at a minimum by implementing a "phased development" approach to operations in all habitat categorizations. FEIS at 2-73.

The actions collectively impose excessive and unexplained government overreach. Indeed, the DEIS implicitly rejected the NTT-like withdrawal proposals noting that "the large increase in areas petitioned for withdrawal under this alternative compared with Alternative A [same direction as Alternative E] would increase the development delays and costs of validity exams on the BLM, Forest Service, or claimant." DEIS 2-192.

Simply stated, there is no justification for the staggering disproportionate size of the recommended withdrawal compared to the small footprint that mineral exploration and development have across the planning area. *See* Bureau of Land Management's Land & Mineral Legacy Rehost 2000 System – LR2000 (noting that in Idaho the number of acres within project are boundaries for Notices of Intent and Plans of Operation – Authorized + Pending Aces is approximated at a mere 10,584 acres). Moreover, this fatally flawed proposal is further exacerbated by the fact that nothing in the DEIS or any other scientific document provides for such an overreach. Even if the underlying scientific record demonstrated a need for something above-and-beyond the existing regulations, LOC-2 (despite its own potential infringements on valid and existing rights) would have been sufficient to conserve the species.

The Proposed Plan is Inconsistent with the General Mining Law of 1872

For over 150 years, the United States has had an official policy of encouraging and facilitating the exploration for and development of the nation's mineral resources on federally managed lands. The General Mining Law of 1872, 30 U.S.C. §§ 22-54, and FLPMA provide the legal framework for hardrock mining operations. In conjunction with the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, they reflect longstanding congressional intent to support the development of minerals that are critical to our national security and prosperity.

The Mining Law extends a unilateral offer granting all persons a statutory right to enter upon Federal lands to explore for and develop valuable mineral deposits. *Union Oil Co. of California v. Smith*, 249 U.S. 337, 346 (1919) ("[The Mining Law] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits …."). Indeed, § 22 of the General Mining Law states that public lands are free and open for mineral exploration and development:

> "[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The General Mining Law ensures the claimant reasonable access to obtain and develop mineral resources. Under the General Mining Law, BLM can work with the miner on how the mining is conducted, but cannot deny the miner access to their claims. On several occasions subsequent to the passage of the General Mining Law, Congress has resoundingly reaffirmed a national policy supporting mineral development.[16]

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[16] In 1955, Congress again reaffirmed its policy towards mineral development by passing the Surface Resources Act, P.L. 84-167 (July 23, 1955), *codified at* 30 U.S.C. §§ 611-615. The Surface Resources Act dealt with the issue of the lack of development on mining claims. In order to alleviate this concern, the Surface Resources Act provides that "[a]ny mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a). The Act also allows multiple use of other surface uses on a mining claim provided "That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as *not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto* . . . ." *Id. at* § 612(b) (emphasis added).With the passage of the Surface Resources Act of 1955, Congress reaffirmed the objective of encouraging development of mineral resources on federal lands. As True Morse, then-Acting Secretary of the Department of the Agriculture stated in a letter to Congress:

> The Department of Agriculture desires to encourage legitimate prospecting, and effective utilization and development of mineral resources of the national forests . . . . We would not favor legislation which would interfere with such development of minerals nor work hardship on the

A person who makes a "discovery" of a "valuable mineral deposit" and satisfies the procedures required for establishing the location of the claim becomes the owner of a mining claim, *i.e.* a constitutionally protected property interest. 30 U.S.C. §§ 22, 23, 26. The United States Supreme Court and other courts have recognized that the essential stick in the bundle of rights making up a mining claim is the right to mine. *Union Oil Co. of California*, 249 U.S. at 348–49 (An owner of a mining claim has "an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States . . . ."); *Forbes v. Gracey*, 94 U.S. 762, 766–67 (1876) (the right to "develop and work the mines, is property in the miner, and property of great value."); *accord United States v. Shumway*, 199 F.3d 1093, 1098–99 (9th Cir. 1999) (The right of an owner of a mining claim to the "exclusive possession of the land for purposes of mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals, and has been the law of the United States since 1866.").

The incorporation of the federal General Mining Law in the Governor's Plan is not surprising. Any land use planning that impairs or prevents the development of mineral resources stands in stark contrast to the longstanding and continuing national policy to encourage and facilitate development of mineral resources and is contrary to the expressed rights granted by the General Mining Law. In this particular area of sovereign authority over public trust resources and Idaho's authority to regulate mining in its state,[17] the Governor's Plan clearly cannot prevent citizens from exercising their rights under the General Mining Law to explore for and develop mineral deposits on federally managed lands.

> bona fide prospector or miner. H.R. Rep. 84-730, at 21, *reprinted in* 1955 U.S.C.C.A.N. 2474, 2493.

Congress also expressed this desire, and recognized that "continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." *Id. at* 6, 1955 U.S.C.C.A.N. at 2479. Accordingly, Congress struck a balance and limited "the exclusive possession of mining claimants" vis-à-vis subsequently located claims "to permit the multiple use of the surface resources of the claims prior to the patenting of the claims, so long as that use did not materially interfere with prospecting or mining operations." *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283 (9th Cir. 1980).

After 1955, Congress again underscored the importance of mineral development when it passed the Mining and Minerals Policy Act of 1970 ("MMPA"). 30 U.S.C. § 21a. The MMPA provides that "it is the continuing policy of the Federal Government . . . to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries . . . ." In 1976, Congress incorporated the MMPA into FLPMA, which requires the federal government to manage federal public lands "in a manner which recognizes the Nation's need for domestic sources of *minerals*, food, timber, and fiber from the public lands including implementation of the [MMPA] as it pertains to the public lands . . . ." 43 U.S.C. § 1701(a)(12) (emphasis added).

[17] Idaho Code echoes this approach, noting that "public domain in the state of Idaho . . . is open to location under the mining laws of the United States." I.C. § 47-601 (1970). Additionally, Idaho Code provides the opportunity for casual exploration, in "all lands belonging to the state of Idaho in which mineral deposits . . . are owned by the state, and which have not been located, leased, or withdrawn . . ." I.C. § 47-702.

36 C.F.R. § 228 and 43 C.F.R. § 3809 are Adequate and Existing Regulatory Mechanisms

In 1897, Congress passed the Forest Service Organic Act, 16 U.S.C. § 473 *et seq.*, which provides the basis for the Forest Service's regulatory authority, but limits that authority to ensure that the development of mineral resources is not curtailed. Specifically, the Organic Act:

> [M]akes clear that the Forest Service must act consistently with the federal policy of promoting mineral development. Section 1 of that Act precludes the Secretary of Agriculture from taking any action that would "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof."

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 598 (1987) (Powell, J., concurring in part and dissenting in part (quoting 16 U.S.C. § 478)). The Forest Service regulations promulgated pursuant to the Organic Act reaffirm Congressional policy. These regulations strike a balance between environmental concerns and the statutory right to mine in National Forests. *See National Forests Surface Use Under U.S. Mining Laws*, 39 Fed. Reg. 31,317–21 (Aug. 28, 1974).

Importantly, the Forest Service recognizes that "prospectors and miners have a statutory right, not mere privilege . . . to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production." *Id. at* 31,317. When promulgating these regulations, the Forest Service expressly stated that the right to mine "could not be unreasonably restricted." *Id.* Accordingly, The Forest Service's regulations provide that mining operations in National Forests must "be conducted so as, *where feasible*, to minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8 (2015) (emphasis added).

The Department of the Interior's regulations regarding the surface management of hardrock mining, 43 C.F.R. subpart 3809 (3809 regulations), carefully balance FLPMA's goal of recognizing "the Nation's need for domestic sources of minerals," 43 U.S.C. § 1701(a)(12), while, at the same time, protect the environment by preventing "unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). The primary purpose of the 3809 regulations is to further FLPMA's statutory purpose in preventing unnecessary or undue degradation (UDD) of the public lands by operations authorized by the Mining Law. Nothing in the Governor's Plan can or does waive these requirements.

The 3809 regulations at 43 C.F.R. Section 3809.415(a) states that prevention of UUD is presumed by "Complying with §3809.420 as applicable; the terms and conditions of your notice or approved plan of operations; and other federal and state laws related to environmental protection and protection of cultural resources." Among others, the regulations advance GRSG conservation interests by:

- Section 3809.420 details 10 performance standards applicable to notice or plans of operation for locatable minerals. Among those performance standards are requirements to comply with all pertinent federal and state laws, 3809.420(a)(6); to take such action as may be needed to prevent adverse impacts to threatened or endangered species and their habitat which may be affected by operations, 3809.420(b)(7); and to take mitigation measures specified by BLM to protect public lands, 3809.420(a)(4);

In addition, the 3809 regulations include several provisions specific to protecting wildlife, wildlife habitat, and wildlife habitat reclamation:

- 3809.5 - the definition of reclamation includes "rehabilitation of fisheries or wildlife habitat;"
- 3809.401(b)(3)(v) - a reclamation plan must include "wildlife habitat rehabilitation;"
- 3809.401 (c)(1) - requires site-specific environmental baseline data on vegetation and wildlife;
- 3809.420(b)(3)(E) - the performance standards mandate “rehabilitation of fisheries and wildlife habitat;" and
- 3809.420(b)(7) - requires " . . . operators shall take such action as may be needed to prevent adverse impacts to threatened or endangered species and their habitat which may be affected by operations."

The Governor’s Plan endorses the conservation requirements of the 3809 regulations. This regulatory construct is an adequate regulatory mechanism that has been undervalued – if not wholly ignored – by the Proposed Plan.

Failure to correct the direct and devastating harm to mineral developers and companies with mining claims in SFAs will also extend to many other stakeholders in the planning area, including local governments. These actions will severely chill investment in mineral exploration and development in Idaho. And these errors cannot simply be cured by the forthcoming segregation process as mineral claimants will immediately face forfeiture of their claims as soon as the segregation process begins.

The Governor’s Plan Fully Protects Valid and Existing Rights

Additionally, the Governor’s Plan fully protects valid and existing rights in this context. The Governor’s September 2012 Alternative states that it cannot be construed as restricting “mineral leases, contracts, permits, and associated activities prior to the effective date of the record of decision.” E.O 215-04, App. 1 at 45. While the agencies make vague attempts at ensuring developers rights are “consistent with the rights granted under the General Mining Act of 1872,” (*see*, GRSG-M-LM-ST-097, and GRSG-M-LM-ST-098), for example, LOC-2 appears to abrogate these rights by requiring developers to incorporate measures above-and-beyond the current regulation of hardrock mining as exemplified by LOC-2. This does not meet the unequivocal language contained in the Governor’s Plan. Accordingly, the agencies must include

this language from the Governor's Plan to provide protection of valid and existing rights and comply with the law.

Aside from the mineral withdrawal language and the infringement on valid and existing rights, the agencies' approach to reclamation is also inconsistent with state law. For example, the Forest Service's Proposed Plan at GRSG-M-LM-GL-098 directs developers to use a phased development approach to reclaim disturbed areas "as soon as they are no longer needed for mineral operations," and GRSG-M-LM-GL-099 which requires abandon mine sites to be closed or mitigated to reduce predation by "eliminating tall structures that could provide nesting opportunities and perching sites." FEIS at 2-73.

This approach to reclamation is inconsistent with the course of performance during the terms of previous agreements between Idaho and the federal agencies. While reclamation is an activity that is traditionally administered by Idaho, under the Surface Mining Act, there is a history of cooperation between Idaho and federal agencies in developing reclamation plans. *See e.g.*, BLM MOU ID-252. Applying the agencies' additional requirements to reclamation has the potential to frustrate an effective regulatory framework. Even if such regulations were consistent with federal agencies' courses of performance with Idaho, the guidelines are not appropriately defined. For example, "phased development" is not defined or described and it implies that unreasonable delays inhibiting the right to develop such areas may occur, violating FLPMA and the General Mining Law.

b. <u>Non-Energy Leasable Minerals (governed by the Mineral Leasing Act of 1920)</u>

Like hardrock mining, non-energy leasable mineral development is not a primary threat to the species in Idaho.[18] The Proposed Plan acknowledges as much by noting that "[w]hile not a large threat in the Idaho and Southwestern Montana Sub-region, mineral development requires construction of roads, well pads, and other infrastructure which result in the removal of vegetation." FEIS 4-95. A recent USGS study concurred in this assessment stating, "[t]he magnitude of the impacts of mining activities on sage-grouse and sagebrush habitats is largely unknown, but mining of various federal mineral resources (locatable and saleable) currently affects approximately 3.6 percent of potential sage-grouse habitat directly (across all MZs) with indirect effects potentially affecting large portions (5-32 percent) of some MZs." *See* "*Summary of Science, Activities, Programs, and Policies that Influence the Rangewide Conservation of Greater Sage-Grouse*," USGS Open File Report 2013-1098 at 71 (Mainer, *et al.*). Thus, because the potential impacts from this particular activity on sage-grouse is extremely localized, and like the COT Report recommends, National Direction for this (or any other threat) is unnecessary.

[18] While other minerals may fall within this category in Idaho, the primary interest of the Governor's Plan in this area is the development of non-energy mineral phosphate. As such, the Consistency Review comments will focus on the Proposed Plan's negative impacts to phosphate development in southeast Idaho.

Because of the strategic importance[19] of phosphate mineral development to our nation's food security, and its confined and limited footprint, the Task Force placed all Known Phosphate Leasing Areas (KPLAs)[20] in the GHZ without additional land-use level stipulations for sage-grouse. Indeed, the FEIS acknowledges the importance of phosphate in eastern Idaho: "The Middle Permian Phosphoria Formation is one of the largest resources of phosphate rock in the world; the richest phosphorite accumulations are found in southern Idaho, northern Utah and western Wyoming. …The thickest, richest accumulations of phosphate occur in southeast Idaho, centered on the Soda Springs area." FEIS 3-111. And this Task Force decision was not done without considering the biological needs of the species. The relevant area is an isolated population in the State and its long-term persistence is not critical for Idaho to maintain its overall population objectives. This conclusion is further reinforced by the fact that FWS never commented on the decision to move this area to the GHZ.

Consistent with the threat level, the Governor's Plan for phosphate mineral development utilizes the flexible management continuum. The Proposed Plan's direction for non-energy phosphate minerals is inconsistent with the Governor's three-tiered habitat approach. Additionally, the Forest Services' inclusion of SFAs in their Proposed Plan or LUPA language is inconsistent with the Governor's Plan because it creates a fourth tier of habitat categorization. As such, references to SFAs in GRSG-M-NEL-GL-100, and GRSG-M-NRL-GL-101 should be eliminated.

The Governor's Plan for CHZ generally prohibits non-energy phosphate mineral development except if developed pursuant to a valid and existing right. E.O. 2015-04, App. 1 at 33. Notwithstanding this general prohibition, there is a limited exception process outlined in Section (D)(4)(ii) of the regulatory language in case the KPLA mapping does not completely capture the ore deposits. *Id. at* 34. The BLM's Proposed Plan at NEL-1 is inconsistent with this approach because it closes PHMA to phosphate mineral leasing without exception. FEIS at 2-55. As such, this decision would remove 4,870 acres from potential leasing for phosphate or 25% of the unleased KPLA in southeastern Idaho, while the Governor's Plan again acknowledges the uncertainty of sole reliance on the KPLA maps. FEIS at 4-261.

In the IHZ, the Governor's Plan permits non-energy phosphate development subject to certain best management practices. E.O. 2015-04, App. 1 at 40. The BLM's Proposed Plan for IHMA and GHMA is open subject to *standard stipulations* within KPLAs. FEIS at 2-55. (emphasis added). While these provisions are somewhat similar to the Governor's Plan, the BLM's emphasis on whether the activity is within a KPLA is not consistent. For IHMA areas outside KPLAs, the BLM plan permits prospecting and subsequent leasing; provided the AD-4 criteria, disturbance cap requirements (AD-1), RDFs, and seasonal timing restrictions are met. *Id.* In the GHMA, activities conducted outside KPLAs are "available" for prospecting and

[19] The importance of this resources was evidenced by a Secretarial Order issued in 1908 by the Secretary of Interior to create a "temporary" phosphate reserve of 18,400 square km in Idaho, Utah and Wyoming.
[20] KPLAs are areas where the phosphate resource is available only through the competitive leasing provisions of the Mineral Leasing Act. There are approximately 19,000 acres of unleased KPLAs in Idaho.

subsequent leasing and initial mine development, subject to RDFs, buffers, seasonal and daily timing restrictions, especially in GHMA, and standard stipulations. *Id.* These restrictions are unnecessary and could have significant adverse effects on non-energy phosphate development.

As part of the agencies' National Direction, the anthropogenic disturbance criteria that apply to phosphate development activities are inconsistent with the Governor's Plan. BLM's AD-1 and its Forest Service counterpart, GRSG-GEN-ST-004, outline how the agencies are to apply a project-level and extremely confusing anthropogenic disturbance cap. The Governor's Plan only adopts a project-level disturbance cap for fluid mineral development.

The Proposed Plan's application of a "net conservation gain" standard (AD-4 and GRSG-GEN-ST-005) for development in SFA, PHMA, and IHMA is also inconsistent. FEIS at 2-32, 2-59. This standard does not exist in the Governor's Plan nor the other co-Preferred Alternative in the DEIS (applying the "no net unmitigated loss" standard). Moreover, the Proposed Plan's adoption of MIT-3 across all habitat zones is unnecessary given the Task Force's above-described decision. Additionally, these measures, MIT-5, GRSG-GEN-DC-03, and GRSG-M-MM-ST-104, require that mining reclamation meet specified standards. As noted in the livestock grazing section, these desired habitat conditions do not account for ecological site variability, and without modification, may not be achievable.

NEL-2 requires seasonal and daily timing restrictions in underdeveloped non-energy mineral leases when exploration activities or initial mine development is proposed, and NEL-3 requires BLM to include RDFs to mine plans in undeveloped non-energy mineral leases for exploration activities or initial mine development. Importantly, both NEL-2 and NEL-3 apply to all habitat categorizations, including GHMA. *Id.* at 2-55.

Additionally, the agencies incorporation of uniform lek buffers across the planning area at a distance of 3.1 miles for non-energy leasable mineral development (*see*, FEIS App. DD at DD-1) is wholly inconsistent with the Governor's Plan. The Governor's Plan does not apply lek buffers to GHZ, and the buffer that does apply in CHZ and IHZ is set at .6 miles. *See* E.O. 2015-04 at (II)(c)(ii)(2)*;* Idaho State Board of Land Commissioners GRSG Plan at section 14.1.2. The cumulative effect of these stipulations will undoubtedly add additional acres that are not available for phosphate mining.

Adequate Regulatory Mechanisms for Phosphate Development Already Exist

Along with the balanced approach of the Governor's Plan, existing regulations protect any potential threat to the species, the agencies have already assessed the minor impact to sage-grouse through existing land use plans. Of particular concern in the Proposed Plan are the agencies' proposed measures for development of non-energy leasable minerals in GHMA. The DEIS noted that "protective measures adopted in the Pocatello RMP would protect GRSG breeding habitat." DEIS at 2-55. The DEIS goes on to further elaborate: "The Pocatello RMP establishes operational standards and guidelines for reclamation plans; groundwater; and

implements BMPSs to control sedimentation and contaminant release." *Id.* Similarly, for the Forest Service, the Targhee National Forest Plan also includes GRSG protection measures for phosphate development. This is symptomatic of the Proposed Plan's emphasis on National Direction, rather than deferring to state-based plans. As a result, the push to expand these unnecessary measures across the entire planning areas, particularly in AD-1 and AD-4, will greatly limit any such development. Taken together, the restrictions in the Proposed Plan for both agencies will greatly reduce the availability for future development and access to current, leased phosphate reserves will be more costly.

The Governor's Plan Fully Protects Valid and Existing Rights

In addition to the valid and existing rights provision noted in the locatable section above, the Governor's Plan provides the following language more specific to leasable minerals:

> This Alternative does not revoke, suspend, or modify any permit, contract or other legal instrument authorizing the occupancy and use of the applicable Federal lands prior to the effective date of the record of decision and prior to the completion of any statutory or regulatory decision-making process to revoke, suspend, or modify such permit, contract or legal instrument.

See E.O. 2015-04, App. 1 at 45.

The Proposed Plan does not clearly protect these important rights by not providing for the infrastructure and auxiliary features necessary for the development and extraction of phosphate minerals. This also includes the ability to conduct land realty transactions and exchanges; and the modification of that lease as provided for in existing rules, especially granting the right to utilize adjacent lands by executing a lease modification.[21] *See, e.g.*, AD-1; LR-14 (stands in direct contravention to ongoing land exchange); GRSG-LR-SUA-ST-16; GRSG-LR-SUA-ST-019; and GRSG-LR-SUA-ST-020; GRSG-M-NEL-GL-100; and GRSG-M-NEL-GL-101. To successfully develop a mineral resource requires the ability to access the deposit (roads), have electrical power (transmission lines), and develop water resources (wells, pipelines), manage waste materials (such as tailings in a tailings pond) and transport ore (pipeline). All of these mine features necessarily require an anthropogenic disturbance. In sum, the Proposed Plan does not fully recognize the totality of the valid and existing rights entitled to existing leases. These rights cannot be suspended, revoked, or modified by the Proposed Plan as a matter of existing law.

[21] Under 43 C.F.R. § 3510.11, when a developer enters into a mineral lease, that company obtains a right to a noncompetitive lease of any lease modification areas. So long as the company complies with the restrictions in 43 C.F.R. § 3510.15, the lease modification will be granted. Therefore, a lease modification is not a new lease and is subject to the exact same terms and conditions as the original lease. A Federal lessee, who is entitled to non-competitive lease of adjacent lands, has the sole discretion of whether to enter into a new lease of the fringe acreage or to modify the existing lease by adding adjacent acreage. 43 C.F.R. § 3510.12(b).

c. Mineral Material (Saleable Minerals)

The Governor's Plan for sage-grouse management as it pertains to saleable minerals uses the management continuum for infrastructure. The three-tiered approach found throughout the Governor's Plan is inconsistent with the agencies' Proposed Plan for mineral material for the reasons discussed below. Additionally, the Forest Services' inclusion of SFAs in their Proposed Plan language is inconsistent with the Governor's Plan because it creates a fourth tier of habitat categorization. As such, the reference to SFAs in GRSG-M-MM-ST-102, GRSG-M-MM-ST-103, and GRSG-M-MM-ST-104 of the Forest Service portion of the Proposed Plan should be eliminated.

The Governor's Plan for infrastructure in CHZ begins with the presumption that new mineral material development is prohibited, except if developed pursuant to a valid existing right. E.O. 2015-04, App. 133. Notwithstanding this prohibition, there is a limited exception process outlined in Section (D)(4)(ii) of the regulatory language in the Governor's Plan. *Id. at* 34. The BLM's Proposed Plan at SAL-1 appears to adopt the same approach until one carefully examines the exemption criteria. FEIS at 2-54.

The BLM's Proposed Plan provides an exception for existing free use permits and expansion of existing free use permits subject to certain criteria. For example, if a project area disturbance cap is not met, the activity is subject to the provisions set forth in the mitigation framework, all applicable RDFs are applied, and AD-3 and AD-4 (discussed below) are met. *Id.* In the Forest Service section of the Proposed Plan (GRSG-M-MM-ST-102), new mineral material disposal or development is closed without exception in PHMA and SFA. *Id. at* 2-73.

While GRSG-M-MM-ST-102 is clearly inconsistent with the Governor's Plan because it does not allow for the limited exception process, and includes SFAs in the PHMA habitat designation, the BLM does provide for exception. However, the BLM's Proposed Plan alters the Governor's Plan by requiring that the project area disturbance cap is not exceeded within a BSU. E.O. 2015-04, App. 1 at54. This is inconsistent with the Governor's Plan because the Governor's Plan does not apply a disturbance cap to these activities. Also, there are significant differences between the BMPs required by the Governor's Plan and the RDFs applied by the agencies' Proposed Plan. Specifically, AD-3 and AD-4 include the "net conservation gain" standard for sage-grouse, which is not a standard found in the Governor's Plan nor the DEIS (no net unmitigated loss, which agency said was sufficient and a cap was unnecessary).

The Governor's Plan for infrastructure in IHZ permits mineral material development so long as certain criteria are met. E.O. 2015-04, App. 1at 40. By contrast, the BLM's Proposed Plan at SAL-1 states that IHMA is open to mineral materials development consistent with AD-4, and subject to RDFs, buffers and seasonal timing restrictions. *Id.* at 2-54. GRSG-M-MM-ST-103 states that "in PHMA, IHMA, and SFA, free-use mineral material collection permits may be

issued and expansion of existing active pits may be allowed" with seasonal timing restrictions, a two mile buffer of occupied leks, and taking into consideration the disturbance cap.

Again, the inconsistency between the Governor's Plan and the agencies' Proposed Plan is in the details of criteria. The "net conservation gain" standard found in AD-4 is inconsistent with the Governor's Plan. The RDFs found in Appendix B and incorporated by AD-4 of the Proposed Plan are inconsistent with the BMPs found in Section G of the Governor's Plan. The calculation for the anthropogenic disturbance cap (AD-1) as incorporated by AD-4 is inconsistent with the calculation for disturbance caps found in the Governor's Plan. Finally, the two mile lek buffer proposed by GRSG-M-MM-ST-103 is inconsistent with the .6 mile lek buffer proposed by the Governor's Plan.

The Governor's Plan for infrastructure in GHZ is that mineral material development is open. E.O. 2015-04, App. 1at 43. In contrast, the BLM's Proposed Plan at SAL -1 states that GHMA is open to mineral materials, subject to RDFs, buffers and seasonal timing restrictions. FEIS at 2-54 GRSG-M-MM-ST-104 states that "in PHMA, IHMA, GHMA and SFA, any permit for existing mineral material operations must include appropriate requirements for operation . . . " The BLM's treatment of mineral material development in GHMA is inconsistent with the Governor's Plan because it attaches RDFs, and lek buffers. The Forest Service's treatment of mineral material development is vague, and inconsistent with the Governor's Plan because it does not enumerate what the "appropriate requirements for operation" are, and provides no certainty for developers.

In BLM's Proposed Plan, AD-3 allows for development in PHMA if certain criteria are met. The LUPA requires that the population trend for sage-grouse is stable or increasing over a three year period. *Id.* at 2-32. It requires development with associated mitigation would not result in a net loss for sage-grouse, with mitigation providing a net conservation benefit to PHMA. *Id.* The project is permissible in PHMA if it would not result in a net loss of GRSG Key habitat or habitat fragmentation or other impacts causing a decline in population within the relevant Conservation Area. *Id.* It requires the determination that the project cannot be reasonably accomplished outside of PHMA, or is developed pursuant to a valid existing right, or can be co-located within an existing footprint. *Id.* Any development must adhere to RDFs and it cannot exceed the disturbance cap. *Id.* Finally, a project must be reviewed by the State Implementation Team and recommended for consideration by the Governor. *Id.*

Additionally, the Governor's Plan makes clear that it cannot be construed as restricting "mineral leases, contracts, permits, and associated activities prior to the effective date of the record of decision." E.O. 2015-4, App. 1 at 45. The agencies must include this language from the Governor's Plan in their Proposed Plans in order to provide real protection of valid, existing rights and comply with the law.

In BLM's Proposed Plan, both SAL-2 and SAL-3 direct BLM to restore salable mineral pits no longer in use, and require reclamation bonding that would require restoration of GRSG

habitat on new salable mineral pits. FEIS at 2-54. GRSG-M-MM-ST-104 states that "in PHMA, IHMA, GHMA and SFA, any permit for existing mineral material operations must include . . . reclamation of the site to restore, enhance, or maintain desired habitat conditions." *Id.* at 2-73. As argued above, mining reclamation under Idaho's Surface Mining Act has been a cooperative activity with the federal government, as illustrated above, and the reclamation standards in the Proposed Plan will frustrate this relationship. For this reason, SAL-2, SAL-3, and the portion of GRSG-M-MM-ST-104 dealing with reclamation are inconsistent.

iii. Fluid Mineral Development in Idaho

The Governor's Plan considers energy development, which includes oil and gas development, as large-scale infrastructure. For the purposes of this Consistency Review, the energy development section will identify the inconsistencies between the agencies' Proposed Plan regarding Fluid Minerals objectives and management (in the BLM and Forest Service LUPAs) and the Governor's Plan.

Idaho does not have a long history with fluid mineral production. In fact, it appears that the Proposed Plan obfuscates this lack of history with a lack of potential and interest.[22] This conclusion in the FEIS, particularly for the southern Snake River Basin, lacks any scientific basis and is based on stale data. Interestingly, fluid mineral development reveals the planning foresight of the Governor's Task Force – namely, although the potential for fluid mineral development in Idaho is nascent, and while it is currently not a primary threat to the species in the state, the Task Force offered a path forward that afforded future flexibility but in a manner consistent with the State's sage-grouse goals. By contrast, the Proposed Plan uses the unfounded conclusion of a "lack of potential" to impose overreaching SFA measures that will stifle any potential development regardless of whether its future development will impact sage-grouse.

The Idaho Legislature in 2012 "declared it to be in the public interest to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the state of Idaho in such a manner as will prevent waste …" Idaho Code § 47-315 (2012). The Governor's Plan is consistent with this direction. The management continuum provides the basic operating framework, and in CHZ, incorporates "management flexibility to permit high value infrastructure with appropriate mitigation and best management practices." DEIS 4-59. Fluid mineral development is that type of high value infrastructure to the State.

Consistent with this general approach, the Governor's Plan for fluid mineral development post-ROD imposes a No Surface Occupancy (NSO) stipulation with an opportunity for full development provided the exemption criteria are satisfied. E.O. 2015-04, App. 1 at 34.

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[22] In 2006 and 2008, expression of interest covering approximately 342,500 federal mineral acres were filed in Idaho. Since 2010, based on state of the art 3D seismic exploration techniques, sixteen wells have been drilled in the western Snake River Plan by Bridge Energy and Alta Mesa. Alta Mesa has invested $130 million in wells, gathering pipelines, and processing infrastructure and is continuing its drilling program. Other operators have leased, conducted geophysical exploration, and begun drilling efforts in SE Idaho.

Exemption criteria includes a determination by the State Director that surface development "will not accelerate and/or cause declines in sage-grouse populations within the relevant Conservation Area based on the application of criteria in 4(ii) and the specific fluid mineral BMPs in section (G)." *Id*. In order to ensure a higher level of protection for the species, the Governor's Plan imposes a three percent (3%) disturbance cap in CHZ; this is the only project-level disturbance cap recommended in the Governor's Plan. *Id. at* 44.

By contrast, the National Direction in the Proposed Plan eliminates the three-tiered habitat scheme and adds another habitat zone with the designation of SFAs. SFAs, implemented by MA-10, require NSO without "waiver, exception, or modification" for fluid mineral development. FEIS at 2-27, *See also* FLM-1 at 2-51; GRSG-M-FMUL-ST-079 at 2-70. This and any other reference to SFAs, including in the Forest Services Proposed Plan at GRSG-M-FMUL-ST-079, GRSG-M-FML-ST-080, GRSG-M-FML-ST-081, GRSG-M-FML-ST-084, GRSG-M-FML-GL-085, GRSG-M-FML-GL-086, GRSG-M-FML-GL-087, GRSG-M-FMO-ST-088, GRSG-M-FMO-ST-089, GRSG-M-FMO-GL-090, GRSG-M-FMO-GL-091, GRSG-M-FMO-GL-092, and GRSG-M-FMO-GL-093, and in the BLM's Proposed Plan at FLM-1 are inconsistent with the Governor's Plan.

In addition to the inconsistency created by the SFA regime, the agencies management direction in the PHMA is inconsistent with the Governor's Plan. For example, FLM-1 states that "areas within PHMA . . . would be open to mineral leasing and development and geophysical exploration subject to NSO with a limited exception (FML-3)." *Id.* FLM-3 states that exceptions to the NSO stipulation will only be granted if there is no "direct, indirect, or cumulative effects on GRSG or its habitat; or is proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel, and would provide a clear conservation gain to GRSG." *Id. at* 2-52. In direct contravention of the law, the BLM requires a unanimous finding from the BLM, FWS, and Idaho Fish and Game in order to grant the exception effectively granting the FWS a "veto" power over a potentially unlisted species. The Forest Service's Proposed Plan mirrors the BLM's approach for PHMA except the exception criteria requires "the exception provides a clear net conservation gain to GRSG."

The agencies' exemption criteria for oil and gas development in PHMA is clearly inconsistent with the Governor's Plan. While both start out with the general presumption of NSO, the Governor's exemption criteria does not require a "unanimous decision" and only requires a project proponent to demonstrate that the activity will not cause an acceleration or decline in sage-grouse populations aided by reasonable and site-specific BMPs. These measures closely mirror the BMPs for oil and gas development approved by the FWS in Wyoming's plan. E.O. 2015-04, App. 1at 44-45, *see also* Wyoming Exec. Order 2011-05 (June 2, 2011), Wyoming Greater Sage-Grouse Conservation Plan 34 (2003).

The agencies go above and beyond what is necessary for the species by also requiring "a net conservation gain" both in the exemption criteria and disturbance caps. As mentioned above, this standard does not exist in the Governor's Plan, nor in the other co-Preferred Alternative in

the DEIS (applying the "no net unmitigated loss" standard). This new standard, coupled with the fact that the agencies have a plethora of additional RDFs that are not required by the Governor's Plan, chills any potential for economic development, which is inconsistent with Secretary Salazar's invitation, the Governor's Plan, and the agencies' multiple-use mandate.

The specific RFDs required by the Proposed Plan, and omitted from the Governor's Plan, are:

- RDF 64 – use of directional drilling and/or multi well-pads to reduce surface disturbance;
- RDF 66 – placement of liquid gathering facilities outside of PHMAs;
- RDF 67 – use of remote monitoring techniques for production facilities and development of a plan to reduce the frequency of vehicle use;
- RDF 68 –siting and/or minimizing ROWs or SUAs to reduce disturbance to sage brush habitats;
- RDF 69 – designing or siting permanent structures which create movement;
- RDF 70 – equipping tanks and above-ground facilities with structures or devices that discourage nesting of raptors and corvids;
- RDF 71 – controlling the spread and effects of non-native plants;
- RDF 72 – restricting pit and impoundment construction;
- RDF 73 – removing or re-injecting produced water to reduce habitat for mosquitos;
- RDF 73 – treating waters with larvicides;
- RDF 74 – requiring noise shields when drilling during lek, nesting, brood-rearing, or wintering;
- RDF 75 – BLM/FS limiting project noise sources case-by-case;
- RDF 76 – BLM/FS evaluating limitation on new noise sources case-by-case;
- RDF 77 – limiting noise sources;
- RDF 78 – increasing limitations with emerging research;
- RDF 79 – coordinating limitations with IDFG as new research emerges;
- RDF 80 – fitting transmission towers with anti-perch devices;
- RDF 81 – requiring sage-grouse safe fences;
- RDF 82 – locating new compressor stations outside PHMAs;
- RDF 83 – cleaning up refuse;
- RDF 84 – locating man camps outside PHMAs;
- RDF 85 – using oak mats for drilling activities;
- RDF 86 – using only close-loops systems; and
- RDF 87 – covering all drilling and production pits and tanks regardless of size.

These RDFs are inconsistent and should be eliminated.

The Governor's Plan permits surface occupancy for fluid mineral development if it does not cause declines in sage-grouse populations in IHZ. E.O. 2015-04, App. 1 at 40. To ensure a

higher level of protection for the species, the Governor's Plan imposes 5% project-level disturbance cap in IHZ. *Id* at 44. The Proposed Plan eliminates the distinction between the management zones by treating the PHMA and IHMA effectively the same for oil and gas development. *See* FLM-1 at FEIS 2-51; GRSG-M-FMUL-ST-077 at FEIS 2-51. Imposing identical characteristics on separate habitats is inconsistent with the management continuum in the Governor's Plan and invalidates the State's scientifically-based map moot. Specifically, the NSO for IHZ does not exist in the Governor's Plan, and is prominently featured by the agencies in IHMA. Like in PHMA, the agencies have eliminated any remote possibility to develop resources in IHMA, ignoring their multiple-use mandate.

For oil and gas development in GHZ, the Governor's Plan provides that fluid mineral development is open consistent with the relevant land management components (meaning that if the BLM's current RMPs are open for leasing the Governor's Plan left those areas was open for leasing) as provided for in Section H. E.O. 2015-04, App. 1at 43. The Governor's Plan offers no special land-use plan level sage-grouse direction in this zone to encourage activity to be sited outside the other zones.

By stark contrast, FLM-1 (FEIS at 2-51) and GRSG-M-FLM-ST-084 (FEIS at 2-70) prioritize GHMA over reasonable land use, rather than mitigate development in habitat as described in the Governor's Plan. This blurs the distinction between habitat categorizations. FLM -1 states that priority will be given to leasing and development of fluid mineral resources, outside of PHMA, IHMA, and GHMA. FEIS at 2-51. Further, if BLM analyzes leasing and authorizes development of fluid mineral resources in PHMA, IHMA, and GHMA, then priority is given to non-habitat areas first and then in the least suitable habitat for sage-grouse. *Id.*

The corresponding Forest Service Proposed Plan Amendment states that "[i]n PHMA, GHMA, and SFA, when authorizing development of fluid mineral resources, work with the operator to minimize impacts to GRSG and their habitat, such as locating facilities in non-habitat areas first and then in the least suitable habitat." GRSG-M-FML-ST-084, FEIS at 2-70, see also GRSG-M-FML-GL-085 (operators should be encouraged to reduce disturbance to GRSG habitat… where appropriate and feasible and consistent with the rights granted to the lessee), GRSG-M-FML-GL-086 (on existing federal leases in PHMA, IHMA, and SFA, when surface occupancy cannot be restricted due to valid existing rights or development requirements, disturbance and surface occupancy should be limited to areas least harmful to GRSG based on vegetation, topography, or other habitat features). Imposing the similar requirements on separate habitats ignores the management continuum approach promulgated by the Governor's Plan.

The "phased development" approach in the Proposed Plan is also inconsistent with the Governor's Plan. *See* RDF 65, FEIS at B-7. While phased development is not defined, it implies unreasonable delays, inhibiting the right to develop oil and gas resources may occur, violating federal law and possibly the Constitution. Thus it is imperative that the agencies' recognize valid existing rights as protected by the Governor's Plan.

Lastly, the State of Idaho regulates fluid mineral development drilling through IDAPA 20.07.02.200 (March 29, 2012), which requires application to and approval by the Idaho Department of Lands prior to the commencement of operations to drill, deepen, or plug back oil and gas wells. Moreover, the Oil and Gas Conservation Commission ("OGCC") has adopted a rule set specifically addresses sage-grouse conservation measures, and implementing them as enforceable stipulations in leases, permits and easements, including oil and gas exploration and development. Therefore, the agencies' Proposed Plan directing them to work with lessees, operators, and project proponents to avoid, minimize and apply compensatory mitigation to the extent compatible with lessees' rights to drill and produce fluid mineral resources is inconsistent with the Governor's Plan. *See*, FLM-OBJ-2 (FEIS at 2-51) and GRSG-M-FML-GL-080-, GRSG-M-FML-GL-084, and GRSG-M-FML-GL-085 (FEIS at 2-70, 2-71).

iv. Transportation

The Governor's Plan encourages the utilization of "existing roads, or realignments of existing routes to the extent possible" in CHZ and IHZ. E.O. 2015-04, App. 1at 43. In CHZ and IHZ developers are to "[c]onstruct new roads to minimum design standards needed for production activities." *Id.* The Governor's Plan provides BMPs for oil and gas development which require developers to locate roads used to provide facility site access and maintenance more than 1.5 kilometers from the perimeter of occupied sage-grouse leks, and to construct roads to minimum design standards needed for production activities. *Id. at* 45.

The Governor's Plan emphasizes the need to ensure access for economic exploration and development of the resources developers gain the right to use. Granting new rights or protecting valid, existing rights to develop becomes impossible if the lands are inaccessible or the agencies have placed so many project-level screens that the permit is rendered uneconomic.

The Governor's Plan selectively applies special sage-grouse conservation measures to the necessary roads and access for infrastructure development. This includes the necessary roads for access to transmission lines, oil and gas development, mines, and renewable energy generation facilities. The Task Force believed that the requirements to build infrastructure in sage-grouse habitat provided the appropriate protection for the species, and that it was too onerous to apply more stringent standards than would be required of developers to obtain a permit at the programmatic level.

Moreover, the Governor's Plan is consistent with the management of roads under the jurisdiction of state and local governments per I.C. § 40-201 (1985), which states that "[t]he improvement of highways and highway systems is hereby declared to be the established and permanent policy of the state of Idaho, and the duty is hereby imposed upon the state, and all counties, cities, and highway districts in the state, to improve and maintain the highways within their respective jurisdiction . . ." Public roads include what are commonly referred to as R.S. 2477 rights-of-way. *See*, I.C. § 40-107(5). Any attempt to impose restrictions on maintenance

or improvement of the state highway system or the public roads system is inconsistent with Idaho Code and FLPMA.

These travel and transportation management restrictions are unlawful because they conflict with the rights granted by § 22 of the General Mining Law and 30 U.S.C. § 612(b) (Surface Use Act), which guarantee the right to use and occupy federal lands open to mineral entry, *with or without a mining claim*, for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of, and associated with, ingress and egress. By closing routes, including primitive roads and trails not designated in travel management plans, the agencies will interfere with potential access to minerals as well as the public's right-of-way across Federal lands.

Additionally, the agencies' proposal to authorize new roads only for administrative access, public safety, or access to valid and existing rights, does not go far enough to maintain access, use and occupancy, associated with unpatented mining claims prior to discovery, and unclaimed lands open to mineral entry for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress. TM-1, FEIS at 2-57. By liming the potential for access to only valid, and existing rights, the agencies fail to maintain access, and thus, conflict with § 22 of the General Mining Law.

Significant differences between the BMPs required by the Governor's Plan and the RDFs required in the agencies' Proposed Plan. Specific RFDs either conflict directly with the Governor's Plan, or are inconsistent because such practices were intentionally omitted from the Governor's Plan. For example, RDF 2 states that there shall be "no repeated or sustained behavioral disturbance…to lekking birds from 6:00 pm to 9:00 am within 2 miles…of leks during lekking season. FEIS B-2. This is inconsistent with the Governor's Plan which states that NSO within one kilometer of the perimeter of leks shall be allowed when supported by the best available science at the time the development undergoes site-specific environmental analysis. E.O. 2015-04, App. 1 at 44-45.

The specific RFDs required by the Proposed Plan, and omitted from the Governor's Plan, are:

- RDF 90 – prohibition on ROW or SUA issuance to counties on newly constructed energy or miner development roads;
- RDF 91 – speed limit establishment on BLM and FS system roads;
- RDF 92 – coordination of road construction and use among ROW or SUA holders;
- RDF 93 – construction of road crossing at right angles to ephemeral drainages and stream crossings;
- RDF 94 dust abatement on roads and pads; and
- RDF 95 – closing and reclamation of duplicate roads.

These RDFs are inconsistent and should be eliminated.

As noted throughout this Consistency Review, the agencies have proposed many new and significant changes to the co-Preferred Alternatives, including but not limited to, (MA-10) creation of the SFA zone and its associated rule set, imposition of lek buffers (AD-9), the net conservation gain mitigation standard (MIT-3)(GRSG-GEN-ST-05), and anthropogenic disturbance caps at the project-level (AD-1, AD-2)(GRSG-GEN-ST-04). For instance, it is likely that the agencies will use the new SFA habitat zone as justification for future closures. The agencies have not adequately disclosed how these new features will influence access decisions both for recreation and development of infrastructure.

More specifically, in BLM's Proposed Plan at TM-2, temporary closures will be considered in all habitat categorizations. FEIS at 2-56. Again, this is inconsistent with the overall approach of the Governor's Plan providing for a management continuum. TM-3 also directs BLM to develop travel management plans for each Field Office, and during subsequent travel management planning, as directed by TM-4, design and designate travel systems to minimize adverse effects on GRSG. *Id. at* 2-57. This includes the requirement to locate areas and trails to minimize disturbance of GRSG and/or to have a neutral or positive effect on GRSG habitat and populations. *Id.* Again, the agencies fail to adequately disclose how these measures will impact infrastructure development and recreation in Idaho.

Additionally, the Forest Service proposes (GRSG-RT-ST-069), which does not "conduct or allow new road or trail construction except when necessary for administrative access, public safety, or to access valid existing rights. If necessary to construct new roads and trails for one of these purposes, construct them to minimum standard, length, and number and avoid, minimize, and mitigate impacts." *Id. at* 2-69. GRSG-RT-ST-070 prohibits road and trial maintenance activities within 2 miles from the perimeter of active leks during lekking from 6 pm to 9 am. *Id.* GRSG-RT-ST-071 prohibits public access on temporary energy development roads, unless consistent with all other terms and conditions included in the forest plan. *Id.* As stated repeatedly, the Proposed Plan ignores the management continuum in the Governor's Plan.

Collectively, the Proposed Plan appears to severely limit the opportunity to access new and valid, existing rights. This is inconsistent with the Governor's Plan ensuring a nexus between the right to develop and the ability to develop. Moreover, without further detail, it may infringe on Idaho's sovereignty, FLPMA, and accordingly references to travel management should either be eliminated or clarified.

v. Renewable Energy

The Governor's Plan for renewable energy development utilizes the management continuum to guide infrastructure development. The three-tiered approach found throughout the Governor's Plan is not consistent with the agencies' Proposed Plan for renewable energy, including wind and solar development. Additionally the Forest Service's inclusion of SFAs in

its Proposed Plan language is inconsistent with the Governor's Plan because it creates a fourth tier of habitat categorization. As such, references to SFAs in GRSG-WS-ST-025 of the Forest Service Proposed Plan should be eliminated.

The Governor's Plan for CHZ treats renewable energy development as a prohibited activity, except if developed pursuant to a valid and existing right. E.O. 2015-04, App.1 at 33. Notwithstanding this prohibition, there is a limited exception process outlined in Section (D)(4)(ii) of the regulatory language in the Governor's Plan.. *Id. at* 34. The BLM's Proposed Plan at LR-2 designates PHMA as an exclusion area for utility scale wind and solar testing and development, nuclear power and hydropower energy development. FEIS at 2-48. Likewise, the Forest Service's Proposed Plan at GRSG-WS-ST-025 does not authorize "new solar and wind utility-scale and/or commercial energy development except for on-site power generation associated with existing industrial infrastructure (e.g. mining site)," in PHMA. *Id. at* 2-63. LR-2 and GRSG-WS-ST-025 are inconsistent with the approach in the Governor's Plan because neither management action allows for the limited exception process outlined in the Governor's Plan.

In the Governor's Plan, renewable energy development in IHZ is permitted as long as certain criteria are met. E.O. 2015-04, App. 1 at 40. The BLM's Proposed Plan at LR-2 designates IHMA as avoidance areas for wind and solar testing and development and nuclear and hydropower development. FEIS at 2-48. Likewise, the Forest Service's Proposed Plan at GRSG-WS-ST-026 states that, "[i]n IHMA, new solar and wind energy utility-scale and/or commercial development should be restricted. If development cannot be restricted due to existing authorized use, adjacent developments, or split estate issues, then ensure that stipulations are incorporated into the authorization to protect GRSG and their habitats." *Id. at* 2-63.

The agencies' general approach to avoid/restrict renewable energy development in IHMA is inconsistent with the Governor's Plan in IHZ. This is particularly evident when calculating the total amount of inconsistencies between the agencies' RDFs and the Governor's Plan BMPs. BLM's AD-1 and its Forest Service counterpart, GRSG-GEN-ST-004, outlines how the agencies are to apply an anthropogenic disturbance cap. The Governor's Plan does not apply an anthropogenic disturbance cap to these activities.

The application of AD-4 and GRSG-GEN-ST-005 are also inconsistent with the Governor's Plan. AD-4 and GRSG-GEN-ST-005 both apply a "net conservation gain" standard to new development in SFA, PHMA, and IHMA. FEIS at 2-32, 2-59. This standard does not exist in the Governor's Plan, nor the other co-Preferred Alternative in the DEIS (applying the "no net unmitigated loss" standard). The agencies' incorporation of lek buffers, as applicable to all habitat categorizations, and at a distance of 3.1 miles for infrastructure related to energy development (*see*, App. DD at DD-1) is inconsistent with the Governor's Plan. The Governor's Plan does not apply lek buffers to GHZ, and the buffer it does apply in CHZ and IHZ is set at .6

miles (s*ee,* Idaho State Board of Land Commissioners GRSG Plan at section 14.1.2; Idaho Exec. Ord. 2015-4 at (II)(c)(ii)(2)).

Lastly, in the Governor's Plan for GHZ, renewable energy development is considered open without special sage-grouse conservation measures. E.O. 2015-04, App. 1at 43. In contrast, the BLM's Proposed Plan at LR-2 designates and manages "GHMA as open for wind and solar testing and development and nuclear hydropower development subject to RDFs, buffers and seasonal timing restrictions." FEIS at 2-48. The RDFs, buffers and seasonal timing restrictions make the BLM's Proposed Plan inconsistent with the Governor's Plan (see above description for details).

D. Livestock Grazing

The inclusion of numerous last-minute conservation actions and prioritization schemes related to livestock grazing represents one of the most dramatic shifts from the Preferred Alternatives to the Proposed Plan. Not only are the grazing *standards* in the Proposed Plan inconsistent with the Governor's *objectives*, but the agencies' decision to arbitrarily elevate livestock grazing to a primary threat is contrary to the best available science. As noted in the 2010 Finding, existing federal regulations (i.e., Idaho Rangeland Health Standards), bolstered and clarified by the Governor's Plan, more than adequately address the secondary threat posed by *improper* livestock grazing within sage-grouse habitat. 75 Fed. Reg. at 13,977 (stating that the permit renewal process provides an adequate regulatory framework, but it is unclear whether it is implemented in a manner that conserves sage-grouse); *see* FEIS, at 1-32 (positing that *improper* livestock management *may* negatively affect sage-grouse habitat); COT Report at 44-45 (stating that "improper livestock management may have negative impacts on sage-grouse seasonal habitats."). The Governor's Plan provides that certainty.

Despite these existing regulatory mechanisms, the additional measures and clarity provided in the Governor's Plan, and the underlying scientific record, the agencies nevertheless are determined to include more stringent measures and propose to implement a prioritization regime that will likely curtail livestock grazing across approximately 3 million acres of sage-grouse habitat in Idaho.

i. Existing Regulatory Mechanisms and the Governor's Plan sufficiently address the secondary threat of improper livestock grazing.

There is nothing in the record demonstrating the need to go above-and-beyond the requirements in the IRHS. The Governor's Plan concurs in this assessment noting that "[n]o studies exist directly relating livestock grazing systems or stocking rates to sage-grouse abundance or productivity. Most concerns about the effects of grazing on sage-grouse are localized in nature, whereas the species is demonstrated to be more responsive to stressors at a larger landscape. Therefore, grazing should be viewed as a landscape stressor with monitoring and management actions tailored accordingly." *See* E.O. 2015-04, App. 1at 12. Accordingly,

the measures in the Governor's Plan are commensurate with the threat posed by improper livestock grazing.

This proper alignment between the threat level and management response is also supported in the COT Report and the 2010 Listing Determination. *See* COT Report at 44 (stating that livestock management should be conducted in a "manner consistent with local ecological conditions that … conserves the essential habitat components for sage-grouse."). Importantly, the FWS determined that the livestock grazing management component in the Governor's Plan "is consistent with the COT Report." FEIS App. Q at Q-125.

First and foremost, the Governor's Plan emphasizes compliance with the IRHS (especially Standards 2 and 4 per the COT Report), incorporates scientifically- and locally-based desired *habitat objectives*[23] as described in Tables 2-16 through 2-18 of the DEIS, and provides an adaptive management construct to deal with unforeseen events on the landscape. DEIS at 2-82; E.O. 2015-04, App. 1at 59-61.

The Governor's Plan also stresses the need to use ecological site potential during regularly scheduled permit renewals when determining whether grazing is the causal factor for the decline of sage-grouse or sage-grouse habitat. Hence these objectives do not constitute uniform standards and may not be achievable due to: "(a) causal events unrelated to existing ecological condition, ecological potential, or existing vegetation; or (b) due to causal events unrelated to existing livestock grazing." *Id*. at 63; *citing* COT Report at 45. Where grazing is the causal factor, the Governor's Plan provides a suite of best management practices tailored to resolve the limiting factor(s) based on appropriate spatial and temporal monitoring. Thus, the Governor's Plan does not view rangeland health in a vacuum but rather provides a flexible, on-the-ground approach to adequately address the genuine threat posed by improper livestock grazing.

Further, livestock operators are incentivized to manage their federal rangeland in a manner that is beneficial to sage-grouse. The Governor's Plan accomplishes this objective by directing the agencies to prioritize allotments in the CHZ for permit renewal and review where sage-grouse populations are declining. DEIS at 2-41. In short, this process does not *presume* that simply because a permittee operates in CHZ, that changes to the grazing system are needed or required. *See* E.O. 2015-04, App. 1at 15 (noting that current livestock management will be maintained "unless reliable monitoring information is provided showing that livestock grazing is the causal factor in not meeting the sage-grouse habitat objectives"). And typically, increasing populations and healthy rangelands are strong indicators of proper livestock grazing. This prioritization scheme, similarly applied in the IHZ, is also important to the implementability of

[23] Guidelines for managing sage-grouse habitats and populations have been published (Connelly et al. 2000; Hagen et al. 2007) and are often included in various management plans. These guidelines describe *characteristics* of productive sage-grouse habitats based on a large number of studies conducted throughout the species' range. However, they do not reflect data collected in all parts of the range nor do they reflect data collected from randomly sampled locations. Thus, this information should be considered as providing *standards* by which to judge effects of livestock grazing on the ultimate quality of sage-grouse seasonal habitats.

the Governor's Plan. *See Id*. (noting that given limited agency resources, prioritization will be given to areas that have the potential to provide the greatest benefit to sage-grouse).

The adaptive management in the Governor's Plan does apply to this particular management component. In short summary, if a trigger has been tripped (soft or hard) within a CA, the Implementation Team will first analyze whether a primary threat was a causal factor. If there is no evidence to suggest a primary threat as a casual factor, then the Team looks to the secondary threats, such as livestock grazing. *Id*. at 60. Specifically, in the context of livestock grazing, the Governor's Plan focuses on IRHS Standard 8 (threatened and endangered species). If the allotment is within a CA where sage-grouse populations are being maintained, and no adaptive triggers have been tripped, there is a rebuttable presumption that the current grazing systems within that particular CA are maintaining adequate sage-grouse populations. *Id*. at 62-63. This presumption does not preclude adaptive changes to grazing permits based on the other standards within the IRHS, such as Standard 2 (uplands) and Standard 4 (riparian). So once an adaptive trigger is tripped, and livestock grazing is determined by the Implementation Team to be a potential limiting factor, there is no longer a presumption that the allotments within the CA are meeting Standard 8 of the IRHS. *Id*. at 63. At that point, the agencies would inventory those allotments and pastures within the CA and initiate the same process as a permit scheduled for renewal. If indeed grazing is the causal factor for the decline in population or habitat, an appropriately tailored management response will be required.

Based on this flexible approach emphasizing existing regulatory mechanisms within an adaptive construct, the FWS strongly endorsed the Governor's approach to addressing the threat of improper livestock grazing. And the Governor's Plan importantly meets the Purpose and Need Statement as outlined in the 2010 Finding and the COT Report. The grazing construct allows the agencies to effectively and efficiently manage the range while still fulfilling their multiple-use mandate and complying with the Taylor Grazing Act. Yet, as discussed in more detail below, the agencies ignored their own conclusions and science and dramatically deviated from the Governor's Plan.

ii. The Proposed Plan for livestock grazing is wholly inconsistent with the Governor's Plan

For the reasons enumerated below, the Proposed Plan is inconsistent with State law, policies, and programs embodied in Executive Order 2014-05 and Alternative E. *See* 43 CFR § 1610.3-2 (stating that management plans "shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of … State and local governments"). The Proposed Plan is materially inconsistent with the Governor's Plan for livestock grazing. The designation of sage-grouse "strongholds" in the Ashe Memo, that imposed designation of 3 million acres of SFAs, is the key driver for this inconsistency. *See* FEIS at 2-14.

Along with the SFAs, the Proposed Plan imposes unnecessary grazing standards contrary to the 2010 Finding, misinterprets or disregards the Governor's adaptive management construct,

and arbitrarily applies lek buffers to range improvements and infrastructure. Despite the fact that improper livestock grazing is not considered a primary threat and that sufficient regulatory measures already exist to address the threat, the agencies decided to implement substantial and unnecessary regulatory burdens directed at livestock grazing. These recent changes are especially confounding considering that the local FWS was supportive of the Governor's livestock grazing strategy, even stating that "[o]ur support for the approach of this element is due to it being a wise approach for regulating the appropriate conservation action for the secondary threat of improper grazing to GRSG where needed." E.O. 2015-04, App. 2 (emphasis added).

These new conservation measures, in concert with the prioritization scheme, elevate improper grazing to a primary threat, presume that management changes need to be made simply by virtue of where the allotment is located, ignore the foundational science, and create a costly diversion of resources. None of these enhanced measures can be fairly traceable to the Purpose and Need statement for this process.

a. The Proposed Plan's prioritization scheme for livestock grazing is inconsistent with the Governor's Plan.

Notwithstanding the prioritization scheme outlined in the Governor's Plan, the Proposed Plan unilaterally adopts an inconsistent prioritization structure for permit renewals and land health assessments. *See* FEIS at MA-10, RM-2, RM-16, RM-18. Again, the SFA scheme is the impetus for this change and inconsistency. *See* FEIS at MA-10 (designating SFAs and prioritizing livestock grazing for "management and *conservation actions* in these areas") (emphasis added). Specifically, the Proposed Plan requires that land health assessments be conducted first within SFAs, with an emphasis on areas within riparian areas, then in PHMA (or CHZ). This directly conflicts with the Governor's Plan which focuses first on those areas within CHZ (PHMA) and IHZ (IHMA) with documented "declining sage-grouse populations." E.O. 2015-04, App. 1 at 15.

Without explanation, the Proposed Plan will analyze allotments within SFAs and PHMA regardless of population trends and possibly irrespective of the fact that the allotments may not be scheduled for renewal.[24] This additional level of prioritization undermines the state-based collaborative development of the Governor's three-tiered habitat construct by adding a *de facto* fourth management zone and arbitrarily focusing the agencies' limited resources on a "secondary threat." By presuming that changes need to be made in SFAs, and to a slightly lesser extent in PHMA, the Proposed Plan appears to shift from "improper grazing" as the identified threat to livestock grazing in general as a primary threat. This profound shift will ultimately punish livestock operators – rather than incentivize – because it targets specific areas without first analyzing the site-specific data.

[24] BLM measure, RM-16, and USFS Guideline, GRSG-LG-GL-037, are ambiguous in that they could be construed to allow habitat guidelines to be incorporated into grazing leases outside of their scheduled renewal (*i.e.* incorporated into the Annual Operating Instructions). This is consistent with the NTT's approach to livestock grazing

b. The Proposed Plan's habitat standards are inconsistent with the Governor's Plan.

The habitat characteristics and objectives in the Governor's Plan have been largely ignored in favor of more uniform standards or "specific management thresholds" and "one or more defined responses." REIS at RM-17. While the agencies do require that management actions, including habitat measures, be based on ecological site potential, there is a reoccurring presumption throughout the Proposed Plan and FEIS that livestock management will (or should) be reduced, particularly in SFAs and PHMA. *See* FEIS AM-10, RM-2, RM-4, RM-17, RM-18, RM-19, GRSG-LG-GL-038, Table 2-3; *see also*, FEIS at 2-2 (discussing that the limited or no grazing Alternatives were analyzed at the DEIS stage, and therefore the presumable impacts to grazing from the SFAs and associated management action have already been addressed); FEIS at 4-192 (stating that grazing systems under Alternative D, a co-preferred alternative, would experience "moderate declines in permitted grazing…," thereby creating the assumption that grazing will be reduced). Even in the face of these enhanced grazing measures, particular through the vehicle of the SFAs, the agencies do not take the requisite "hard look" to analyze the impacts on livestock grazing. Simply including a cursory "moderate decline" statement does not satisfy the agencies' NEPA obligations.

Instead of habitat objectives or characteristics, permits within SFAs and PHMAs, under the Proposed Plan, will include "specific management thresholds based on the GRSG Habitat Objectives Table … and one or more defined responses that will allow the authorizing office to make adjustments…." FEIS at RM-17. Without further explanation, terms like "management thresholds" and "defined responses" become synonymous with standards and one-size-fits-all management responses, contrary to the COT Report and the Governor's Plan. The Proposed Plan is vague when defining these "defined responses," making it difficult to conduct a meaningful consistency analysis. At bottom, we are left with RM-6 and its adoption of an NTT Report-like response – namely, change in season or timing of use; numbers of livestock; distribution of livestock; and duration and/or level of use. Again, the agencies' default position appears to curtail livestock grazing in sage-grouse habitat.

The COT Report clearly and unequivocally states that habitat characteristics should include desired conditions with the caveat that they may not be achievable based on existing ecological condition (which the agencies half-heartedly acknowledge) or because of some other causal factor other than grazing. COT Report at 45. Now, and without explanation, it appears the agencies are defaulting to standards (e.g., 7 inch stubble height), that may not be achievable due to varying site conditions. *See* FEIS at RM-15, Table 2-3, Table 2-6, Table 2-8. Instead of a uniform 7 inches, the objective should be adequate nesting cover as collaboratively developed in the DEIS (and changed in the FEIS without explanation). DEIS at 2-290.

RM-19 heightens this concern and uncertain that the agencies will arbitrarily presume changes to grazing systems and ultimately closure of an allotment. "At the time a permittee or

lessee voluntarily relinquishes a permit or lease, the BLM will consider whether the public lands … should remain available for livestock grazing or be used for other resource management objectives….” This LUPA language in conjunction with adaptive response at G-35 and 4110.3-3(b) paints a bleak picture for grazing operations in SFAs. This approach is inconsistent with the agencies’ multiple-use mandates.

Further, the post fire restoration and rehabilitation measures – ESR-3, ESR-4, ESR-5 - do not reflect the best available science. Grazing permits and conservation measures need to provide land managers and permittees the flexibility to adaptively manage areas post-burn to allow for sustainable livestock operations while providing for rehabilitation. Return of livestock to burned areas should be based on site-specific objectives, ecological site conditions, and determined on a case-by-case basis, rather the Proposed Rule’s rigid and unworkable approach. Moreover, the agencies’ approach in this instance may exacerbate the primary threat of wildfire by increasing fuel loading in areas already impacted by wildfire. .

Finally, the proposed adoption of additional prioritization and management requirements makes little sense considering the agencies budget constraints. *See* Appendix 10 (stating that the BLM is unable to dedicate staffing to complete the necessary NEPA analysis on portions of the Governor’s Plan). For permit renewals, the Governor’s prioritization framework utilizes existing agency resources simply by focusing efforts in areas with documented habitat or population declines, rather than areas that may or may not have sustainable populations.

c. The Proposed Plan’s lek buffer standards for range infrastructure is inconsistent with the Governor’s Plan.

The Proposed Plan requires a 1.2 mile lek buffer around new fences and livestock facilities such as water tanks and corrals. FEIS RM-12, GRSG-LG-GL-041, GRSG-LG-GL-042. The uniform 1.2 mile buffer is inconsistent with the Governor’s Plan, the COT Report, and the best available science because it innately discourages site-specific analysis or adjustments to the buffer distance by setting minimum buffers that, in reality, are unlikely to be altered.[25] RM-13 extends this to existing range infrastructure noting “[d]uring the land health assessment and grazing permit renewal process, evaluate existing livestock management range infrastructure with respect to their effect on GRSG habitat.” FEIS 2-46. And the Proposed Plan requires the BLM to “consider removal of projects” that “negatively affect GRSG habitat” unless that structure is benefiting other species. This language is vague and should have adopted the approach in RM-15 to make any such adjustments “following appropriate cooperation, consultation and coordination.” In fact, that language should be added to all livestock measures before issuance of the ROD.

[25] There is one exception to the 1.2 mile standard for range infrastructure: GRSG-LG-GL-041 does not allow fences within 1.2 miles of an occupied lek unless the collision risk can be mitigated through markings or other design features.

Development of buffers for range infrastructure is best suited for site-specific NEPA. The adoption of a 1.2 mile uniform standard for any or all range infrastructure makes little sense at the land-use plan level because, as with the relationship between habitat characteristics and ecological site potential, each allotment or pasture provides unique landscapes that may allow for buffer distances less than 1.2 miles. In addition, the basis for the 1.2 miles stems from the USGS Lek Buffer Report that, as discussed above, was not available at the DEIS stage and was not vetted with the Governor's Task Force and the public.

The Governor's Plan requires fences to have a 0.6 mile (1 km) buffer and other structures should be placed in a manner that considers their impacts on sage-grouse. E.O., App. 1 at 38-39. This is consistent with the COT Report which states that range structures should be designed and placed in a manner that is "neutral or beneficial to sage grouse," allowing for considerably more flexibility than the Proposed Plan. COT Report at 46.

d. <u>The Proposed Plan's adaptive management scheme for livestock grazing is inconsistent with the Governor's Plan.</u>

The adaptive management protocol in the Proposed Plan also deviates from the Governor's Plan by consistently blurring the line between the "soft" and "hard" triggers. *See, e.g.*, FEIS AM-11, AM-13; FEIS at G-35-36. For example, AM-11 (BLM) states that the Implementation Team will "evaluate causal factors and recommend additional potential implementation level activities" subsequent to a soft trigger; thus, failing to first evaluate the primary threats. This lack of clarity in language reinforces the notion that the Proposed Plan has inappropriately elevated grazing to a primary threat. The Forest Service's Proposed Plan further obfuscates the adaptive trigger construct that received concurrence from the FWS. E.O. 2015-04, App. 2; *see* FEIS GRSG-AM-ST-010, GRSG-AM-ST-011. Here, the Forest Service is proposing to adopt immediate actions for livestock grazing at the soft trigger level – namely, "apply[ing] more conservative or restrictive implementation measures," such as "modifying seasons of use for livestock grazing." This is inconsistent with the Governor's approach requiring only a consideration of management options at the soft trigger level. E.O. 2015-04, App. 1 at 60.

The specific adaptive management construct for grazing is also inconsistent with the Governor's Plan. Conservation measure AM-13 (BLM) states that "[i]f an adaptive regulatory trigger is tripped and livestock grazing is identified as a probable limiting factor then adjustments would follow the Adaptive Grazing Management Response described in Appendix G." Several inconsistencies stem from this language, including no differentiation between soft and hard triggers; between primary and secondary threats; and immediately adopting conservation measures without first determining causal factors at the allotment level. While Appendix G is more consistent than the LUPA language, AM-13 seems to distance the Proposed Plan from that outlined process by emphasizing the adaptive *response* in Appendix G.

Next, absent any mention of the presumption that Standard 8 is being met within a CA if an adaptive trigger has not been tripped.[26] Under the Proposed Plan, if a trigger has been tripped and livestock grazing is a "probable limiting factor" then adjustments to grazing management will be made. FEIS at AM-13, App. G at G-35. This reduces the threshold and skews the process. Again, the Governor's Plan never suggested that the agencies are to move directly from identifying grazing as a potential issue at the Conservation Area-level to immediately adopting new conservation measures at the allotment level. E.O. 2015-04, App. 1, at 62-64. In short, the language in the Proposed Plan seemingly suggests that the agencies need only determine that grazing is a "probable" contributor to sage-grouse declines in a CA before implementing an adaptive management response, contrary to the IRHS.

Moreover, the agencies' adaptive response dramatically differs from the Governor's Plan. The Forest Service, GRSG-AM-ST-010, states that if a hard trigger is tripped, "immediate action is necessary to stop a severe deviation from sage-grouse conservation objectives. Upon reaching a hard trigger, an appropriate component of a more restrictive alternative analyzed in the environmental impact statement will be implemented." The more "restrictive alternative(s)" included significant to total reductions to AUMs across sage-grouse habitat. *See* FEIS at 2-146 (eliminating grazing completely in Alternative C, and a 25% reduction in Alternative F).

At bottom, the Proposed Plan has substantially deviated from the adaptive construct outlined in the Governor's Plan for livestock grazing. The state and federal agencies have invested countless hours analyzing and reviewing the trigger system. At the last minute, significant changes were made without appropriate consultation with the State. This is especially disappointing since this innovative concept originated from the Governor's Task Force. Hopefully, some of these issues result from a misalignment between the LUPA language and Appendix G and can be easily clarified in favor of the Governor's Plan before issuance of the ROD. Other changes, unfortunately, cannot be fairly ascribed to a misalignment and reveal an agenda driven effort to elevate livestock grazing to a primary threat.

E. Lek Buffers

As previously stated, at the direction of the Department of Interior, the U.S. Geological Survey (USGS) published a compilation of scientific studies related to anthropogenic disturbances and their effects on sage-grouse populations. "*Conservation Buffer Distance Estimates for Greater Sage-Grouse – A Review*," USGS Open File Report 2014-1239 at 1 (Mainer, *et al.*) (USGS Report). The USGS Report was released close to one year following the release of the DEIS preceding the public availability of the Proposed Plan by a matter of months. The purported purpose of the USGS Report is to provide land managers a summary of "information, citations, and interpretation (sic)" to develop "practical lek buffers around sage-grouse habitats." *Id*. The substantive portions of the USGS Report are incorporated into the Proposed Plan at AD-9 and Appendix DD of the FEIS, and are materially inconsistent with the

[26] To reiterate, there is no presumption related to IRHS Standards 2 and 4.

Governor's Plan. FEIS, at 2-3 (noting the Proposed Plan included a management action to incorporate the lek buffer-distances identified in the USGS Report … during NEPA analysis at the implementation stage).

Six categories of disturbance are analyzed in the Lek Buffer Report, including 1) surface disturbance, 2) linear features, 3) energy development, 4) tall structures, 5) low structures, and 6) activities. For each category, the USGS Report recommends a minimum "interpreted range," which the authors believe to be the minimum buffer distance that should be applied for each particular category. *Id*. The agencies, in the Proposed Plan, relies solely on the USGS Report to set the minimum and uniform lek buffer distances for activities occurring within PHMA, IHMA, and GHMA in Idaho.

i. The Governor's Plan establishes lek buffers commensurate with the threat level and the best available science.

The Governor's Plan appropriately establishes lek buffers for certain activities, while also recognizing that applying uniform buffers at the land-use plan level is not tailored to the overall threat level posed by large-scale infrastructure development and other activities. E.O. 2015-04, App. 1, at 46. Depending on the location of the proposed project (i.e., CHZ or IHZ), the Governor's Plan permits with stipulations, and in other areas generally prohibits certain activities. *See Id. at* 33-60 (applying the management continuum's three-tiered habitat scheme whereby infrastructure development is prohibited with limited exception in CHZ (PHMA), open subject to stipulations in IHZ (IHMA), and open without any special sage-grouse measures in GHMA (GHZ)).

As explained in the infrastructure section, for new infrastructure projects, the Governor's Plan provides for necessary and appropriate lek buffers for activities occurring in CHZ and IHZ. To encourage siting outside of CHZ, and to a lesser extent IHZ, new activities proposed within GHMA containing only 5% of sage-grouse males are open without stipulations unless prohibited by a previous land use plan. *Id. at* 45, 47. Sections III.C. and III.D. (infrastructure and grazing), discussed above, compare and discuss the specific buffer recommendations in the Proposed Plan and their associated inconsistencies with the Governor's Plan and other relevant state and local laws.

More specifically, the Governor's Plan emphasizes following the specified process for any new development within CHZ and IHZ. In CHZ, new infrastructure is prohibited unless it is developed pursuant to a valid and existing right, such as a claim under the General Mining Law of 1872, or an incremental upgrade/capacity increases to existing infrastructure subject to specific BMPs. *Id. at* 35. Notwithstanding this general prohibition, the State Director may authorize infrastructure development within CHZ under limited circumstances. *See Id. at* 36 (development may be authorized if, *inter alia*, the activity cannot be accomplished outside of CHZ, the sage-grouse population is increasing, co-locate to the maximum extent practical, etc.). Development in IHZ is open subject to certain screening criteria and BMPs. *Id. at* 42.

These specified BMPs provide a comprehensive set of conservation measures aimed at avoiding and minimizing disturbances to sage-grouse habitat within CHZ, and to a lesser extent IHZ. Specific to lek buffers, the BMPs in the Governor's Plan range from 1 km to 2 km, depending on the category of disturbance, such as transmission lines, essential public services and oil and gas. *Id. at* 46. Even more important than spatial buffers, the BMPs allow for reduced buffer distances depending on the cumulative impacts associated with the project and the local population trends. *Id*. For example, there is a 1 km (0.6 miles) NSO for oil and gas leases, "provided this distance is supported by the best available science at the time the development undergoes site-specific environmental analysis." *Id*; *see* Land Board Plan at 30 (applying to 1 km on State endowment lands for fluid mineral leases). Adjustments can be made if supported by the best available science. E.O. 2015-04, App. 1 at 42. This is consistent with the State of Wyoming's approach, which is supported by the longest track record of implementation within sage-grouse habitat.

And further, the two habitat zones with the highest levels of protection, CHZ and IHZ (PHMA and IHMA), contain 95% of the sage-grouse males in Idaho. E.O. 2015-04. The residual 5% of the population occurs in GHZ (GHMA). *Id*. Management within GHZ, under the Governor's Plan, is focused on "facilitating multiple use activities in order to avoid siting conflicts in the other management zones." *Id*., App. 1 at 31. This zone was established to be less restrictive in order to more easily site projects that may have otherwise occurred in CHZ or IHZ. As such, it makes little sense to apply the same lek buffer restrictions to activities in GHZ as those applied in the more restrictive management areas. Applying the same buffers across all three habitat zones disincentivizes project proponents from locating outside of CHZ and IHZ because they are essentially subject to the same project level screens across all habitat management areas. The Agencies provide no justification for such sweeping restrictions in a management zone that contains a mere 5% of the species.

ii. The Proposed Plan imposes uniform lek buffers across the planning area contrary to the Governor's Plan.

In addition to the fact that the USGS Report was not available for public review, discussed infra, the Lek Buffer Report is also inconsistent with the Governor's Plan. Lek buffers should largely be determined at the site-specific level, as ecological conditions vary across the species' range and even between sites within close proximity. *See* COT Report at 31 (noting that "[d]ue 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.").

Both plans recognize the need for local data and that baseline information can be helpful at the land use plan level to appropriately inform site-specific NEPA analyses. Yet the Proposed Plan goes too far by relying solely on the USGS Report and setting uniform buffers that are too rigid across the entire planning area. FEIS at AD-9. The buffer distances in the Proposed Plan

conflict directly with those in the Governor's Plan by ignoring the best available science and diluting the effectiveness of the management continuum. Even more acute, is the fact that the Governor's Task carefully placed some areas in the GHZ because of known and ongoing development activities with large economic implications for the state. This decision was not detached from the science as these areas were isolated populations with low likelihood long-term of persistence not necessary to meeting the state's population objectives. FWS in their review of Idaho's map never disagreed with this conclusion. Accordingly, application of uniform lek buffers in the GHZ is a major inconsistency with the Governor's Plan.

To be sure, the agencies do allow for some "variance" in the lek buffer distances, but as evinced by other infrastructure projects in Idaho, there is little-to-no incentive for the agencies to deviate from these set standards. It is unlikely in the short-term that local land managers would risk further litigation and scrutiny by deviating from the standards established in the Proposed Plan, even if at the project-level such excessive distances are arbitrary and unsupported by the local science. And, according to Appendix DD, deviation requires additional analysis and justification, which may be onerous and hamstrung by agency budget constraints.

As established, the Governor's Plan works to encourage development outside of sage-grouse habitat by and through the three-tiered habitat scheme and management continuum appropriately reducing impediments and project screens as you move away from core habitat; thereby, obviating the need for buffers. However, by applying uniform measures across all habitat zones, regardless of habitat quality, as the Proposed Plan does, the purpose behind the tiered habitat construct is disrupted by no longer striking a reasonable balance with the agencies' multiple-use mandate. The costs and impediments associated with development become the same whether in optimal or sub-optimal sage-grouse habitat.

Some of the USGS Report studies themselves are inadequate.[27] However, the real problem lies in the fact that the USGS Report was not properly vetted. The purpose of NEPA is to "ensure a process," and that process was marginalized when interested parties were not provided the opportunity to analyze the findings within the Lek Buffer Report, or test the theories proffered in the cited studies. *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008). The Lek Buffer Report was introduced during the ninth inning of this process, and flies in the face of the "meaningful public involvement" requirement in FLPMA. 43 U.S.C. 1712(c)(9).

a. <u>The USGS Report does not reflect the best available science.</u>

As described above, the uniform lek buffers in AD-9 and Appendix DD, as well as the Forest Service measures, are inconsistent with those in the Governor's Plan. And while it

[27] *See* Dinkins et al. 2013, Lockyer et al. 2013, Howe et al. 2014, and Coates et al. These studies do not analyze quantitative data related to an increase in predation on sage-grouse. In addition, the 1,200 m buffer is immaterial because it is simply the average distance of raven nests to the nearest transmission line. It does not evaluate the birds actually nesting or perching on the transmission lines, which are the birds of concern

appears at first blush that both plans base their buffer distances upon scientifically defensible data, the Proposed Plan relies on a single report citing to studies and information not available for public review.[28] The agencies determined this significant change was within the scope of the EIS and would not require further public comment. But buffer distances applied across the entire planning area will result in immeasurable impacts to industries in Idaho, and therefore, should have been included in the DEIS for public review and comment. Not only was the USGS Report itself published after the publication of the DEIS, many of the studies referenced within the report were also recently released (*see, e.g., Howe, et al. 2014*). As discussed infra, the agencies can only cure this procedural defect by issuing an SEIS. Until such time, the USGS Report cannot serve as the best available science for lek buffers.

In addition, the USGS Report arbitrarily establishes each categories' minimum "interpreted range," as opposed to the actual minimum ranges reported in the cited literature. *See* USGS Report at 14 (the study reported minimum distances, and maximums, but did not report on other reported distances between the minimum and maximum levels reported in the literature); FEIS, App. DD. The FEIS must assess alternative lek buffer distances, as reported by various original literature sources, and should not have completely relied upon the "interpreted ranges" created by this study. According to the USGS Report, the interpreted ranges represent the "distances upon which protective, conservation buffers <u>might</u> be based…." USGS Report at 1 (emphasis added). However, at no decipherable point in the USGS Report, does it cogently describe how the interpreted ranges were developed for each corresponding activity. The reader is simply supposed to accept the authors' quixotic justification for the proffered distances. Unfortunately, the BLM fully adopts the interpreted ranges in their Proposed Plan. Appendix DD does recognize that local data and science can influence the buffer distances; however, the arbitrarily established interpreted ranges serve as the default minimums without any sort of justification for their adoption. *See* FEIS at AD-9 (adopting the USGS Report).

Moreover, the interpreted ranges applied across federal lands in Idaho differ greatly from the buffer distances applied in Wyoming for the exact same activities. *See* Wyoming-9 Proposed Plan Actions #129-30. There appears to be little-to-no explanation in the cumulative effects analysis for the best science being vastly different between two neighboring states. *See Id*. (applying a 0.6 mile buffer for surface disturbances in Wyoming's PHMA (3.1 miles in Idaho) and .25 miles in non-PHMA (also 3.1 miles in Idaho)). The State of Idaho is unaware of any significant topographical or geographic differences that occur on the southeastern border of Idaho to justify such differences, nor do the agencies provide any rationale.[29]

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[28] The USGS Report is only applied to BLM conservation measures in the Proposed Plan. However, the USFS also proposed buffers that are inconsistent with the Governor's Plan. *See* Tables 2-6 and 2-8 (applying a 6.2 mile buffer, without explanation, during breeding and nesting); *see also*, GRSG-GEN-GL-009, GRSG-LG-GL-041, GRSG-LG-GL-042, GRSG-RT-ST-070, GRSG-MM-ST-103.

[29] The agencies cannot simultaneously say the "best science" in Idaho is 3.1, while .25 mile is the "best science" in Wyoming. The agencies have not adequately disclosed this impact.

b. The lek buffers are internally inconsistent and vague in their practical application.

The lek buffers are not consistently applied within the Proposed Plan. For purposes of identifying the Project Analysis Area in the density disturbance calculation, the agencies state that "[a]ll occupied leks located within the four mile project boundary and within PHMA will be considered affected by the project." FEIS App. G at G-6 (emphasis added). This creates ambiguity for proposed projects in CHZ. Although a significantly smaller lek buffer (*i.e.*, 2 miles) may be required for certain projects, the agencies can still determine that the project will affect an occupied lek that is 4 miles away; potentially creating a *de facto* 4 mile buffer for any and all disturbances that occur within PHMA. Project proponents cannot be expected to operate with such uncertainty as to which buffer may apply, especially for purposes of mitigation.

Further, the lek buffers are often vague or unclear in their practical application. For example, within the Proposed Plan and attendant appendices, it is unclear whether the lek buffers apply to co-located infrastructure and/or incremental upgrades to existing sites. *See, e.g.*, FEIS, AD-5 (stating the BLM's preference for co-locating new infrastructure within existing ROWs, but making no mention of lek buffers); *see also*, FEIS, AD-9, LR-1, LR-2, FLM-1, FLM-3, SAL-1, NEL-1, GRSG-GEN-DC-009-Guideline, GRSG-LR-SUA-ST-020-Standard (making no mention of the lek buffers applicability to project renewals, co-location, maintenance or upgrades). In most instances, it would make little sense to require lek buffers for new development within existing ROWs, as the anthropogenic disturbance has largely been realized by the footprint of the existing ROW. However, there is no certainty as to how the agencies may apply lek buffers to existing projects.

IV. RECOMMENDATIONS FOR RESOLVING THE INCONSISTENCIES

The FLPMA standard for the agencies' consistency obligations instructs that, "the Director *shall* accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R. § 1610.3-2(e). (emphasis added). If the State Director accepts the below recommendations, pursuant to 43 C.F.R. § 1610.3-2, then "the State Director shall provide the public with an opportunity to comment on the recommendation(s)."

The Governor's cover letter noted this is not a typical consistency review, primarily because the Federal government's invitation provided the unique opportunity for a governor's sage-grouse plan to be included in this unprecedented land-use planning process (i.e. Alternative E). Again, this invitation was and is consistent with both FLPMA's 202(c)(9) obligations and the agencies' multiple-use mandate. Whereas the typical Governor's Consistency Review offers recommendations not analyzed as a separate alternative, the agencies' consistency obligations in this setting must apply with greater force because the solid foundational analysis already exists to reach a meaningful resolution of the identified inconsistencies.

As evidenced by the foregoing discussion, a wide and significant delta exists between the Proposed Plan and the Governor's Plan. Because the Governor's Plan was included and analyzed as Alternative E, received a strong endorsement from the FWS, and was selected as a co-Preferred Alternative, it is apparent that Alternative E comports with federal law and the purposes of FLPMA. Moreover, Alternative E's scientific underpinnings and its collaborative foundation unequivocally represents a reasonable balance between federal and states interests. The Proposed Plan, by contrast, is per se imbalanced because it is inconsistent with federal law. Accordingly, 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.

Governor's Otter's Recommendations Strike a Reasonable Balance

Adopt Alternative E. The agencies must immediately withdraw the Proposed Plan and adopt Alternative E. As demonstrated by the Imbalance section, the Governor's Plan comports with federal law, strikes the appropriate federalism balance, and is the perfect fit to meet the needs of the species in Idaho.

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. Otter DC Memo (Appendix 11). 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 Otter 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. 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.

As noted in the Inconsistency section, we are greatly disappointed the agencies did not afford Idaho the same opportunity to review and provide comments to the Ashe Memo in a timely manner. Because the Department did not fully comply with U.S. Senator Risch's SFA request, we cannot precisely calibrate or divine the BLM's rationale for exempting Wyoming from SFA management. At least in part, on January 6, 2015, Governor Mead's office sent an email with an attachment to top Interior officials highlighting Wyoming's regulatory authorities over hardrock mining. (Appendix 21).

Had Idaho been afforded this opportunity, the State and the federal government could have discussed the provisions of Idaho's Surface Mining Act (SMA), I.C. § 47-1501 *et seq*. The SMA requires an approved reclamation plan, performance bond, and adherence to water quality standards. The scope of the SMA covers mining for decorative stone, sand and gravel, phosphate and molybdenum, gold, silver and other minerals. And the Act applies to all lands in the state, including private and federally managed lands. Idaho has long has a Memorandum of

Understanding with the federal agencies to coordinate one reclamation plan, which ironically, may be undermined by many of the measures in the Proposed Action. *See* mining inconsistency section. These adequate regulatory authorities, at a minimum, should provide an opportunity for the agencies and the Otter Administration to meaningfully discuss resolving the SFA issue.

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

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.

Ask for a Reasonable Extension of Time. As noted in Governor Otter's cover letter, to comply with your consistency obligations by meaningfully considering, analyzing and resolving the inconsistencies to the "maximum extent" as identified in the Consistency Reviews and Protest Letters from the western governors, Secretary Jewell has no other option than to ask the U.S. Congress or the court for a reasonable extension of time to resolve the Governors' Consistency Reviews. Without a reasonable extension, the agencies cannot comply with the law.

In sum, failure to act on these sensible recommendations will signal a disappointing end to collaborative engagement on this issue. Moreover, it will place the agencies in a situation where they are attempting to implement legally flawed and imbalanced Proposed Plan that is wholly inconsistent with the consistency and multiple-use mandates.

V. FAILURE TO ADOPT GOVERNOR OTTER'S PLAN WOULD CONSTITUTE AN UNREASONABLE IMBALANCE BETWEEN NATIONAL AND STATE INTERESTS

From a more holistic perspective, and rather than viewing this planning effort through the lens of individual inconsistencies, there is deep and significant divide between the Proposed Plan and the Governor's Plan. Particularly troubling is the Proposed Plan's purported adoption of the same overall structure as Alternative E stating, "[t]he Proposed LUPA/FEIS is a variation of the co-preferred alternative (Alternatives D and E), and is within the range of alternatives analyzed in the DEIS." FEIS 2-1. But on closer examination, the agencies should have accurately disclosed that the last-minute National Direction effectuated a "radiator capping" of the Governor's Plan.[30]

[30] "Radiator capping" is where the radiator cap is taken off a vehicle. The original vehicle is removed and an entirely new vehicle is driven under the cap, which is then screwed onto the radiator. Thus, the Proposed Plan arbitrarily "radiator capped" the Governor's approach. In fact, the Department of Interior "Fact Sheet" claims as

In other words, the inclusion of the SFA scheme, changes to the livestock grazing management component, imposition of uniform lek buffers and stringent mitigation standards across the entire planning area, as well as the unnecessary modifications to the adaptive management construct, materially disrupt the core components of the Governor's Plan. For these reasons, the Proposed Plan is *per se* imbalanced.

The BLM regulations require the agency in this situation to accept the Governor's recommendations, as outlined in the previous section, because they "provide for a reasonable balance between the national interest and the State's interest." 43 C.F.R. § 1610.3-2(e). The following section further describes that imbalance by demonstrating: (1) the Governor's Plan, not the Proposed Plan, strikes the appropriate federalism balance and is a 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) overrides the state's sovereign authority over its wildlife. Accordingly, the agencies' rejection of the Governor's Plan creates an unreasonable imbalance between national and the state's interests.

A. The Governor's Plan, not the Proposed Plan, represents a balanced solution and a perfect fit to meet the needs of the species in Idaho.

When Governor Otter established his Task Force, pursuant to EO 2012-02, his goal was to develop specific regulatory mechanisms aimed at precluding the need to list the sage-grouse under the ESA while maintaining multiple-uses of federally managed lands. To do so, the Task Force would need to have an understanding of the threats to sage-grouse in Idaho.

Recognizing that the severity of threats varied across the range of the species, the Task Force requested advice from the FWS and BLM during their deliberations. The agencies provided a delineation of threats (primary or secondary) to the Task Force consistent with the 2010 Finding. *See, e.g.*, COT Report, at 9 (noting that "fire is one of the primary factors linked to loss of sagebrush-steppe habitat and corresponding population declines of greater sage-grouse…Concern with habitat loss and fragmentation due to fire and invasive plans has mostly been focused in the western portion of the species' range."). Consistent with that advice, the Task Force spent a significant portion of its time developing recommendations to address the primary threats of wildfire and invasive species, such as through the creation of the Rangeland Fire Protection Associations.

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much noting that, "[t]he plans build upon the foundation for sage-grouse conservation initiated by a number of states, including … Idaho's three-tiered conservation approach …." *See* Fact Sheet: BLM, USFA Greater Sage-Grouse Conservation Effort, May 29, 2015, available at http://www.blm.gov/wo/st/en/prog/more/sagegrouse.html (last visited July 20, 2015). With the inclusion of SFAs, the Proposed Plan for Idaho now has a four-tiered approach and should have been accurately portrayed in the Proposed Plan.

While the 2010 Finding identified loss and fragmentation of sagebrush habitats due to large-scale infrastructure development as a primary threat to sage-grouse, the threat of infrastructure is more acute in the eastern part of the species' range. 73 Fed. Reg. at 13,954. The Governor concurred with this assessment in his draft comments:

> Idaho has not seen the effects of oil and gas production nor is development occurring at an unsustainable rate across sage-grouse habitat. In fact, development of the magnitude addressed by the Service is not occurring at all. Thus, across the rest of the range, the primary threat is wildfire.

Idaho DEIS Comments at 15. Notwithstanding the relative lack of infrastructure development in Idaho, the Task Force still developed a suite of regulatory measures to ensure that future development would be permitted in a balanced manner that conserves the species in the most important habitat. *See* E.O. 2015-04, App. 1 at 5. (describing the management continuum in the Governor's Plan); *see also Id. at* 33-34; 40.

Further, the Governor's Plan addressed the secondary threats of improper livestock grazing, mining, and West Nile Virus in the appropriate context. *See* COT Report at 44 (stating that "improper livestock grazing as determined by local ecological conditions may have negative impacts on sage-grouse seasonal habitat"). The Governor's approach to addressing improper livestock grazing emphasizes the need to comply with existing regulatory measures (*e.g.*, IRHS) and fully captures the intent of the COT Report. Alternative E states:

> Existing grazing management would be maintained unless the current grazing system does not meet GRSG habitat objectives and there is compelling information that changing the system would enhance habitat. Specifically, management actions in this alternative state that where population and habitat triggers are being maintained within a Conservation Area, this shows that the current grazing system is adequate to maintain viable GRSG populations and therefore absent compelling information, no further changes to BLM grazing systems would be required pursuant to Standard 8. Modifications to grazing management would continue to be implemented, however, where Standards 2 and 4 are not being met.

FEIS, at 4-193. The FWS determined that this approach is consistent with the COT Report. *See* E.O. 2015-04.

Similarly, and as noted above, the Governor's Plan does not alter mining conducted pursuant to the General Mining Law of 1872 and the Mineral Leasing Act because: (1) like livestock grazing is a secondary threat; and (2) has existing regulatory mechanisms commensurate with the threat level. *See* COT Report at 49 (stating the goal for mining is to"[m]aintain stable to increasing sage-grouse populations and no net loss of sage-grouse habitats in areas affected by mining").

Aside from the individual threats to the species, the Governor's Plan fully recognizes that to maintain the state's population objectives there has to be a regulatory mechanism to capture the inherent unpredictability of threats like wildfire. The Task Force wisely recognized the need for an integrated, outcome-based solution that included two primary objectives: (1) implementation of regulatory mechanisms to support the overall management objective – to maintain and enhance sage-grouse habitats, population and connectivity in areas within the CHZ, buffered by strategic areas within IHZ. This will allow the state to conserve at least 65% of current known leks within the Idaho; and (2) ensure effectiveness of those measures and specific objectives by implementing an adaptive regulatory construct. E.O. 2015-04, App. 1 at 9.

This recognition, as detailed above, was the primary driver for the innovative adaptive regulatory construct to serve as a backstop to ensure the populations and habitats within CHZ, and to a lesser extent IHZ, are maintained and enhanced consistent with the overall conservation objectives. As the Governor wrote Secretary Jewell, "[t]he core structure of the Idaho Plan provides an innovative path forward for GSG conservation, especially in addressing the critical threat of wildfire. In the short-term, the three management zones, adaptive triggers and the innovative Rangeland Fire Protection Associations will collectively flatten the foreseeable extinction risk curve and provide the opportunity for longer-term solutions (i.e., targeted grazing, fuel breaks and habitat restoration) to demonstrate effectiveness." Otter DC Memo, at 2. For this outcome-based strategy to effectively work, the Governor's Plan must be taken as comprehensive approach, rather than as spare and segmented pieces that can be combined with unnecessary and excessive regulatory measures. Thus, to constitute a balanced solution for sage-grouse in Idaho there must be proper threat alignment; conservation measures commensurate with that threat; and an adaptive construct to address the inherent risk of wildfire.

i. The Governor's Plan is the perfect fit with the COT Report.

In the development of the Governor's Plan, the agencies were regularly consulted to avoid developing an alternative that was not in compliance with federal law and could not be implemented by the agencies. Following the release of the draft Governor's Alternative, the FWS positively responded to such a request noting that "[t]he Core and Important Habitat Zones, as currently drafted by the Task Force, are *indeed* among the most important sage-grouse habitats in the State. In identifying these zones, the Task Force had the foresight to address not only the conservation of what are now the most important habitats, but also a means to provide for long-term conservation and restoration of sage-steppe habitat and rangelands in Idaho." *See* Appendix 4 (emphasis added).

Even with that affirmance, Governor Otter along with the other western states wanted to avoid a "moving the goalposts" scenario where the federal government arbitrarily required more restrictive conservation measures without appropriate scientific justification. One of the key outgrowths of the December 2011 meeting with then Secretary Salazar was the development of the goalposts for this process (*i.e.* the COT Report). Because FWS was aware that several states

were either in the process of developing or had developed state-based plans and alternatives, the agency invited representatives from each state to participate in the COT process. As noted in the COT Report, "[r]ecognizing that state wildlife agencies have management expertise and management authority for sage-grouse, the FWS created a Conservation Objectives Team (COT) of state and FWS representatives to accomplish this task." COT Report at 5. This collaborative team completed its work on March 22, 2013.

In the cover letter to the COT Report, Director Ashe identified the operating framework for the document. First, the main purpose is to "minimize habitat threats to the species so as to meet the objective of the 2006 Western Association of Fish and Wildlife Agencies' (WAFWA) Greater Sage-Grouse Comprehensive Strategy: reversing negative population trends and achieving a neutral or positive population trend." Second, "one key component of this report is the identification of Priority Areas of Conservation (PACs), which were described as key habitats that are essential for sage-grouse conservation." And for areas outside the PACs, "the report, encourages, but does not require, that important habitats outside of PACs be conserved to the extent possible. In addition, page 36 of the COT Report indicates that states with state plans developed in conjunction with the Service should follow those plans in making decision about areas outside of PACs." Third, "the report identifies conservation objectives and measures for each of the habitat threats assessed. For some threats, the team identified examples of actions that could be used to help attain the conservation objectives, and they termed these "conservation options." The Service interprets these "options" as suggestions and examples only, not prescriptive or mandatory actions."

As determined by the FWS, and further explained below, the Governor's Plan meets the core objectives of the COT Report.

a. <u>The FWS Determined that Governor Otter's Plan Meets the COT Report Objectives</u>

As stated in the Background section, one of the reasons Governor Otter accepted the Secretary's invitation was to be exempted from the BLM's national IM 2012-043. After submitting the Governor's Alternative to the agencies in September 2012, Governor Otter continued to work with local FWS office to determine what was necessary to improve or clarify to achieve this objective. In March 2013, Governor Otter sent a letter to the FWS requesting concurrence. As mentioned above, FWS's response mirrored the positive endorsement in the Habitat Zone (Appendix 4) letter and provided concurrence on the four foundational elements and individual components of the Governor's Alternative. The FWS concurred on the sage-grouse map with the three habitat zones and four conservation areas; the adaptive management construct; and population objectives. The agency also offered an endorsement of the livestock grazing and large-scale infrastructure strategy. Importantly, all of the FWS's analysis focused on whether the Governor's Alternative was consistent with the COT Report. *See* E.O. 2015-04, App. 2.

These findings by the FWS were made for good reason. The following illustrates the solid rationale for why the FWS concluded that the Governor's Alternative is the perfect fit to meet the objectives of the COT Report. First, the four foundational elements are consistent with the General Conservation Objectives and Specific Conservation Objectives related to Priority Areas for Conservation (PACs) in the COT report.[31] These foundational elements include the designation of the three habitat zones. The Core Habitat Zone (CHZ) is home to 73% of the male sage-grouse in Idaho. The designation of CHZ also addresses the primary threat of infrastructure development by prohibiting it, but providing a process for limited exceptions. This meets the COT report intent of avoiding development in PACs. The FWS commended the Governor's Alternative for ensuring that any exception must still meet the standards for development in the IHZ.

The IHZ includes 22% of the male sage-grouse in Idaho, and while new infrastructure development is permitted, the project screens and BMPs will ensure that this zone meets its dual purpose: (1) to minimize threats, as directed by the COT Report, in the areas of the IHZ considered to be PACs; and (2) provide a savings account to provide an adequate regulatory mechanism for dealing with the inherent uncertainty of wildfire. Thus, the areas included in the CHZ and IHZ, as noted in both the August 2012 letter (Appendix 4) and the subsequent consistency determination from the FWS (Appendix 6), encompass the total sage-grouse identified as PACs.

Another of the COT's objectives, as outlined in the cover letter, is to identify areas and habitats outside of PACs that may be necessary to maintain viability of sage-grouse. Additionally, if development or vegetation manipulation activities outside of PACs are proposed the project proponent should work with federal, state or local agencies and interested stakeholders to ensure consistency with sage-grouse habitat needs. COT Report at 37. There is nothing in the COT to suggest that the regulatory mechanisms in the PACs must be equivalent with the areas outside the PACs. Yet, that is exactly what the Proposed Plan does by imposing the net conservation gain standard and uniform lek buffers in the GHZ. Even more to the point, even though the Governor's Plan does not impose any special land-use project screens in the GHZ to incentivize development in this zone, it by no means suggests the absence of adequate regulatory mechanisms. Many of these activities still have to comply with other regulations (e.g. unnecessary or undue degradation standard) that going forward will address any potential sage-grouse concerns. Thus, the COT's direction for activities outside the PACs is met.

Along with the core habitat objectives, the monitoring program and adaptive triggers in the Governor's Plan meet the COT's objective of implementing appropriate restoration efforts if PACs are lost due to catastrophic events. *Id*. It also meets the objective of restoring and rehabilitating degraded sage-grouse habitat within PACs. The Governor's Plan meets this objective through its outcome based strategy within an adaptive construct. *See generally* E.O. 2015-04, App. 2. And as explained above, one of the key attractive features of the Governor's

[31] FEIS, Appendix G.

Plan to the FWS was and is the adaptive regulatory triggers. Confirmed by the FWS, this approach meets the COT's objective to re-evaluate the status of PACs and adjacent sage-grouse habitat at least once every 5 years or when important new information becomes available. COT Report at 37; *see also* Adaptive Trigger section, above at III.B.i.

The Governor's Plan also applies the COT's conservation measure to design and implement restoration of burned sagebrush habitats to allow for natural succession to healthy native sagebrush plant communities. COT Report at 37. This is also addressed through Alternative E's habitat monitoring program and adaptive triggers. Alternative E's monitoring program. This conservation objective measure notes that successful monitoring must continue until restoration is complete, with sufficient commitment to make adequate corrections to management efforts if needed.

Given this alignment with the COT Report, it was unsurprising that Alternative E was selected as a co-Preferred alternative. As evidence of those findings, along with the previous correspondence from FWS, Idaho attached an FWS document to our DEIS comments highlighting what components of each alternative addressed the COT Report's objectives for each threat. Alternative E was the only plan to address the majority of those objectives.

b. <u>The Proposed Plan rejects the collaborative and balanced recommendations in the COT Report.</u>

Yet, and for reasons still unclear, the application of Director Ashe's SFA memo to Idaho does not find support in the agency's own acknowledged goal posts for this process (i.e. COT Report). First, as both directed by FLPMA § 202(c)(9) and as the key cooperating agent, there is simply no excuse for the agencies' failure to consult with the state wildlife experts on this new habitat zone While the Governor's Plan, especially after the interagency refinement process, completely incorporates the PACs in Idaho, this SFA zone includes habitat that does not meet this high bar. These are both key aspects to the COT Report as described above.

Second, there is nothing in the COT Report that requires uniform standards across vast landscapes. COT Report at 31. But with the unprecedented mineral withdrawal, NSO without exemption, and enhanced livestock grazing measures, that is precisely what the Ashe Memo and other National Direction effectuates in Idaho. Moreover, the heavy restriction now proposed for these secondary threats, will provide no real conservation benefit to the species but will have serious economic ramifications. And as discussed previously, will create a costly diversion of resources away from the key threats. *See, e.g., Id.* at 42 (stating "[i]n the case of limited resources, prioritize PACs over habitats outside of PACs for restoration.").

Third, these activities are already, or with implementation of the Governor's Plan, have adequate regulatory mechanisms. This is also confirmed by the FWS's consistency determination for livestock grazing and large-scale infrastructure (including mining activities). *See generally* E.O. 2015-04, App. 2.

Yet despite this demonstrated record of consistency with the COT Report, the BLM and FWS arbitrarily rejected their own documents by developing SFAs and other National Direction. The Governor's Plan meets COT Report objectives, 2010 Finding; and thus, should be a sufficient basis to adopt Alternative E as the Proposed Plan.

At bottom, the findings in the FWS's April 2013 consistency determination still confirms that the Governor's Plan remains the most consistent or prefect fit with the COT Report relying on the best available science, collaboration, and proportionate responses to the threats in Idaho.

ii. The Governor's Plan is the Perfect Fit for the Purpose and Need Statement.

Taken together, the Governor's Plan is the only alternative that proposes a strategy that appropriately addresses the key threats in Idaho, provides for predictable implementation, builds on a collaborative framework, will meaningfully help the sage-grouse, meets the 2010 Listing Determination, and meets the COT Report. In short, the Governor's Plan is the only alternative that meets the Purpose and Need statement.

This FEIS's broad purpose and need is: To identify and incorporate appropriate conservation measures into LUPs [Land Use Plans] to conserve, enhance, and restore GRSG [Greater Sage-Grouse] habitat by reducing, eliminating, or minimizing threats to that habitat. (FEIS 1-13).

At the draft stage, the Governor expressed concern that many of the alternatives did not comply with the purpose and need statement; and thus, should not have been analyzed by the agencies. Alternatives B and D were both based on the NTT Report and virtually redundant in their impacts. Alternative C focused almost exclusively on eliminating grazing from public land without addressing any primary threats or recognizing that adequate regulatory measures for this activity are in place. All of the alternatives, except A and E, were either a close approximation to or more restrictive than the NTT Report. The NTT Report is simply not the best available science and some of its underlying studies are either outdated and/or not applicable to the Planning Area. *See* WAFWA Letter to Secretary Jewell (May 16, 2013) (Appendix 23) (stating that "[a]pplying a "one-size-fits-all" approach focusing solely on the NTT Report is not appropriate for management of the variations that occur across the sage-grouse range. Our concern is that using the NTT, in a vacuum, would undermine sage-grouse conservation range-wide.") In fact, the NTT Report has little to do with addressing the threats in Idaho and providing a rationale response to sage-grouse conservation; in its own words, the report represents a "new paradigm" of subordinating all of uses in the name of sage-grouse.

When BLM selected the Governor's Alternative and Alternative D as "co-preferred" alternatives for the DEIS, the Governor believed we had a meaningful opportunity for a productive solution. However, BLM inexplicably reverted back to, and is some cases exceeded, the NTT Report's flawed recommendations. By following this erroneous pattern, and even more

poignant because of the rejection of the Governor's Plan, the FEIS failed to meet the purpose and need statement and is inconsistent with NEPA. As noted in the Recommendations section, the Proposed Plan should be immediately withdrawn to comply with the purpose and need statement, or begin the process with Congress to amend FLPMA, NEPA, NFMA and the General Mining Law. The agency cannot circumvent their legal obligations in this process.

iii. The Governor's Plan is the perfect fit for compliance with the agencies' multiple-use mandate.

As noted in the Governor's Protest Letter at 17, the Proposed Plan violates the agencies' multiple-use mandates under FLPMA and NFMA. The FLPMA requires that BLM, under the Secretary of the Interior, "develop, maintain, and[,] when appropriate, revise land use plans' to ensure that land management be conducted 'on the basis of multiple use and sustained yield.' " *Klamath Siskiyou Wildlands Ctr. v. Boody,* 468 F.3d 549, 555 (9th Cir.2006) (quoting 43 U.S.C. §§ 1701(a)(7), 1712(a)). Further, NFMA requires the USFS to manage its renewable resource program, private forest and rangelands through "…coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use, Sustained-Yield Act of 1960. 16 USCA 1600 (3); *see also* 16 USC 528-531.

The Proposed Plan does not meet this multiple-use mandate, but rather effectively subordinates all other uses to sage-grouse by infringing on valid and existing rights or "zoning-out" most future development in Idaho where adequate regulatory measures are in place to deal with anthropogenic threats. Under the purported rationale of providing the FWS greater "certainty," and notwithstanding the FWS's record of correspondence with Governor Otter, the Proposed Plan overly restricts every activity regardless of the threat level and habitat zone in Idaho. *See, e.g.*, Appendix G-14 (describing that the Preferred Alternatives (D & E) did not include a disturbance cap since disturbance was not identified as a major concern causing loss of habitat in Idaho…). Yet the Proposed Plan effectively closes future oil and gas leasing across 3 million acres and imposed an unworkable project-level disturbance cap without justification. *Cf.* COT Report at 43-44.

By contrast, the Governor's Plan reflects the agencies' multiple-use mandate and adopts a flexible management continuum that allows protection of the species in the most important habitat without arbitrarily zoning-out future economic development, as described in detail above. Moreover, if those assumptions do not hold in the future, or more likely, accounting for the uncertainty of wildfire, the Governor's Plan provides an adaptive mechanism for the agencies to take action in real time for sage-grouse conservation. Each year, the Governor's Implementation Task Force will review habitat and population data to ensure that management assumptions are ground-truthed. This annual monitoring component allows the agencies to analyze whether management may need to change before any severe drop in population or habitat occurs.

Zoning out a minimum of 3 million acres might provide the "certainty" that FWS now purportedly desires, but it fails to meet the agencies' multiple-use mandate. *See* Otter June 17,

2013 Letter, at 2-3 (noting that after 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?*').

Further, failing to adopt the Governor's Plan or alternatively, Alternative E with modifications as described above, in favor of these last-minute changes not only violates the agencies' multiple-use mandate, but also exceeds the agencies' authority under FLPMA and NFMA because the improperly delegated authority to the FWS effectively to veto land use management decisions concerning a species that is not listed under the ESA. *See U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554, 567, 78 (D.C. Cir. 2004) (noting that although federal agencies may seek advice from outside entities, they may not sub-delegate decision-making authority to non-subordinate parties absent a clear showing of congressional authorization to do so); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132-33 (2d Cir. 2008) (agencies may seek advice and recommendations from outside parties, but delegation of authority beyond the agency is impermissible); *Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F. Supp. 2d 263, 275 (D.C. Cir. 2009) (court determined that a comment by the FWS that a proposed natural gas drilling project could cause "irreversible" losses of sage-grouse habitat did not impose a duty on the BLM to prepare an FEIS to determine whether the project would cause sage-grouse to be listed under the ESA.) Neither Congress, nor the Secretary has delegated to FWS the authority to manage non-listed species or their habitat, either on federal or private lands or to approve proposed uses of lands administered by the Forest Service and BLM.

Here, the agencies have unlawfully delegated their authority to FWS on several occasions. For example, the Ashe Memo providing a reverse-engineered approach to designating ACECs; forcing Idaho to adopt a disturbance cap when the agency experts did not believe such a measure was necessary; and providing FWS effective veto power over exemptions in CHZ. The BLM and Forest Service can and should consider the comments of the FWS, especially given the Purpose and Need statement, but on almost every occasion the record demonstrates that FWS had the de facto final say over this Proposed Plan.[32]

B. The Multiple Violations of the Law and Policy Render the Proposed Plan *per se* Imbalanced

BLM's own regulations implementing FLPMA § 202(c)(9) require the BLM's land use plans to "be consistent with State and local plans to the maximum extent … consistent with Federal law and the purposes of this Act." And if in conformance with federal law, the State Director must accept the Governor's Consistency Review recommendations if they strike an appropriate federalism balance:

[32] National Environmental Policy Act of 1969, § 102(C), 42 U.S.C.A. § 4332(C).

> The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a <u>reasonable balance</u> between the national interest and the State's interest.

43 C.F.R. § 1610.3-2 (emphasis added). As mentioned in the Governor's Recommendations section, Alternative E comports with federal law and appropriately strikes the reasonable federalism balance. Moreover, as discussed in the Inconsistencies section, the Governor's Plan more appropriately balances the agencies' multiple-use mandates as compared to the Proposed Plan. For a multitude of reasons, the Proposed Plan is deeply flawed and is per se imbalanced.

On June 29, 2015, Governor Otter duly filed a Protest Letter (Appendix 25) outlining multiple violations of law and policy. The Consistency Review incorporates those by reference to illustrate that the Proposed Plan is legally infirm, does not comport with federal law as outlined above, and is per se imbalanced. Furthermore, as we have examined the inconsistencies on a more individualized basis, other significant legal issues have emerged with some of those discussed in other portions of the Consistency Review. The following section should by no means be construed as an exhaustive or complete list of legal issues; it is merely illustrative of the imbalance issue primarily through the lens of demonstrating that an SEIS is required.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, "exists to ensure a process." *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008). NEPA requires that the action agencies thoroughly consider the impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA "aims to make certain that 'the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts." Id. (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

NEPA aims to ensure agencies are making informed decisions and that the public has been afforded an opportunity to participate. *Balt. Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97 (1983). NEPA allows both the agencies and the public to focus their attention on the environmental effects of a proposed action. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). This allows the agencies to conduct informed decision-making, while providing interested parties a political check on the agencies' decisions. *Id.*

While courts review agency compliance with NEPA under the deferential "arbitrary and capricious" standard, courts will not "automatically defer to the agency [ ] … without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the … new information." *See Marsh*, 490 U.S. at 377.

i. The agencies must prepare a supplemental EIS.

The last minute inclusion of SFAs, uniform lek buffers, new mitigation standards, and a host of new additional management actions necessitates the preparation of an SEIS. Contrary to the agencies' claim, the SFAs represent much more than a simple outgrowth or "minor variation" from the management actions analyzed in the draft alternatives. *See* FEIS, 2-2. As noted in the Inconsistencies section, the inclusion of the SFAs has dramatically re-shaped the Proposed Plan to the point that it would require a major restructuring effort to resolve the inconsistencies to the "maximum extent."

NEPA requires an SEIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i-ii); *see also Marsh*. 490 U.S. at 378 (agency must make a "reasoned decision based on … the significance- or lack of significance-of the new information"); 40 C.F.R. § 1502.9(c)(1)(i).

The standard for determining when an SEIS is required is essentially the same as the standard for determining when an EIS is required." *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F. 3d 1209, 1215-16 (11 Cir. 2002); *see also* 40 C.F.R. § 1508.27 (noting the term "significantly" requires consideration of both context and intensity); and *California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982) (holding that an SEIS is required when the proposed action is radically or dramatically different from the alternatives proposed in the draft so that meaningful public comment was precluded). As such, the agency must "take a 'hard look' at the new information to assess whether supplementation might be necessary." *Norton v. S. Utah Wilderness* Alliance, 542 U.S. 55, 72-73 (2004).

The creation of a fourth habitat zone (SFAs), as further detailed in the Inconsistencies section, significantly altered the Proposed Plan due to its sweeping management recommendations (MA-10). And the setting of uniform lek buffers relying solely on the post-DEIS USGS Report (AD-9), coupled with the new "net conservation gain" mitigation standard (MIT-3) collectively constitute "significant" post-DEIS information bearing on the proposed action or its impacts. Accordingly, an SEIS is required.

These changes within the Proposed Plan, were not "qualitatively within the spectrum" of the alternatives discussed in the DEIS and certainly qualify as major variations from the draft alternatives. FEIS at 2-2. This is even more pronounced when evaluating the last-minute changes in the Proposed Plan against the Preferred Alternatives. Furthermore, little to no justification is provided to support the agencies' determination that these measures were needed other than the USGS Report and the Ashe Memo. Even substantively, simply comparing the new and/or vastly different buffer distances compared to the DEIS reveals a lek buffer scheme that effectively "zones out" or will substantially increase the cost of conducting business in southern Idaho. *Compare* DEIS at 2-37 (applying a 1.86 mile or great buffer for saleable

minerals) *with* FEIS, App. DD (applying a 3.1 mile buffer for surface disturbance, which includes mining).

Moreover, this situation is similar to *Dubois v. Department of Agriculture*, where the First Circuit held that the U.S. Forest Service made "substantial changes from the previously proposed actions that are relevant to environmental concerns, and that the Forest Service did not present … to the public in its FEIS for review and comment." 102 F.3d 1273, 1293 (1st Cir. 1996). In *Dubois*, the Forest Service maintained that a supplemental EIS was not warranted because the proposed alternative was just a "scaled-down" version of an alternative considered in the draft EIS (as the agencies are claiming here). However, the court disagreed and held that the Forest Service's failure to issue an SEIS was arbitrary and capricious because the proposed action entailed a "different configuration of activities and locations, not merely a reduced version of a previously-considered alternative." *Id. at* 1292-93.[33] .

There is no doubt the same is true here. While the draft alternatives analyzed certain aspects of the management actions in the Proposed Plan, the SFAs are not a logical outgrowth from those alternatives, and they represent a completely "different configuration of activities and locations." No reasonable person could have anticipated the very detailed and specific management actions included in the SFAs simply by reading the DEIS. The Governor was blindsided by these last-minute inclusions, especially the SFAs, plain and simple.

ii. The agencies failed to take a "hard look" at the impacts associated with the inclusion of SFAs, uniform lek buffers, and the net conservation benefit standard.

As with SEIS determinations, agencies must take a "hard look" at the "environmental consequences of their actions." *McNair*, at 1000-01; 42 U.S.C. § 4332(C). NEPA documents must "provide [a] full and fair discussion of significant environmental impacts" so as to "inform decision makers and the public of the reasonable alternative which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. Meaningfully engaging the public is an important element of the "hard look" requirement,

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[33] *See Block*, 690 F.2d at 758 (noting that an SEIS is required because the agencies have "seriously dilute[ed] the relevance of public comment" on the DEIS); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F. 3d 683, 707 (10th Cir. 2009) (new alternative proposing new locations of activities required an SEIS because it affected "environmental concerns in a different manner than previous analyses," even though the general nature of the alternatives impact resembled those already analyzed); *see also Sierra Club v. U.S. Dept. of Transportation*, 310 F. Supp. 2d 1168, 1197 (D. Nev. 2004) (holding that where the new information shows the federal action will affect the quality of the human environment to a significant extent not already considered, a supplemental EIS must be prepared). Accordingly, broadening the scope of the management decision, inclusion of 3 million acres of SFAs, not originally identified in the DEIS requires a supplemental EIS because operators and livestock permittees in newly affected areas lacked appropriate notice that management decisions would apply to their projects and those on affected parcels.

especially with new and potentially significant information. For a detailed discussion of the agencies failure to adequately analyze the cumulative impacts see the Governor's Protest Letter (Appendix 25).

Two examples illustrate this point. First, despite the agencies' insistence that the SFA designation is crucial to precluding the need to list the species, the FEIS does not disclose – other than in cursory fashion – that including livestock grazing in the SFA management regime will have any additional impact. In fact, the Proposed Plan notes that impacts to livestock permittees will be similar to Alternatives B and D with an expected "moderate decline" in permitted grazing. FEIS, at 4-196. The only difference for grazing interests, according to the FEIS, is that permits within the SFAs will receive priority review. The FEIS does disclose that there will be a "focus" on SFA allotments containing riparian areas including wet meadows, but the document does not analyze the *degree* to which an allotment within a SFA could face more scrutiny and stringent conservation measures other than simply concluding the impacts could be "relatively higher." FEIS, at 4-200. If prioritization of permit renewals is the only additional conservation benefit emanating from the SFA framework, that benefit could have been readily achieved by adopting Alternative E. The agencies cannot have it both ways – namely, either the SFAs materially impact livestock grazing interests or the SFA designation is simply a confusing an unnecessary academic exercise.

Second, the designation of SFAs as well as the other last-minute changes will require a serious commitment of resources to address secondary threats in Idaho. *See* COT Report at 11 (stating fire and invasive species are the primary issues in the western portion of the species' range). The agencies failed to take the requisite hard look nor did they analyze the cumulative effects (40 C.F.R. § 1508.7) of the potential management and budgetary implications of administering the SFAs, such as conducting a costly mineral segregation process and monitoring enhanced livestock grazing measures, and how that diversion of resources could prove to have serious impacts to the species. Logically, the agencies have finite budgets, and the requirement to apply these resources toward secondary threats at the expense of a primary threat (wildfire, invasive species) belies the agencies commitment to respond to the Purpose and Need. Rather, the last-minute National Direction assumes that all human activity has significant impacts to the species and requires subordinating those uses to a non-listed species in contravention of the agencies' multiple-use mandate.

iii. The SFAs are de facto ACECs.[34]

Pursuant to 43 U.S.C. 1712(c)(3), during the development and revision of land use plans, the Secretary of Interior shall "give priority to the designation and protection of areas of critical environmental concern," more commonly known as ACECs. To be considered as a potential ACEC, the area in question must meet the "relevance" and "importance" criteria as established by 43 C.F.R. § 1610.7-2; BLM Handbook 1613.1. An area will be "relevant" if there is

[34] According to 36 C.F.R. § 294.1, USFS designations of special interest areas, including zoological areas, do not require notice and comment, but do require approval from the Secretary of Agriculture or the Regional Forester.

"significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard." 43 C.F.R. § 1610.7-2(a)(1). Whereas to satisfy the "importance" generally requires the relevant areas to have substantial significant value, more than just local significance and special worth, consequence, meaning, distinctiveness, or cause for concern." *Id. at* (b)(2).

Following the relevance and importance determination, pursuant to the regulations, and preceding the draft RMP or amendment that includes the potential ACECs, the State Director shall publish a notice in the Federal Register describing the ACECs and provide a 60-day public comment period. *Id. at* (b). The final approval of the RMP or RMP amendment "constitutes formal designation of any ACEC involved." *Id*. The RMP or RMP amendment will include management actions and uses, including mitigation, for activities occurring within the ACECs. *Id*.

Similarly, the Forest Service has a protocol for administratively designating "recreational areas," which are areas "other than wilderness or wild areas, which should be managed principally for recreation use." Despite its name, these recreation areas can include "Zoological Areas," which are Forest Service areas that include "animal specimens, animal groups, or animal communities that are significant because of their occurrence, habitat, location, life history, ecology, rarity, or other features." FSM 2372.05(1). The designation of such areas "shall constitute a formal closing of the area to any use or occupancy inconsistent with the classification." 36 C.F.R. § 294.1(b). Zoological areas greater than 100,000 acres must be designated by the USDA Secretary. *Id. at* 294.1(a). And further, the Chief of the Forest Service must "notify the House Committee on Interior and Insular Affairs and Senate Committee on Energy and Natural Resources of any pending designation of 100,000 acres or larger." FSM 2372.04b.

The agencies analyzed ACECs and Zoological Areas across sage-grouse habitat in Alternatives C and F of the DEIS. DEIS at 2-61, 2-92. In their analysis, the BLM acknowledged that ACECs for a species usually include restrictions such as "NSO, ROW exclusion or avoidance, and locatable mineral withdrawal recommendations, as well as other use constraints." DEIS at 2-61; *see also*, BLM Handbook 1613.12 (an example restriction would be "a seasonal use stipulation on permits…"). By nearly identical comparison, the SFAs in the Proposed Plan include NSO without modification etc., recommended mineral withdrawal, as well as likely restrictions on grazing permits (*i.e.* season and timing of use). *See* FEIS, at MA-10. Thus, there are no material differences between SFAs and an ACEC or Zoological Area.

After conducting the required analysis, the agencies rationally rejected the ACEC analysis/conclusion as that conservation action is not a proportionate response to the threats and would violate the agencies' multiple-use mandate. In their analysis, the agencies determined that the sage-grouse habitat did not warrant special designation, stating "the BLM determined that the mere presence of [sage-grouse or sage-grouse habitat] does not constitute a significant wildlife resource per 43 C.F.R. § 1610.7-2."

Because the agencies failed to fully and timely disclose the Ashe Memo to Idaho, it is difficult to divine the rational of such an about-face from the underlying record. Comparing the SFA language to the DEIS ACEC analysis raises some significant red flags. Simply papering over the ACEC label with the so-called "stronghold" concept, without conducting a new ACEC analysis based on some new and persuasive scientific evidence (the Ashe Memo falls woefully short in this regard), is in direct contravention of the agencies' agencies' legal responsibilities under 43 C.F.R. § 1610.7-2. The SFAs in the Proposed Plan represent *de facto* ACECs that attempt to circumvent the formal rulemaking process required for the designation of ACECs. Even a cursory examination of the SFAs and associated management reveal that these areas should be required to go through the necessary procedural requirements for such designation. Clearly, the sagebrush "strongholds" identified in the SFAs would qualify for consideration as an ACEC in the BLM's estimation because they include sensitive species habitat that is of high significance (*i.e.* relevance and importance). Thus, the BLM cannot adopt the Proposed Plan without the requisite process for designating ACECs.

Moreover, the SFAs are virtually identical to Forest Service Zoological Areas, which qualify for designation as a Recreational Area. However, the SFAs in Idaho, which consist of 236,800 acres of Forest Service land have not been presented to the USDA Secretary for designation, nor has the Forest Service Chief notified the germane resource committees of these pending designations.

At bottom, NEPA exists to "ensure a process." The agencies simply skirted the process by analyzing the ACEC proposal; rejecting it; providing nothing more than a simple internal memo; then resurrecting this bad proposal by papering over the necessary procedural requirements with a name change. The overarching issue here is that the agencies cannot make last minute special land management designations and avoid the requisite administrative procedures simply by calling the designations by another name. Such actions are clearly "not in accordance with the law" and renders the Proposed Plan *per se* imbalanced.

C. Selecting the Proposed Plan will Chill Future Collaboration in Idaho

The land use planning/amendment process under NEPA and FLMPA requires and encourages collaboration with state and local governments. *See* 40 C.F.R. § 1501.6 (establishing the requirements for a cooperating agency); 43 U.S.C. 1712(c)(9) (describing BLM's FLPMA coordination requirements). Throughout this entire process the Otter Administration and local governments (*i.e.* counties) have closely collaborated with the relevant federal agencies. This collaborative relationship culminated in the adoption of Alternative E as a co-Preferred Alternative. As mentioned above, the Governor's offer to Secretary Jewell to bridge the differences between the Preferred Alternatives resulted in a constructive interagency refinement process.

The State of Idaho has expended millions of dollars, and the Task Force and stakeholders have provided monetary and in-kind investments, in an effort to conserve sage-grouse in a manner that balances conservation and reasonable multiple-uses of federally managed land.[35] A prime example is the development of Rangeland Fire Protection Associations (RFPAs), which receive state and private funding to provide rural community volunteers the necessary training and equipment to adequately and timely respond to rangeland fires (often as first responders).[36] *See* I.C. § 18-104B. These RFPAs help protect more than 3.5 million acres of federal, State, and private rangeland, much of which includes key sage-grouse habitat.

Additionally, several Idaho counties have long been actively engaged in sage-grouse conservation, with many of those developing their own county or Local Working Group sage-grouse conservation plans. Despite these efforts, the counties feel ignored because the Proposed Plan undermines with the counties' resource and/or sage-grouse management plans. *See* attached letters from Idaho counties (Appendix 19) (stating their concerns with the Proposed Plan and the lack of local collaboration).

Unfortunately, the SFAs and other unvetted additions to the Proposed Plan have pushed the state-federal collaborative to a tipping point. Should the Proposed Plan be adopted, without serious modification, the State and local collaborators will have little incentive to continue working under the a land-use plan amendment that is materially inconsistent with Governor's Plan and strongly opposed by the State.

Because significant portions of the Proposed Plan rely on the expertise and cooperation of the State, the federal government should set aside these divisive and unnecessary measures and develop a genuine planning partnership through this Consistency Review process. *See, e.g.*, FEIS, at CC-1 – CC-8, AM-1, AM-3, AM-6, AM-11, AD-3, AD-4, AM-16, MIT-1, MIT-2 (establishing the Greater Sage-Grouse Conservation Team that will compile data from the States and will invite the States to participate in the Team). Failure to course correct, will chill future collaboration both on this issue and other important natural resource issues in the State.

D. The Proposed Plan Violates Idaho's Sovereignty

The State has a sovereign interest in managing all wildlife within its borders, and the Proposed Plan will directly harm this interest. I.C. § 36-103(a) ("all wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is … property of the state."). The Idaho Department of Fish and Game is the state agency tasked with managing State species and has over 40 years of management expertise. Furthermore, the Governor's Office of Species Conservation ("OSC") is statutorily tasked with coordinating State activities and negotiating

[35] Since 2005, IDFG and IDL have expended $10,158,601 and $158,813, respectively.
[36] *See also*, Press Release, Idaho Department of Lands, Award Given for Wildland Fire Protection (May 9, 2014), available at: http://www.idl.idaho.gov/news-media/2014-releases/5-9-2014-award-given-for-wildland-fire-protection.pdf (last visited July 26, 2015) ("[t]he Governor, along with the Idaho Legislature, supported changes to Idaho Code and funding to assist new RFPAs with one-time startup costs.").

agreements with federal agencies concerning candidate, threatened, and endangered species under the ESA, such as sage-grouse. *Id. at* § 67-818. As such, the State of Idaho clearly has a sovereign interest in maintaining its management authority over sage-grouse.

In particular, FLM-3[37], which concerns exemptions for fluid mineral leases in PHMA and IHMA, exceeds BLM's authority under FLPMA because it unlawfully abdicates authority to the FWS:

> Any exceptions to this lease stipulation may be approved by the Authorized Officer only with the concurrence of the State Director. The Authorized Officer may not grant an exception unless the applicable state wildlife agency, the USFWS, and the BLM unanimously find that [a certain condition(s) has been met]. Such finding shall initially be made by a team of one field biologist or other GRSG expert from each respective agency. In the event the initial finding is not unanimous, the finding may be elevated to the appropriate BLM State Director, USFWS State Ecological Services Director, and state wildlife agency head for final resolution. *In the event their finding is not unanimous*, the exception will not be granted.

FEIS at 2-52 (emphasis added).

This language allows any one of the three named individuals to veto an exemption (either the BLM State Director, FWS State Ecological Director, or the head of the state wildlife agency). In reality, this would allow the FWS to veto actions and dictate BLM management actions related to a non-listed species. The BLM does not have the power to delegate such decision-making authority to the FWS. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2nd Cir. 2008) (holding that agencies can seek policy recommendations but cannot abdicate final review authority).

Additionally, this language also violates the State of Idaho's sovereign authority over its fish and wildlife. The FWS has authority to manage threatened and endangered species, but has no jurisdiction over sage-grouse which currently do not have any federal protections, and thus, are property of the state under its police powers. *See* 16 U.S.C. §§ 1531 *et seq.* The Proposed Plan authorizes FWS to make management decisions related to a non-listed species, which it does not have statutory authority to do. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("[u]nquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."). The BLM has compromised the State's sovereign authority over sage-grouse by allowing, among other things, the FWS to veto and override management recommendations from the State and rejecting the best available science for the species.

[37] GRSG-M-FMUL-ST-077-Standard has a similar requirement that "an exception could be granted by the authorized office with unanimous concurrence from a team of agency GRSG experts from USFWS, Forest Service, and State wildlife agency."

VI. REMEDY

Governor Otter appreciates the willingness of the State Director and Regional Forester to carefully review his Consistency Review comments. Given the tireless effort of so many individual stakeholders, and the fact that Idaho was on the cusp of delivering another significant collaborative milestone, the Governor respectfully requests the State Director/Regional Forester to ask the Washington Office to open a productive dialogue with Idaho to resolve the numerous inconsistencies with the Governor's Plan. The Consistency Review process provides the final opportunity to achieve and preserve a meaningful state-federal partnership on this issue consistent with FLPMA. Adherence to an arbitrary settlement with highly litigious environmental groups cannot dictate the outcome on such an important issue.

Accordingly, because Governor Otter's plan is compliant with federal law and the purposes of FLMPA; and because the Proposed Plan is per se imbalanced, the only way the federal government can legally comply with its consistency obligations is to immediately withdraw the Proposed Plan and adopt Alternative E. We look forward to your positive consideration.