



C.L. "BUTCH" OTTER
GOVERNOR

June 29, 2015

BLM Director (210)
Attention: Protest Coordinator
20 M Street SE, Room 2134LM
Washington, DC 20003
Via Overnight Delivery and
Via e-mail to protest@blm.gov

RE: State of Idaho's Protest to the Bureau of Land Management and U.S. Forest Service Idaho and Southwestern Montana Sub-Regional Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement; 80 Fed. Reg. 30,711.

Dear Director Kornze,

In accordance with 43 C.F.R. § 1610.5-2, the State of Idaho ("Idaho" or "State") timely protests the Bureau of Land Management's ("BLM") Great Basin Region Greater Sage-grouse ("GRSG") Land Use Plan Amendments ("LUPA") and Final Environmental Impact Statement ("FEIS") for the Sub-Region of Idaho and Southwestern Montana.¹ The BLM published its Notice of Availability on May 29, 2015. The Proposed LUPA and FEIS address a range of alternatives focused on specific conservation measures across the range of the GRSG.

Governor C.L. "Butch" Otter, on behalf of the State of Idaho formally submits this protest. The Governor's mailing address and telephone number are stated in the letterhead, as per 43 C.F.R. § 1610.5-2(a)(2)(i).

In accordance with 43 C.F.R. § 160.5-2(a)(2)(ii) the State is protesting, among other issues, the BLM's diversion from the collaborative process, the addition of sagebrush focal areas ("SFAs") and associated management actions, and the agencies' reliance on data and information not previously available.

¹ The reference to "BLM" throughout this protest includes the United States Forest Service (USFS). The Forest Service is amending its land use plans under the National Forest Management Act but has waived its objection procedures and adopted BLM's protest procedures pursuant to 43 C.F.R. § 1610.5-2.

The State has served as a Cooperating Agency with the BLM in the development of the Proposed LUPA and FEIS. It is vital to the interest of the State to prevent the listing of sage-grouse and prevent overly restrictive federal LUPAs that would adversely impact Idaho's sovereign interest in managing its wildlife pursuant to Idaho Code § 36-103 and § 67-818 and its customs, culture, and way of life. Also at stake is the State's ability to generate revenues from privately owned property, State endowment trust lands, and federally managed lands. Additionally, the State of Idaho timely filed comments to the DEIS (attached as App. A) and on the Administrative Proposed Plan (attached as App. B). Idaho has full standing to bring this protest because it has an interest which is or may be adversely affected and it participated in the planning process.

As discussed below, and pursuant to 43 C.F.R. § 160.5-2(a)(2)(iii), the State protests the Proposed LUPA within the FEIS, which violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 *et seq.*, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.*, the Information Quality Act, 44 U.S.C. § 3516, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 706.

I. BACKGROUND

In 2010, the U.S. Fish and Wildlife Service ("Service") found the GRSG warranted for listing under the Endangered Species Act ("ESA"), but precluded due to higher listing priorities. Species warranted for listing are considered candidate species under the ESA. The Service ranks candidate species on a scale of 1 to 12, with 1 as the highest priority for listing. Sage-grouse received a rank of 8 ("moderate"). Section 4 of the ESA requires species to be listed as endangered or threatened solely on the basis of their biological status and threats to their existence. When evaluating a species for listing, the Service must base this determination on one or more of the following five factors: A) damage to, or destruction of, a species' habitat; B) overutilization of the species for commercial, recreational, scientific, or educational purposes; C) disease or predation; D) inadequacy of existing protection; and E) other natural or manmade factors that affect the continued existence of the species. 16 U.S.C.A. § 1533(a).

When making a listing decision, the Service looks to the five factors outlined in statute to determine whether a particular species warrants federal protection. 16 U.S.C. §§ 1533(a)(1). The Service based its 2010 Warranted but Precluded determination primarily on Factors A and D, "present or threatened destruction, modification, or curtailment of habitat or range" and the "inadequacy of regulatory mechanisms," provided in Section 4(a)(1) of the ESA. *Id.* Under Factor A, the Service identified infrastructure development, wildfires, and invasive plants as the primary threats facing sage-grouse. *See 12 Month Findings for Petitions for Listing the Greater Sage-Grouse (Centrocercus urophasianu) as Threatened or Endangered; Proposed Rule*, 75 Fed. Reg. 55, 13976-79 (proposed March 23, 2010) (to be codified at 50 C.F.R. pt. 17). Existing regulatory mechanisms under Factor D were considered inadequate to address these primary threats due to a lack of sage-grouse specific directives and certainty of implementation, particularly for wildfire prevention and suppression.

In 2010, a coalition of environmental groups sued the Obama Administration demanding that the Service make determinations for multiple species with the “warranted but precluded” status. In 2011, the Obama Administration agreed to settle the lawsuit with the environmental organizations and make listing determinations for over 750 species, including 251 candidate species. *See In re Endangered Species Act Section 4 Deadline Litig.*, Misc. Action No 10-377 (EGS), MDL Docket No 2165 (D.D.C. 2011). This settlement included sage-grouse and the deadline for determination was set for September 2015.

In 2011, the BLM announced it would undertake an unprecedented land use planning effort to include sage-grouse specific measures for 88 BLM Resource Management Plans (“RMP”) and several Forest Service LUPAs in an effort to respond to the 2010 Warranted but Precluded determination that their existing regulatory mechanisms were inadequate. The goal was to complete the amendments in time for the Service’s court imposed September 2015 deadline. To aid in this effort, the BLM released the National Technical Team Report (“NTT Report”) and Instructional Memorandum (“IM”) 2012-43 in December 2011. That same month, Secretary of the Interior Ken Salazar invited western states to develop their own state GRSG management plans for inclusion as alternatives within the BLM’s LUPA and EIS. Secretary Salazar committed that if these state plans or portions thereof were approved by the Service, the state plans could replace the National IM 2012-043 until the BLM completed the EIS process. The State accepted the Secretary’s invitation.

In 2012, through Executive Order 2012-02, Idaho’s Sage-Grouse Task Force, consisting of a variety of stakeholders, was created to develop recommendations for an Idaho specific alternative.² The Task Force held 8 public meetings across Idaho and received advice from the Service, BLM, and Idaho Department of Fish and Game and other agencies. Governor Otter also requested and received comments from the public prior to submitting the Governor’s Alternative to BLM.

In July 2012, Governor Otter sent a letter to the Service (attached as App. C), requesting feedback on the progress being made on the development of the Governor’s Alternative. The Service responded (attached as App. D) with a strong endorsement, stating that the framework of the Governor’s Alternative would “provide a sound policy outline” and would address “a means to provide for long-term conservation and restoration of sage-steppe habitat and rangelands in Idaho.”³ The Service’s response also encouraged the State to better define the adaptive triggers, enhance measures to address the primary threat of wildfire, and better integrate the secondary threat of improper grazing into the overall strategy. In September 2012, Governor Otter adopted recommendations of the Task Force and submitted a strategy to BLM (“Alternative E” or “Governor’s Alternative”). In March 2013, consistent with IM 2012-043, Governor Otter submitted a “Concurrence Request” to the Service.

The Service favorably responded to Governor Otter’s request (attached as App. E), “concurring” that the four foundational elements – namely, the habitat zones, conservation areas,

² *See Idaho Exec. Ord. 2012-02, available at:* http://gov.idaho.gov/mediacenter/execorders/eo12/eo_12_02.pdf.

³ *See also*, Governor Otter’s letter to Idaho BLM Director, Steve Ellis, seeking feedback on the development of the Governor’s Alternative (attached as App. I); and the subsequent response from Steve Ellis (attached as App. J).

adaptive regulatory triggers, and population objectives – were consistent with the Conservation Objectives Team Report (“COT Report”).⁴ The Service also conditionally concurred with the livestock grazing management and infrastructure components subject to more detail regarding the Implementation Team. In May 2013, and based on the Service’s concurrence letter, the BLM requested further clarification and refinement of Alternative E to ensure it was accurately captured and analyzed in the EIS. On July 1, 2013, the State submitted its response (attached as App. F), further clarifying the adaptive triggers, infrastructure, mitigation, and wildfire measures.

In October 2013, the BLM selected the Governor's Alternative as a "co-preferred" alternative for the Draft Environmental Impact Statement (“DEIS”), along with the BLM's Sub-regional Alternative. The State submitted comments to the DEIS in January 2014, where it expressed concerns with the two zone approach found in Alternative D, noting that Alternative E’s three zone approach better equipped BLM to prioritize limited resources for the “best of the best” sage-grouse habitat. The State also pointed out that Alternative E most closely comported with the COT Report, met the purpose and need statement, best addressed the 2010 Warranted but Precluded determination for sage-grouse, and was also based on the best available science. Further, Alternative E is the most consistent with the BLM’s multiple use mandates.

After submitting comments, on the DEIS, the Idaho Sage-Grouse Task Force reconvened to discuss further refinement of Alternative E and to determine whether the co-preferred alternatives could be merged. The Task Force continued to focus on addressing the remaining elements of the Governor’s Alternative that the Service had indicated were still in need of refinement, and submitted an update to the BLM in April of 2014 (attached as App. G). This update included refinement of the criteria for new large-scale infrastructure development within Idaho’s “Core Habitat,” recognizing that some activities are incompatible with the needs of GRSB. This update also included a very thorough approach to disturbance caps that provided an additional backstop for the adaptive management strategy.

The Idaho Fish and Game, the Idaho Office of Species Conservation, and the Office of the Governor continued to work through the inconsistencies between the two co-preferred alternatives with the Service, BLM, and, at key moments, with Interior Secretary Jewell’s office for the next several months. However, in November 2014, the BLM and Interior officials began urging the State to unjustifiably adopt a more restrictive conservation approach for priority habitat areas, even though the robust management rule set for core habitat areas found within the Governor’s Alternative thoroughly addresses the threats to sage-grouse. Frustratingly, additional management actions were unilaterally incorporated into the Proposed Plan that appeared in the FEIS months later, including a recommendation to Secretary Jewell to withdraw 2.9 million acres from locatable mineral leasing. A newly-created, post-DEIS habitat construct, SFAs, will also be the first priority for renewing grazing permits, instead of Idaho's Core Habitat Zones. The inclusion of a new management area significantly impacts the ability for Idaho's three zone adaptive management strategy to operate efficiently.

⁴ See FISH AND WILDLIFE SERV., DEPT. OF THE INTERIOR, GREATER SAGE-GROUSE CONSERVATION OBJECTIVES: FINAL REPORT (2013).

II. DISCUSSION

A. The BLM's Proposed Plan Violates NEPA

NEPA “exists to ensure a process.” *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008). It requires that BLM 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 involved. *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.*

In the FEIS, MA-10 designates SFAs and manages them as a Priority Habitat Management Area (“PHMA”), with the following additional management:

- Recommended for withdrawal from the General Mining Act of 1872, as amended subject to valid existing rights.
- Managed as NSO, without waiver, exception, or modification, for fluid mineral leasing.
- Prioritized for management and conservation actions in these areas, including, but not limited to review of livestock grazing permits/leases (*see* livestock grazing section for additional actions).
- Areas of non-PHMA mapped within the SFA boundary will not be managed as SFA, except for the Donkey Hills ACEC and three Forest Service Parcels in the Lost River Range, Idaho (Borah Peak, Big Flat Top Mountain, and Copper Basin Knob).

Idaho and Southwestern Montana FEIS at 2-27.

SFAs amount to 3,606,100 acres of BLM lands and 236,800 acres of Forest Service lands totaling 3,842,900 acres within the sub-region. *Id.* at 2-2. The State protests MA-10 and any reference thereafter (collectively referred to as “Management Actions”) to SFAs based on the arguments discussed below.

1. The BLM must develop a Supplemental Environmental Impact Statement (SEIS) based on the substantial changes between the Draft and Final EIS.

A supplemental environmental impact statement (SEIS) must be prepared if “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns.” 40 C.F.R. § 1502.9(c)(1)(i) (emphasis added). A SEIS is also required when “[t]here 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)(ii) (emphasis added). The Ninth Circuit Court of Appeals held that a supplement is unnecessary if the new alternative is: (1) “qualitatively within the spectrum of alternatives that were discussed in the draft” and (2) only a “minor variation” from those alternatives. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854 (9th Cir. 2013) (quoting *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18035 (Mar. 17, 1981

The designation of SFAs in the FEIS and Proposed LUPAs stems from a pronouncement in an October 27, 2014, memorandum from U.S. Fish and Wildlife Service Director Dan Ashe, entitled *Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes* (“Ashe Memo”). Based on the date of issuance, this memorandum was not available for consideration in the Draft EIS comment period. The Ashe Memo constituted a significant shift in the direction of preferred alternatives in Idaho.

The Ashe Memo and subsequent SFAs represent a drastic change from draft to final EIS. The inclusion of SFAs, which includes, *inter alia*, proposals for mineral withdrawal and no surface occupancy (“NSO”) for oil and gas development, constitutes much more than a “minor variation” from the alternatives discussed in the DEIS. While the acreage proposed for mineral withdrawal is less than the proposed acreage in the DEIS, the SFAs also include a suite of additional management actions and prioritization, ironically creating a fourth tier to Idaho’s three-tiered habitat conservation approach.

Additionally, the BLM’s decision to adopt a 3.1 mile lek buffer distance was based on a report that was unavailable for review during the public comment period of the DEIS. The report was published by the United States Geological Survey (“USGS”) and is entitled “*Conservation Buffer Distance Estimates for Greater Sage-Grouse – a Review*,” USGS Open File report 2014-1239 (Mainer, *et al.* 2014) (“USGS Report”). The BLM relies heavily on the USGS analysis to support their lek buffer distances for certain activities within the FEIS and Proposed LUPAs.

This change in buffer distance also represents a material change between draft and final EIS. The 3.1 mile buffer is over 5 times the distance that Idaho had agreed to in negotiations with the Idaho BLM. The result of this change will be a significant reduction in acres that can be utilized for any purpose.

This is very similar to the scenario in *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 argued 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. However, the Appellate Court disagreed and held that the U.S. Forest Service’s failure to issue an SEIS was arbitrary and capricious because the proposed action in the FEIS entailed a “different configuration of activities and locations, not merely a reduced version of a previously-considered alternative.” *Id.* at 1292-93.

When two new, key and significant pieces of information are incorporated late and are not subject to fair notice and comment, this creates a potential fatal defect in the “meaningfulness” of the NEPA process. *See* 40 C.F.R. § 1506.6(b) (Federal government shall “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected” by proposed actions of the United States.”); *See also*, Council on Environmental Quality, *A Citizen’s Guide to the NEPA* at 26 (“Agencies are required to make efforts to provide meaningful public involvement in their NEPA processes.”).

Courts have required an SEIS when the proposed action differs “dramatically” from the alternatives described in the FEIS so that meaningful public comment on the proposed action was precluded. *See California v. Block*, 690 F.2d 753, 758 (9th Cir. 1982). Here, none of the DEIS alternatives utilized all or most of the key elements found in the Proposed Action. The Proposed Action amalgamated so many different elements that the Preferred Alternative could not be fairly anticipated by reviewing the draft EIS alternatives. *See 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).

The additional Management Actions, prioritization, and restrictions, as well as the lek buffers, were not “qualitatively within the spectrum” of draft alternatives. *Richardson*, 565 F.3d at 705. And these additions certainly constitute more than a “minor variation” from the alternatives analyzed at the DEIS stage. *Id.* Here, because BLM has “seriously dilut[ed] the relevance of public comment on the draft EIS alternatives,” an SEIS is required. *California v. Block*, 690 F.2d at 772.

2. The BLM failed to take a “hard look” at the impacts of Management Actions associated with SFAs in Idaho.

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, especially with new and potentially significant information. In *Delaware Dept. of Nat. Resources and Environmental Control v. U.S. Army Corps of Engineers*, the Third Circuit found the Corps took a “hard look” because they solicited public input, provided the public with sufficient material to comment meaningfully, and published a thorough 179-page assessment of the information in an EA. 685 F.3d 259, 262-69 (1982).

Here, BLM’s Management Actions fail to take a “hard look” at the impacts of SFAs, instead relying on broad over-generalized conclusions. In its analysis, BLM provides no site-specific analysis to justify the drastic limitations being proposed. In fact, contrary to the COT Report, it appears that the FEIS is attempting to raise the level of threat posed by mineral development and

livestock grazing to primary threats, rather than secondary threats as prescribed by the COT Report. COT Report at 11.

Further, the public has not been afforded an opportunity to provide any input on these proposals. Instead, the BLM and the Service both seemed committed to merging Alternatives D and E until late 2014, when the SFAs and additional Management Actions within those boundaries were unexpectedly added into the proposed plan.

NEPA analyses must be “prepared by using an interdisciplinary approach,” and “the disciplines of the preparers must be appropriate to the scope of the analysis and to the issues identified in the scoping process.” *See* 40 C.F.R. § 1502.6. The late inclusion of SFAs, without any regard to the recommendations from the Task Force and the state agencies that have diligently been in consultation, cooperation, and coordination with the BLM over the past three years, effectively nullified prior collaboration with the State. Idaho worked closely, and in good faith, with the Idaho BLM and Service officials to merge portions of Alternatives D and E and reach a compromised preferred alternative. However, inclusions added at the latest possible hour, make drastic material changes to the character and scope of the Proposed Action. With no attempt at consultation on inclusion of SFAs, the BLM has greatly eroded the results of prior collaboration.

3. The BLM failed to adequately consider the economic implications of Management Actions associated with SFAs on Idaho, its citizens, and its industries.

NEPA’s “hard look” requirement includes the obligation to consider the economic impacts of a proposed action. The NEPA process must be conducted “in a manner calculated to foster and promote the general welfare, 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). If “an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.” 40 C.F.R. § 1508.14; *See also, Northwest Env. Adv. v. NMFS*, 460 F.3d 1125, 1143 (2006) (Courts “have recognized that [i]nnaccurate economic information may defeat the purpose of an . . . [environmental impact statement] by impairing the agency’s consideration of the adverse environmental effects and by skewing the public’s evaluation of the proposed agency action.”) (internal quotations omitted).

The decision to designate 3,842,900 acres as SFAs with their associated Management Actions will have a dramatic impact on the State and local economies. The analysis conducted by BLM in the FEIS is inadequate. Specific economic impacts based on Management Actions are discussed below.

- i. *The BLM must do an in-depth analysis on the economic impacts of SFAs on State Endowment Trust Lands in Idaho.*

State Endowment Trust Lands were granted to Idaho at the time of statehood by the federal government to be held in trust and managed "...in such manner as will secure the maximum long-term financial return to the institution to which [it is] granted." Idaho Const. Art. IX § 8.

Approximately 324,000 acres of State Endowment Trust Lands are located within or adjacent to SFA "boundaries" and are heavily intermingled with federal land ownership. Virtually all of these lands would require access through BLM or other federal ownerships. While the SFA's specifically exclude non-federal land in their designation, the State assumes based on past experience that the BLM and USFS would not consider any new authorization (permit, easement, etc.) for any activity that would result in any type of surface occupancy or other impact within the SFA. The SFA designation has the potential to affect the State's ability to authorize oil and gas leases in a significant way. The SFA designation could cost the State \$1.00/acre in competitive bidding and \$1.00/acre in annual rent in years 1-3 of the lease and \$1.50/acre in years 4-10.

Of the approximate 600,000 acres of endowment trust lands located within PHMA and Important Habitat Management Areas (IHMA), 420,220 acres currently are, or historically were under mineral lease (including oil & gas and geothermal), with 335,280 acres currently or historically under oil and gas lease.

The NSO stipulation does not preclude the state from leasing endowment trust lands; however, the NSO stipulation applied broadly across the SFAs and within the PHMA and IHMA on adjoining federal lands will significantly diminish the desirability of such state leases. Additionally, the overly-broad NSO stipulation will effectively preclude the development of oil and gas resources on state endowment trust lands that are surrounded by federal ownership. This scenario would result in a minimum loss to the endowment beneficiaries of \$1.00/acre in competitive bidding, plus \$1.00/acre in annual rent in years 1-5 of the lease, plus an additional \$1.00/acre in years 6-10 if diligent drilling is not undertaken. The endowment would also lose out on royalties of 12.5%, if oil and gas is produced in marketable quantities.

Similarly, the State's grazing program will also see significant reductions. According to the FEIS, the SFAs will be "Prioritized for management and conservation actions in these areas, including but not limited to review of livestock grazing permits/leases." FEIS at 2-27. However, the FEIS also states "...Alternatives C and F proposed no grazing in occupied GRSG habitat whereas other alternatives were open with varying management options. As such, the management of these areas as SFAs and the impacts of the associated management decisions was addressed in the DEIS and is qualitatively within the spectrum of alternatives analyzed." FEIS at 2-2.

Since the "no-grazing" analysis is brought up in the same paragraph as the SFA discussion, it leads to a logical assumption that the BLM anticipates that many allotments within SFAs will be prioritized for heavy restrictions or cancellation upon their renewal period. Since the federal permittees are generally the same lessee on adjacent state trust lands, cancellation of permits

within the SFAs will likely lead to a 10 year period (federal allotment renewal cycle) where IDL grazing leases within the SFA boundaries will be eliminated. This could equate to an annual loss of 32,400 acres of state grazing lands.

The BLM further states under impacts of Alternative D (the co-preferred alternative to the Governor's Alternative E) that with implementation of grazing systems or permit modifications to meet habitat objectives in areas that are not meeting objectives, results would be "moderate declines in permitted grazing over time as permits are modified to incorporate GRSG objectives at renewal." FEIS at 4-192. It seems clear that BLM is taking a pre-decisional approach here in already projecting reductions in Animal Unit Months ("AUMS") based on their claims of declines in permitted grazing. Without any data collection, results of Rangeland Health Assessments, Allotment Photos and Information, or other necessary monitoring data, the BLM in Alternative D is anticipating reductions in livestock grazing. While Alternative D is considered a co-preferred alternative to the Governor's Alternative E, the State does not support pre-decisional declines in permitted grazing. This is a violation of NEPA.

It is clear that BLM failed to consider the severe economic impacts that are caused by the Management Actions associated with SFAs. The BLM must either re-analyze the economic impacts of SFAs on State Endowment Trust Lands or abandon the SFA framework and revert to the conservation framework of the Governor's Alternative.

- ii. *The BLM must do an in-depth analysis on the economic impacts of SFAs on private industry in Idaho.*

The BLM included Management Action FLM-1 (FEIS at 2-51), and its Forest Service counterpart, GRSG-M-FMUL-ST-079 (FEIS at 2-70) which indicates that there will be NSO in SFAs "and no waivers, exceptions, or modifications for fluid mineral leasing." FEIS at 2-70. This has a tremendous economic impact on Idaho because of oil and gas exploration expenditures. Revenue from oil and gas development is apparent through job creation, taxable income, severance and ad valorem taxes, royalties, and research dollars. Much of the land with potential for oil and gas development in southern Idaho is under the control of the BLM. Through Management Action FLM-1, the BLM is removing the opportunity and desire for any responsible exploration of its oil and gas resources in southern Idaho.

The NSO stipulation on federal lands in Idaho will greatly diminish or preclude financial payments to the State of Idaho, as provided under the Mineral Leasing Act of 1920, 30 USC §§ 181-263, and the Mineral Leasing Act for Acquired Lands, 30 USC §§ 351-360. A recent BLM oil and gas lease auction in Idaho resulted in \$3,878,683 for leases outside of sage-grouse habitat. Idaho will receive payment of half this amount.

Additionally, the late inclusion of SFAs and the attendant Management Actions associated with SFAs has the potential to dramatically impact Idaho's livestock industry. Agriculture accounts for 7% of jobs, nearly 20% of sales and 7% of gross state product. Idaho's beef industry generates nearly 14% of the over \$9.78 billion agricultural industry. Additionally Idaho sheep and goats generate \$37.5 million in annual farm revenues. Individual producers utilizing public grazing allotments will be directly impacted by the Proposed LUPAs and FEIS.

If the Proposed Plan is implemented in its current form, changes in livestock numbers, AUMS, season of use, and more stringent Terms and Conditions requiring intensive management are expected. However, the proposed actions related to grazing are unnecessary because the BLM already has sufficient regulatory measures to ensure livestock grazing is compatible with sustained multiple use. *See* 43 C.F.R. § 4100; *Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management* (1997). In addition, Alternative E places improper livestock grazing in the appropriate context as a secondary threat, in that changes are only made if sage-grouse habitat objectives are not being met and there is compelling evidence to show that changing the grazing system would enhance the habitat.

BLM regulations are intended to “promote healthy sustainable rangeland ecosystems; . . . to provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy public rangelands.” *See* 43 C.F.R. § 4100.0-2. The SFAs and the acreages involved in these special management areas do not provide adequate details on the economic impacts this new regulatory layer will have on individual producers, the communities where they live, and the larger industry in Idaho.

Management Actions associated with SFAs will have a significant impact on private industry in Idaho. The BLM must either re-analyze the economic impacts of SFAs on industry or abandon the SFA framework and revert to the Governor’s Alternative.

4. The BLM failed to ensure the integrity of the information relied upon in justifying their management actions.

The APA states that agency decisions will be set aside if they are “arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a). “A decision is arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Native Ecosystem Council v. Weldon*, 697 F.3d 1043, 1050-51 (9th Cir. 2012).

Moreover, NEPA requires that the BLM “shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. Pursuant to the Information Quality Act, 44 U.S.C. § 3516, the BLM has promulgated Information Quality Guidelines “for reviewing and substantiating the quality of information it disseminates.”⁵

- i. *The BLM’s decision to designate SFAs is arbitrary and capricious because the Management Actions associated with SFAs contain no conservation gain for sage-grouse.*

⁵ http://www.blm.gov/pgdata/etc/medialib/blm/national/national_page.Par.7549.File.dat/guidelines.pdf (updated Feb. 9, 2012)

The Management Actions associated with SFAs do not address primary threats to sage-grouse. The Service listed habitat fragmentation and loss under Factor A of the five factor analysis found in Section 4 of the ESA as a reason sage-grouse received the warranted listing in 2010. The Service identified wildfires, invasive plants, infrastructure development, agricultural habitat conversion, energy development and urbanization as the primary causes of habitat loss and fragmentation. COT Report at 11. Fire and invasive weeds are the primary issue in the western portion of the species' range, while non-renewable energy development affects primarily the eastern portion of the species' range. 75 Fed. Reg. at 13957.

The COT Report indicates wildfire is a widespread threat to the two largest sage-grouse populations (Snake-Salmon-Beaverhead and the Northern Great Basin) in Idaho. COT Report, Table 2 at 23-24. However, SFAs and the associated Management Actions do not reduce the wildfire threat above and beyond conservation actions already included in the Proposed Plan for PHMA. The COT Report also indicates that weeds and annual grasses are a widespread threat to the Weiser, Snake-Salmon-Beaverhead, and Northern Great Basin sage-grouse populations. *Id.* However, SFA designations and the associated Management Actions do not provide any additional conservation benefit than those contained in the Proposed Plan for PHMA.

Instead, the COT Report indicates that mining is not a threat in four (East Central, Snake-Salmon-Beaverhead, Sawtooth and Weiser) sage-grouse populations in Idaho and is a localized threat to the Northern Great Basin Population. *Id.* Mining is not listed as a widespread threat to sage-grouse populations in Idaho. The SFA mining withdrawal conservation action does not address a priority threat to sage-grouse in Idaho and is therefore arbitrary.

Moreover, the COT Report states, “[a]lthough grazing management should initially focus on retaining the above habitat conditions within [Priority Areas of Conservation or “PACs”], sound grazing management should be applied across all sagebrush habitats.” COT Report at 45. The COT Report also states that. “[t]here are several potentially useful tools for developing management strategies (such as Ecological Site Descriptions and Proper Functioning Conditions metrics. However, use of these tools must be tied to sage-grouse habitat and population parameters if they are to be considered as a sole measure for monitoring condition . . .” *Id.* (citing Doherty *et. al.* 2011).

SFAs are designated as priority for grazing review in the Proposed Plan and FEIS. However, SFAs are subsets of PACs in Idaho, and are therefore not adequately addressing COT Report objectives. Additionally, the SFA grazing permit review process is not tied to sage-grouse habitat and population parameters (e.g. population and habitat triggers). The Governor's Alternative focuses on grazing permit review on areas of concern (within PACs – Core and Important) as indicated first by population and habitat triggers, second by applying Standard 8, and third by applying Standards 2 and 4. Furthermore, IM No. 2012-043, does not define SFAs as a priority for grazing review but defines a prioritization process for Permit/Lease Renewal/Issuance as follows: “*when several small or isolated allotments occur within a watershed or delineated geographic area, strive to evaluate all of the allotments together. Prioritize this larger geographic area against other PPH areas for processing permits/leases for renewal.*”

The BLM should abandon its designation of SFAs because it was an arbitrary and capricious agency action. As argued above, BLM's explanation for issuing SFAs runs counter to the evidence before the agency. Instead, the BLM should utilize the Governor's Alternative to manage sage-grouse and its habitat throughout the range in Idaho.

- ii. *The BLM's decision to designate non-habitat for sage-grouse in SFAs is inconsistent with the purpose and need of the FEIS and Proposed LUPAs and is not scientifically defensible.*

SFAs in Idaho include “[t]hree areas of Non-Habitat managed by the BLM or USFS . . . included at the direction of the Washington [D.C.] Office. These include an area in and adjacent to the BLM Donkey Hills ACEC, approximately 12,400 acres; 4,900 acres managed by the USFS in the Lost River Range described as Borah Peak, and 6,800 acres of USFS managed lands described as Big Flat Top Mountain/Copper Basin Knob.” FEIS at 2-27.

These non-habitat areas included in SFAs do not provide any additional conservation benefit for sage-grouse because these areas are not sage-grouse habitat by the BLM's own definition. The purpose of the FEIS and LUPA is to “identify and incorporate appropriate conservation measures in to LUPs, to conserve, enhance and restore [sage-grouse] habitat by reducing, eliminating, or minimizing threats to that habitat.” FEIS at 1-14. Thus, the inclusion of these areas does not meet the purpose of the FEIS and Proposed LUPAs, and the BLM must exclude these areas from regulation under the FEIS framework and SFA Management Actions.

- iii. *The scientific justification for FLM-1 within SFAs is based on stale science and FLM-1 should be eliminated from the Management Actions in the Proposed LUPAs.*

The BLM proposes management action FLM-1, which leaves open “fluid mineral leasing and development and geophysical exploration subject to NSO without waiver, exception or modification” in SFAs. FEIS at 2-51. In a recent fact sheet, entitled *Idaho Facts and Figures for BLM-USFS Conservation Plans for Greater Sage-Grouse* (attached as App. H), the BLM justifies FLM-1 by estimating that one-hundred percent (100%) of federal lands and minerals within PHMAs have low oil and natural gas potential. The fact sheet erroneously surmises “that less than 1% of PHMAs on federal lands and minerals are leased, with none of these held by production.” The citation for the information contained in the fact sheet is “*Inventory of Onshore Federal Oil and Natural Gas Resources and Restrictions to Their Development – Phase III Inventory – Onshore United States*.” Importantly, the citation notes that a “[d]etailed analysis was performed in defined basins, with an extrapolation model applied to all other areas.”

The BLM's conclusion that the State contains no potential for oil and gas development is wildly inaccurate. In fact, industry has expressed interest in fluid mineral development covering approximately 342,500 federal acres. The BLM, after numerous requests, held a lease sale in May of 2015 on approximately 6,200 acres in the Western Snake River Plain. This sale generated \$3.87 million in lease bonuses for the BLM, with the statutory share of this revenue going to Idaho.

By itself, the request for federal lease auctions is not a direct indicator of the economic presence of oil and gas. It is, however, an indicator that a few if not many professionals such as geoscientist, engineers, and landowners have an interest and are willing to spend dollars to do further research and exploration. Since the time of the 2008 study the phrase “unconventional resources” has reached equal usage and importance as that of “conventional resources.” While industry is still exploring “conventional sources in areas like the Payette Basin, they are also pursuing source rocks that have high total organic carbon percentages and have the ability to produce without structural or stratigraphic trapping mechanisms. Industry is currently interested in several areas north of the Idaho/Nevada-Utah border in PHMA and the Idaho/Oregon border. This includes naming the Mississippian Chainman Shale and the Eocene Elko formation as rocks of interest that had shown and generated commercial hydrocarbons in the northern portion of Nevada.

The BLM must, at a minimum, re-evaluate the potential for oil and gas in southern Idaho in justifying its position on the NSO stipulations in SFAs. They should base this analysis on the current and accurate conditions for this area, including industry interest, and not rely on an “extrapolated model” or outdated technology. If this analysis is done appropriately, the BLM will see that their justification for the NSO stipulation, that no potential for oil and gas in exists in PHMA in southern Idaho, is clearly false.

- iv. *Lek buffer distances are arbitrary and capricious and do not reflect a scientifically defensible approach to sage-grouse management.*

The BLM’s Proposed Plan implements a lower “interpreted range” suggested by the USGS Report, and do so universally within all sage-grouse habitat management areas in Idaho. *See* FEIS Appendix DD at DD-2. Yet in Wyoming, significantly smaller buffer distances are applied, and are differentially applied within PHMA as opposed to outside PHMA. The BLM cannot simultaneously state that a 3.1 mile buffer zone is the “best science” in Idaho, while stating that a 0.25 mile buffer zone is the “best science” in Wyoming.

Further, the lek buffer “interpreted range” from the USGS Report are suggested to be some “reasonable range” between the minimum and maximum distances reported by the literature. However, those lek buffer distances constitute one alternative of many. For example, the BLM did not consider exposing to public comment via any alternative the minimum lek buffer actually reported in the literature, but instead the minimum “interpreted range” arbitrarily devised by the USGS Report. This level of decision making is a land-use-plan level that requires its own NEPA analysis, separate and distinct (or in combination with) how to manage the land. Yet no such public comment has been permitted regarding the buffer distances suggested in the report, and particularly as to other, alternative, buffer distances.

The USGS Report concludes that the minimum distances reported by the literature, as opposed to their minimum (lower) “interpreted ranges” are as follows:

Surface disturbance: literature – 2.0 miles; lower “interpreted range” – 3.1 miles
Linear features: literature – 0.25 miles; lower “interpreted range” – 3.1 miles
Energy development: literature – 2.0 miles; lower “interpreted range” – 3.1 miles

Tall structures: literature – 0.6 miles; lower “interpreted range” – 2.0 miles
Low structures: literature – 0.12 miles; lower “interpreted range” – 1.2 miles
Activities: literature – 0.25 miles; lower “interpreted range” – 0.25 miles

Further, the USGS Report provided minimum distances, and maximums (mostly reported by a single source), but did not report on other reported disturbance distances between the minimum and maximum levels reported in the literature. The FEIS could have, and should have, assessed alternative lek buffer distances, as by various original literature sources, and should not have relied upon the arbitrary distances within the USGS Report.

Additionally, there are internal inconsistencies with the FEIS as lek buffer distances are listed as 3.1 miles in Appendix DD, whereas in the description of disturbance caps and mapping of disturbance, as expressed in Appendix G, they are listed as 4 mile buffers.

5. The FEIS is incomplete and does not contain information that is important to evaluate the foreseeable environmental effects.

According to NEPA, and the Environmental Quality Improvement Act of 1970 as amended (42. U.S.C. 4371 *et seq.*), an EIS “shall provide a full and fair discussion of significant environmental impacts and shall inform the decisionmakers [*sic*] and the public of reasonable alternatives which would avoid or minimize adverse impacts of enhance the quality of the human environment.” 40 C.F.R. § 1502.1. Further, “[s]tatements . . . shall be supported by evidence that the agency has made the necessary environmental analyses.” *Id.* “When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an [EIS] and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.” 40 C.F.R. 1502.22.

The BLM failed to meet this standard in Appendix G where it states, “Tables 2-7 describe the acreages associated with the BSU by Conservation Area for the Idaho and Southwestern Montana Subregion. The tables contain values for the entire BSU (Priority and Important), including all ownership, acres of effective habitat within the BSUs and acres of anthropogenic disturbance within the BSU.” FEIS, Appendix G at G-28. This piece of information is important to determining the significant environmental impacts and informing decision makers which would avoid or minimize the adverse impacts of the BLM’s decision to change the way that disturbance caps are calculated. However, Table 2-7 only describes “Treatment Acres per Decade on National Forest System Lands.” *See* FEIS, Table 2-7 at 2-64.

It does not appear that the information described in Appendix G (*i.e.* acreages associated with BSU by Conservation Area) is in the FEIS. The amount of acreage associated with disturbance caps is important to determining the environmental analysis, both as a baseline, and a predictor of allowable future disturbance in the conservation area. It is vital for planning purposes, particularly with the change in calculation for disturbance caps from post-DEIS negotiations between the BLM and Idaho and the publishing of the FEIS. The BLM did not issue notice that the information provided in the FEIS was incomplete or unavailable.

In order to cure this error, the BLM should replace the disturbance cap language to the negotiated language because that language was the result of meaningful public participation, with input from the Task Force. In the alternative, the BLM should consider this issue in a supplemental EIS, with the necessary information made available for public comment.

B. The BLM's Proposed Plan Violates FLPMA and NFMA

1. The BLM violated FLPMA's Section 202(c)(9) requirement for meaningful participation with the State.

The Governor on behalf of the State of Idaho, as a sovereign state, is accorded "special solicitude" to challenge federal actions impacting state natural resources. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that when states such as Idaho confront policies and decisions of the United States impacting natural resources within its borders, it is "of considerable relevance that the parties seeking review here is a sovereign state," *Id.* at 518. The Supreme Court pointed to Massachusetts's "well founded desire to preserve its sovereign territory" and characterized the State's interest as sufficiently concrete and a traditionally recognized "independent interest 'in all the earth and air within its domain.'" 549 U.S. at 519. The State of Idaho asserts the precise interest in BLM's FEIS as was recognized as a sovereign interest in *Massachusetts v. EPA*.

As the Service and the BLM are well aware, coordination under FLPMA, specifically Section 202(c)(9) of FLPMA requires the Service and the BLM to provide for involvement of state and local government officials in developing land use decisions for public lands, including early public notice of proposed decisions that have a significant effect on lands other than BLM-administered Federal lands.

The key to coordination with state agencies is the ongoing, long-term relationship where information is continually shared and updated throughout the entire process, not through portions of the process only to have additional information added to the document without agency collaboration, consultation, and coordination. Coordination must start as early in the land use planning process as is practical and must continue throughout the entire planning efforts. When BLM included SFAs and their associated Management Actions without consultation, cooperation, and coordination with State agency partners, the BLM violated their own Land Use Planning Handbook ("Handbook"). Appendix A of the Handbook paraphrases Section 202(c)(9) of FLPMA, as requiring "meaningful participation by local officials and consistency, to the extent practicable, with officially approved plans of tribal, state, and local governments so long as the plans are consistent with Federal laws and regulations." Handbook, Appendix A, at 1 (emphasis added). The Handbook also indicates that "[a]n effective collaborative process for public land planning assures that local, regional, and national interests are integrated." *Id.*

43 C.F.R. § 1610.2(a) under Public Participation clearly states that "[t]he public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities. Public involvement in the resource management planning process shall conform to the requirements of

the National Environmental Policy Act and associated implementing regulations.” During the planning process, the State was not invited to participate in the planning of SFAs which constitutes a violation of 43 C.F.R. § 1610.2(a). Adding SFAs to the Proposed LUPAs and FEIS based only on a Service memorandum violates the spirit of the collaborative process that the State of Idaho was operating in good faith under and with the clear intent of Section 202(c)(9) of FLPMA.

2. The inclusion of Management Actions associated with SFAs violates FLPMA’s and NFMA’s multiple use requirement.

FLPMA “established a policy in favor of retaining public lands for multiple use management.” *Lujan v. Nat. Wildlife Fed.*, 497 U.S. 871, 977 (1990). As such, the BLM is mandated to manage the lands it administers to retain uses including “but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” 43 U.S.C. § 1702(c) (emphasis added).

As with FLPMA, NFMA similarly has a requirement that the Secretary of Agriculture shall “provide for multiple use and sustained yield ... in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” 16 U.S.C. § 1604(e)(1); see *The Lands Council v. McNair*, 537 F.3d 981, 990 (stating that Congress intends National Forest lands to be managed for competing uses).

The Management Actions associated with SFAs violate FLPMA and NFMA. The management regime associated with SFAs, in addition to the PHMA restrictions, include “recommended withdrawals from the General Mining Act of 1872, as amended, subject to valid existing rights; Managed as NSO, without waiver, exception, or modification for fluid mineral leasing; prioritized for management and conservation actions in these areas, including, but not limited to review of livestock grazing permit/leases....” FEIS at 2-27. These Management Actions are re-emphasized within the document.

The inclusion of such drastic restrictions to livestock grazing, mining, and oil and gas development arbitrarily elevates these secondary threats to primary threats, which runs contrary to the federal agencies’ multiple use mandate. Since 2010, the Service and BLM have appropriately labeled these threats as secondary, including within the FEIS. See COT Report at 11; FEIS at 1-13. Keeping these threats in the proper context, the State concentrated its conservation actions and regulatory framework on the primary threats facing sage-grouse in Idaho. Now, at the last moment and without notice, the BLM proposes to adopt drastic conservation measures for minor, secondary threats that have the potential to unnecessarily preclude some of the most historic and prominent land-uses on public land.

3. The Proposed Land Withdrawals and the General Mining Law of 1872.

FLPMA expressly provides that none of its land use planning provisions, among others “shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress” (43 U.S.C. § 1732(b),

emphasis added). Similarly, Section 528 of the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”) provides “*Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands...*” 16 U.S.C. § 528.⁶ In enacting FLPMA, Congress explicitly acknowledged the continued vitality of the Mining Law of 1872. Section 302(b) of FLPMA states:

Except as provided in Section 1744, Section 1782, and Subsection (f) of Section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the act, including, but not limited to, rights of ingress and egress (43 U.S.C. § 1732(b)).

The House Committee on Interior and Insular Affairs described this provision more particularly when it stated:

This section specifies that no provision of the Mining Law of 1872 will be amended or altered by this legislation except as provided in Section 207 (recordation of mining claims), Subsection 401(f) (regulation of mining in the California desert), Section 311 (wilderness review areas and wilderness areas), and except for the fact that the Secretary of the Interior is given specific authority, by regulation or otherwise, to provide that prospecting and mining under the mining law will not result in unnecessary or undue degradation of the public lands. The secretary is granted general authority to prevent such degradation (H.R. Rep. No. 94 1163 at 6 (1976)).

BLM is required to strike an appropriate balance between potentially competing interests and land management objectives. Therefore, the LUPA/FEIS’ mineral withdrawals, prohibitions, and restrictions are contrary to explicit statutory language in FLPMA, and MUSYA, and Section 22 of the General Mining Law.

Throughout the LUPA/FEIS, BLM conditions several objectives, goals, management actions, and standards and guidelines subject to “Valid Existing Rights” (“VERs”) with the implication that the impact of these restrictions on claim holders would be mitigated because their rights to their claims would be protected. The Governor’s Alternative also takes into consideration of VERs, but does not invoke the reference as a broad sanction for the unprecedented land withdrawals in the Proposed Plan. The VER requirement puts an overly restrictive and unrealistic burden on mining operators exercising their rights under the General Mining Law, and creates a *de facto* withdrawal which is outside BLM’s authority and contrary to law.

For locatable minerals the term “valid existing right,” is a specific term that is reserved for those claims after a “discovery” has been made. Therefore, the proposal to honor VERs fails to

⁶ The discussion following also applies to similar U.S. Forest Service regulations, policies, and directives; including but not limited to those under NFMA and MUSYA.

protect the rights associated with claims *prior* to a discovery of a valuable mineral. Very few mining claims can withstand the rigorous economic evaluation, required of a claim validity examination (“validity examination”) to which they would be subjected as a result of this constraint.

Validity examinations are used to determine whether a claim has a discovery of a valuable mineral deposit that qualifies as a VER that the federal government must exclude from the various restrictions, prohibitions and withdrawals. Thus, the many references to VERs in the LUPA/FEIS are misleading because they create the false impression that the rights of mining claimants with claims in areas subject to restrictions, prohibitions, withdrawals and *de facto* withdrawals from future mineral entry would be respected and that claimants could continue to explore and develop their claims.

Only *after* a claim is found to be valid as a result of a validity examination is it considered a VER. But mineral validity examinations create such a high threshold of proof that a claim can be mined at a profit that very few claims can demonstrate sufficient profitability to satisfy the criteria for a valid claim and a VER. Generally speaking, some (but not all) claims at operating mines may meet the claim validity examination test and be treated as having a VER. However, claims that are being actively *explored* almost never qualify as valid claims with a VER. Even claims at advanced exploration projects that are being proposed for mine development may not qualify as VERs.

The repeated and incorrect use of the term “Valid Existing Rights” when discussing the applicability of the conservation measures that restrict and prohibit land uses actually has the exact opposite effect on mining claims. It can be read to mean that the proposed land use restrictions apply to all mining claims in the planning area except those few claims that have a valuable discovery that can meet the economic tests to create a VER. Thus, rather than limiting or exempting mining claims from the draconian land use restrictions, the references to VERs throughout the LUPA/FEIS broaden the impact of these restrictions to nearly all mining claims in the relevant planning area.

C. The BLM Violated Its Own Regulations by Failing to Consult With the State Regarding SFAs

BLM regulations require consensus-based management.

“Consensus-based management incorporates direct community involvement in consideration of Department of Interior bureau activities subject to NEPA analysis, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purpose of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities . . . Consensus-based management involves outreach to persons, organizations, or communities that may be interested in, or affected by, a proposed action, with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.”

43 C.F.R § 46.110(a).

This consensus-based management is exactly what the State planned for and implemented with the development of a 15 person Task Force. The 15 individuals represented a wide range of diverse interest in sage-grouse and public land management in Idaho. State and local elected officials, sportsmen and conservation organizations, sage grouse experts, industry groups and others participated in a collaborative and cooperative way so that all the issues were open for discussion with the intent that consensus would be reached by all parties. 43 C.F.R. § 110(c) requires that the Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process. The BLM's process began with adequate and effective "consensus based" management. However, inexplicably, the BLM abandoned its collaborative approach with the State and abandoned its own regulations by creating and including SFAs and the associated Management Actions without any outreach efforts whatsoever. Such an approach fails the standards set in 43 C.F.R. § 46.110(a).

III. CONCLUSION

The BLM's (and USFS's) eleventh-hour inclusion of SFAs and associated Management Actions, lek buffer distances, and changes in anthropogenic disturbance cap calculations represent serious shortcomings in the FEIS and LUPAs. The Agencies should be concerned with the lack of site-specific analysis required by NEPA, including the impacts of the Proposed Plan on federally managed lands, State Endowment Trust Lands, and private property that will provide Idaho and its citizens an accurate and fair analysis of the environmental effects of this proposed action.

The Agencies should also be cognizant of the decay in relationship with the State as a result of a promise to collaborate and the failure to execute that promise. State agencies invested significant amounts of time and resources to develop the Governor's Plan in response to the original invitation from the Secretary of Interior to collaborate with the federal government. What resulted was the best strategy for balancing sage-grouse conservation with the need to protect Idaho's way of life. The Proposed Plan, as currently written, has significant potential to erode the longstanding relationship between the State and federal agencies.

In order to remedy the flaws contained in the FEIS and LUPAs, the BLM and the USFS must abandon the overly restrictive federal land management proposal. They must either adopt the negotiated, vetted, and sound policy laid out in the Idaho Plan or initiate a Supplemental Environmental Impact Statement and Revised Land Use Plan Amendments.

As Always – Idaho, "Esto Perpetua"

A handwritten signature in black ink, appearing to read "C.L. Butch Otter". The signature is stylized and written in a cursive-like font.

C.L. "Butch" Otter
Governor of Idaho