



December 13, 2024

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SENT VIA EMAIL AND OVERNIGHT MAIL

The State of Wyoming's Appeal to the BLM State Director's Response to Governor Mark Gordon's Consistency Review and Recommended Changes to the Bureau of Land Management's Proposed Resource Management Plan for the Rock Springs Field Office

The State of Wyoming, under 43 C.F.R. § 1610.3-2(e), appeals the Wyoming State Director's Response to the Governor's Consistency Review for the Proposed Resource Management Plan (RMP) for the Rock Springs Field Office. For the following reasons, the State requests that the Director accept the recommendations in the Consistency Review because those actions provide a reasonable balance between national and State interests.

INTRODUCTION

The proposed RMP does not balance national and State interests. Instead of a thoughtful review, the State Director's response inaccurately paraphrased several key arguments, was nonresponsive to many issues identified, and contained several other errors. The State Director's hasty response indicates that the proposed Rock Springs RMP is a politically motivated decision rather than focused on making the right decisions for land use.

The State Director's response ignored significant procedural and substantive issues the State raised in its Consistency Review. The State Director's non-response compounds the existing procedural flaws identified in the Consistency Review and reinforces the need for BLM to revisit

its RMP. Further, BLM's refusal to examine the several overlapping management strategies and their effects on resources is far from the "hard look" the National Environmental Policy Act (NEPA) requires from the agency.

The State raises five categories of issues in this appeal. First, the Environmental Impact Statement (EIS) is not an adequate substitute for the RMP. Second, any new points raised in the Consistency Review must be reopened for comment. Third, BLM must analyze the impacts of the proposed management actions in the final EIS for the sage grouse plan amendment and must stay its final decision on the Rock Springs RMP if it intends to keep the South Wind River Area of Critical Environmental Concern (ACEC). Fourth, the State Director failed to address several inconsistencies in his response. Fifth, the State Director's response was inadequate for the limited issues to which it did respond.

THE DIRECTOR'S REVIEW

The Federal Land Policy and Management Act (FLPMA) and BLM's planning regulations guide the Director's decision for this appeal. 43 U.S.C. § 1712(c)(9); 43 C.F.R. § 1610.3-2. In reviewing this appeal, the Director must focus on the Consistency Review and Recommendations that the State first submitted to the State Director and the issues raised in this appeal. *See* 70 Fed. Reg. 3550, 3552 (Jan. 25, 2005) (Director's Response to an Appeal from the Governor of New Mexico). "[The Director] will first consider whether [the State] raised actual inconsistencies with officially approved state resource related plans, policies, and programs." (*Id.*) (alterations added). "If an actual inconsistency is raised, [the Director] will then consider whether a recommendation addresses that inconsistency and provides for a reasonable balance between the national interest and the [State's] interest." (*Id.*) (alterations added); (*see also* BLM Land Use Planning Handbook

H-1601-1 at I.E.1) (“BLM’s plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law and FLPMA provisions.”).

I. The State Director’s failure to disclose the actual proposed RMP during the Consistency Review process requires more public comment.

Incredibly, the State Director **refused to disclose the actual proposed RMP to the Governor during the Consistency Review Process**. Rather, the State Director forced the State of Wyoming to parse through descriptions of BLM’s proposed RMP scattered throughout BLM’s EIS. That not only hindered the State’s ability for meaningful engagement, but also violated BLM’s planning regulations and guidance while depriving the public of the ability to comment upon the additional recommendations.

BLM regulations provide that before approving a resource plan “the State Director **shall submit to the Governor of the State(s) involved, the proposed plan or amendment and shall identify any known inconsistencies with State or local plans, policies or programs.**” 43 C.F.R. § 1610.3-2(e) (emphasis added). The regulations also require that the “draft plan and environmental impact statement **shall be provided for comment to the Governor of the State involved[.]**” *Id.* § 1610.4-7 (emphasis added). Similarly, the BLM Handbook provides that “the BLM State Director **will submit the proposed plan, revision, or amendment to the Governor(s) of the state(s) involved.**” (BLM Land Use Planning Handbook H-1601-1, Appendix E) (emphasis added); (*see also id.* at III.A.12) (stating a “print-ready copy” should be sent to the Governor). BLM’s failure to provide a copy of its proposed RMP language was inconsistent with the land planning regulations. This failure also compromised the review process by limiting the Consistency Review to BLM’s EIS.

BLM's failure not only hindered the State's ability to provide a Consistency Review in the first instance—it also compounded that problem when it prevented the public from having an opportunity to comment on the Governor's recommendations. (*See* Governor's Consistency Review at 3) (“Any recommended changes by the Governor, not raised in the public participation process, must be subject to public comment.”) (citing 43 C.F.R. § 1610.3-2(e)). “If the written recommendation(s) of the Governor(s) recommend changes in the proposed plan or amendment which were not raised during the public participation process on that plan or amendment, the State Director shall provide the public with an opportunity to comment on the recommendation(s).” 43 C.F.R. § 1610.3-2(e).

Accordingly, BLM must release the Governor's recommended changes not raised in the public participation process to public comment. Here, the Governor recommended several changes not raised during the public participation process that the State Director should have provided the public an opportunity to comment on.

First, the Governor recommended that “BLM should pursue an alternative where proposed withdrawal and closure to mineral leasing are mutually exclusive.” (Governor's Consistency Review at 16). Second, “BLM should consider alternatives opening more areas to off-highway vehicle (OHV) use or avoiding an all or nothing approach to using existing trails or roads.” (Governor's Consistency Review at 29). The State also provided recommendations not analyzed under the current alternatives. These recommendations should also be analyzed to maximize public participation, as required by BLM regulation.

Thus, the Director should remand to the State Director with directions to allow the public to comment on the recommendations that were not raised during the public participation process.

II. BLM needs to analyze the cumulative effects of the sage grouse plan amendment and wait until the sage grouse planning process is completed before finalizing the South Wind River ACEC.

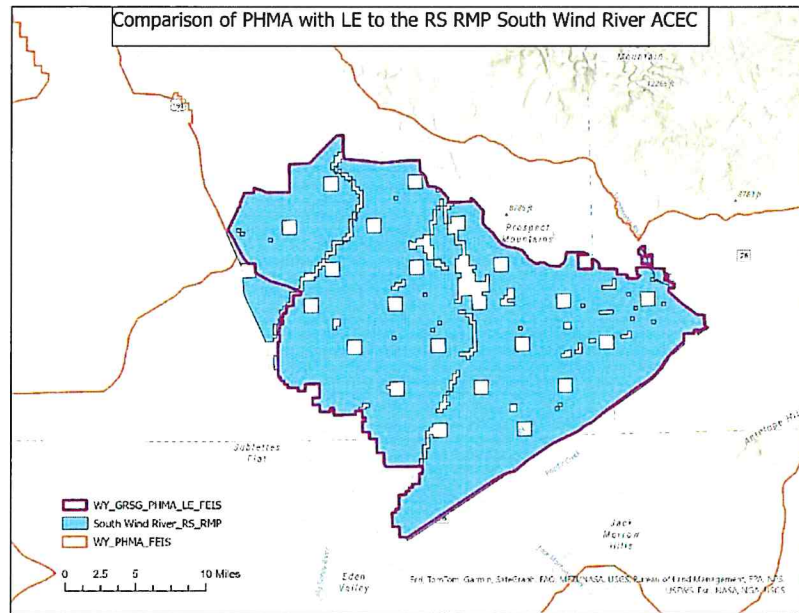
BLM must analyze the cumulative effects of the proposed sage grouse RMP, which will also impose restrictions on the planning area. *See Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (agencies must study the cumulative impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions” under NEPA).¹ To fulfill its procedural obligations, BLM’s “cumulative-impact analysis must identify (i) the ‘area in which the effects of the proposed project will be felt’; (ii) the impact expected ‘in that area’; (iii) those ‘other actions – past, present, and **proposed**, and reasonably foreseeable’ that have had or will have impact ‘in the same area’ (iv) the effects of those other impacts; and (5) the ‘overall impact that can be expected if the individual impacts are allowed to accumulate.’” *Id.* (quoting *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)). After the Governor sent his Consistency Review, BLM published the final EIS for the sage grouse RMP, which contains management actions overlapping the South Wind River ACEC.

Compounding the issue is the overlap between priority habitat management areas (PHMA) with limited exceptions and the South Wind River ACEC. The current version of the sage grouse RMP EIS established PHMA with limited exceptions for the first time.

¹ While this case relies on the NEPA regulations which were overturned by the *Marin Audubon Society v. Federal Aviation Administration*, these cases and regulations are still relevant to this appeal. The EIS was prepared under the NEPA regulations and they governed the EIS’s preparation. (*See, e.g.*, Rock Springs RMP FEIS at ES-1). Even if BLM did not already declare these regulations the “rules of the road” for this EIS, these regulations informed a body of case law that is still relevant to determining if BLM adequately performed its NEPA obligations.

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Interestingly, the borders of BLM's new management area almost directly align with the South Wind River ACEC.



Prepared by the Wyoming Game and Fish Department

If BLM's proposed sage grouse plan is adopted, PHMA with limited exceptions would impact the environmental resources that BLM proposes to protect with the South Wind River ACEC. The EIS plans to manage PHMA with limited exceptions as exclusion for wind and solar, no surface occupancy (NSO) for fluid minerals, and exclusion for major ROWs. These stringent management actions would influence whether the South Wind River ACEC is required to protect and prevent irreparable harm.

Even though there is no final decision for the sage grouse RMP, BLM cannot hide behind its timing decisions. *See, e.g., Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010) ("However, 'the comprehensive "hard look" mandated by Congress and required by [NEPA] must be timely, and it must be taken objectively and in good faith, not as an exercise

in form over substance, and not as subterfuge designed to rationalize a decision already made.”) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)). “[T]he court is not simply a ‘rubber stamp’ for agency action and will set aside agency action if it is in contravention of the agency’s own rules or congressional mandate. In other words, the court will not accept pro forma compliance with NEPA procedures, nor post hoc rationalizations as to why and how the agency complied with NEPA.” *W. Organization of Resource Councils v. BLM*, 591 F.Supp.2d 1206, 1230 (D. Wyo. 2008) (quoting *Wyoming v. Dep’t of Agric.*, 570 F.Supp.2d 1309, 1330-32 (D. Wyo. 2008)).

BLM must analyze the cumulative impacts of the management actions proposed in the sage grouse RMP. Otherwise, BLM’s EIS will be an exercise of form over substance because it fails to consider real environmental impacts. Furthermore, the complete alignment of PHMA with limited exceptions with the South Wind River ACEC means that BLM must postpone designating the ACEC because PHMA with limited exceptions if implemented could prevent irreparable harm.²

III. The State Director ignored or was unresponsive to several of the Governor’s concerns.

As discussed above, multiple procedural obligations have been overlooked throughout this consistency process. The State Director’s responses magnify the procedural flaws because in most instances, his responses are unresponsive or he ignored crucial inconsistencies. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (“But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”) (citing 5 U.S.C. § 706(2)(A)). In short, the State Director treated the Consistency

² Assuming BLM can demonstrate that the South Wind River ACEC is required to prevent irreparable harm in the first place.

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Review as a mere paper exercise instead of a meaningful process for soliciting the State's input. *See* 43 U.S.C. § 1712(c)(9) (stating the Secretary "shall provide for meaningful public involvement of State and local government officials.").

A. BLM has not established that the ACECs are "required" to protect and prevent irreparable damage.

BLM has not established that the proposed ACECs are necessary to prevent irreparable damage. In addressing the State's identified inconsistency, the State Director stated that it looked at a range of alternatives. (BLM State Director's Response at 3). NEPA's requirements to consider a range of alternatives is a completely different legal issue than FLPMA's definition of an ACEC. *See* 43 U.S.C. § 1702(a) (defining an ACEC as an area "where special management attention is required ... to protect and prevent irreparable damage[.]").

BLM's current analysis undercuts that its designation meets the statutory definition. Under the No Action Alternative BLM says the existing ACECs "will ensure special management attention is generated to protect and prevent irreparable damage[.]" (Rock Springs RMP FEIS at 4-138). The State Director also frames the proposed RMP as being the same as the no action alternative except just over a larger area. (*Id.*) Thus, BLM has not established that the proposed ACECs were "required ... to protect and prevent irreparable damage." 43 U.S.C. § 1702(a). While BLM does state that the larger area would offer "greater protections," that is not the standard. (Rock Springs RMP FEIS at 4-138).

Also undermining BLM's designations is that the ACECs rely on several values that are already adequately protected. For example, proposed stipulations already protect basin big sagebrush/scurfpea plant communities and big game parturition areas, which BLM could expand to cover the necessary habitat instead of designating an ACEC. (*See* Governor's Consistency

Review at 6) (citing Rock Springs RMP FEIS at B-10, B-15). Similarly, the State Director never responded that its choice to designate ACECs when big game and wildlife habitat could be readily managed through habitat designations is inconsistent with county plans. (See Governor's Consistency Review at 7) (quoting Sweetwater County Federal Lands and Resources Plan at 52).

Accordingly, the State Director's unrelated NEPA argument is nonresponsive and needs to be remanded to answer the actual inconsistency raised. See *BNSF Ry. Co.*, 741 F.3d at 168 (“agency's “failure to respond meaningfully” to objections raised by a party” is arbitrary and capricious). Otherwise, the Director should order that the EIS be amended to perform the analysis FLPMA requires.

Furthermore, the State Director's response opened up the 2024 regulations, which are even more stringent on what qualifies as an acceptable ACEC. (BLM State Director's Response at 5) (citing 43 C.F.R. § 1610.7-2(j)(3)); *but see* 43 C.F.R. § 1610.7-2(1983); 43 C.F.R. § 1610.7-2(2017) (no (j)(3) exists). The RMP used the more relaxed standards under the older regulations. *Compare* 43 C.F.R. § 1610.7-2(2017); *with* 43 C.F.R. § 1610.7-2(2024). Either BLM has opened the door to stricter standards under its new regulations or the State Director's response relying on those regulations must be remanded. (BLM State Director's Response at 5) (citing 43 C.F.R. § 1610.7-2(j)(3) to defend itself against arguments that its proposed ACEC designation which excludes ROWs and closes entire landscapes is contrary to its mandate to manage for multiple-use).

BLM has not met the standards under the 2024 regulations. One of the new changes to the 2024 regulations was they defined “irreparable damage.” 43 C.F.R. § 1610.7-2(d)(3)(ii). “Irreparable damage” means “harm to a value, resource, system, or process that substantially diminishes the relevance or importance of that value, resource, system, or process in such a way

that recovery of the value, resource, system, or process to the extent necessary to restore its prior relevance or importance is **impossible.**" *Id.* (emphasis added). The EIS fails to explain how without the ACECs recovery and restoration of the values is impossible.

B. Using ACECs to stop mineral development violates FLPMA.

The State Director **never responded to the point that FLPMA provides a detailed process for mineral withdrawal**, and using other processes like creating ACECs instead of the mineral withdrawal process is improper. (Governor's Consistency Review at 8-9). The court has found even discretionary Secretarial actions to be impermissible withdrawals. *Mountain States Legal Found. v. Hodel*, 668 F. Supp. 1466, 1475 (D. Wyo. 1987). "The action of the Secretaries ... involves affirmative action to withhold these forested lands from mineral leasing, thereby limiting leasing activities in order to maintain basic environmental values for an indefinite period of time." *Id.* at 1474 (ellipsis added). Legally, the Director should remand to the State Director to respond to this issue or amend the EIS to solely rely on FLPMA's process for mineral withdrawal.

C. The State Director unlawfully asserts that the public will never have an opportunity to provide input on the RMP monitoring plan.

The State Director responded to the Governor's concern that there were no monitoring intervals or standards for the ACECs by stating "[m]onitoring plan components will be outlined in the Record of Decision (ROD) for the RMP and will include reference to the ACEC monitoring as part of the larger RMP monitoring and evaluation." (BLM State Director's Response at 6).

This contradicts BLM's response to comments. There, BLM rejected a comment pointing out the failure to provide a monitoring plan that includes ACEC monitoring. (Rock Springs RMP FEIS at W-324). BLM rejected the comment by stating that "ACEC monitoring plans are site specific implementation documents and are not within the scope of this DEIS." (*Id.*). However,

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when responding to the Consistency Review, the State Director acknowledged that “ACEC monitoring is a component of the RMP monitoring plan as required by 43 CFR 1610.4-9.” (BLM State Director’s Response at 5). “Specific ACEC **activity** plans are implementation level plans that typically describe multiple projects that are proposed to meet RMP objectives. The BLM may prepare activity plans for ACECs where circumstances warrant; however, the development of an activity plan is not required.” (*Id.*). However, like the State, that commenter had raised an issue with the lack of an ACEC monitoring plan and referenced 43 C.F.R. 1610.4-9 and .63 of BLM’s manual. (Rock Springs RMP FEIS at W-324). ACEC activity plans are discussed in Section .62 of the Manual. (BLM Areas of Critical Environmental Concern Manual, MS-1613, .62) (Rel. 1-1541). BLM’s recognition of ACEC monitoring as part of the monitoring plan in the ROD contradicts its comment response.

Beyond being contradictory, there are three issues with BLM waiting to provide the monitoring plan and the ACEC monitoring until the ROD. First, BLM’s strategy supports the Governor’s argument that the EIS is not an adequate substitute for the plan because the EIS is missing a critical component. Second, the public will never get to comment on the monitoring plan if BLM waits to share this vital plan component until the ROD. Third, the State questions how “systematic and structured” the monitoring measures are if they were only analyzed while BLM prepares a ROD. (BLM Areas of Critical Environmental Concern Manual, MS-1613, .63) (Rel. 1-1541) (“In the case of the ACEC’s, it is particularly important that the monitoring measures be systematic and structured so that the managing official is informed on a timely basis of any significant changes in the related plans of other Federal agencies, State or local governments, or Indian tribes.”).

The Governor and the public's review are hobbled by missing a critical piece. A "proposed plan shall establish intervals and standards, as appropriate, for monitoring and evaluation of the plan." 43 C.F.R. § 1610.4-9. "ACEC monitoring is part of the monitoring provisions in the RMP. The BLM's planning regulations prescribe that the RMP shall establish intervals and standards for monitoring." (BLM Areas of Critical Environmental Concern Manual, MS-1613, .63) (Rel. 1-1541). To remedy this egregious error, BLM should provide the State and the public a copy of the plan with the monitoring plan so they can provide input and be meaningfully involved in the process.

D. The State Director completely misses the point of why multiple ACECs are contrary to Wyoming Executive Order 2020-1.

The State Director's response to the Governor's identified inconsistencies with its Executive Order is nonresponsive for four reasons.

First, the State Director failed to address that it created management action #4424 to protect big game corridors, but does not refute that Executive Order 2020-1 adequately protects these corridors. (*See* BLM State Director's Response at 6-7). The closest the State Director gets to refuting the adequacy of Executive Order 2020-1 is a statement that management action #4424 ensures the continued protection of the migration corridor. (*Id.* at 6). However, neither the EIS nor the State Director has provided evidence that the corridor is not adequately protected and irreparable damage will occur to the Sublette mule deer migration corridor without the ACEC designation.

Second, the State Director did not respond to the point that using the Sublette mule deer migration corridor as a value supporting ACEC designation conflicts with the definition of an ACEC. (*See, e.g.,* Governor's Consistency Review at 15). As the migration corridor is already

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protected through Wyoming's laws, an ACEC is not "required." Even if Secretarial Order 3362 did apply, the order is preempted by FLPMA. (*See id.*); *see also* Secretarial Order 3362, at Sec. 6 (explaining that other laws, like the statutory definition of an ACEC, preempt Secretarial Order 3362).

Third, the State Director either misrepresented what management action #4424 does or he needs to update the language in the management action to clarify its meaning. Management action #4424 says "BLM will consult with the Wyoming Game and Fish Department (WGFD) to evaluate the adequacy of the conservation plan prior to finalization." (Rock Springs RMP FEIS at B-11). However, the State Director described the relationship as "WGFD determines adequacy of the conservation plan for the surface use." (BLM State Director's Response at 6). There is a difference. Under the action text, BLM only asks for WGFD's opinion or advice.³ Further, because BLM is the actor in the sentence the decision-making authority lies in BLM. Whereas, the State Director insinuates in its response that WGFD is the actor and WGFD gets to determine or have the power to decide.⁴ If the State Director's interpretation was BLM's intention, the language needs to be changed. This change would also have to go out for public comment.

Fourth, the State Director's response regarding the Governor's concerns over its plans to develop a Habitat Management Plan (HMP) is non-responsive. The State expressed concerns because the State has created an extensive process for designating migration corridors, so any HMPs developed outside of Wyoming's designation process would likely violate Executive Order 2020-1. (*See* Governor's Consistency Review at 13-14). Instead of addressing those concerns, the

³ <https://www.collinsdictionary.com/us/dictionary/english/consult>;
<https://dictionary.cambridge.org/us/dictionary/english/consult>.

⁴ <https://www.merriam-webster.com/dictionary/determine>

State Director merely defined an HMP. (BLM State Director's Response at 7). This non-response is arbitrary and capricious. *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) (“agency’s “failure to respond meaningfully” to objections raised by a party” is arbitrary and capricious). This response also should be remanded to the State Director to provide an answer that is neither arbitrary nor capricious.

E. The State Director used a red herring in response to the State's concern that its proposal to pursue a withdrawal but to retain and petition to extend the withdrawal is pre-decisional.

In its Consistency Review, the State pointed to action text that said both “Pursue a withdrawal from mineral location and entry under the U.S. mining laws” and “retain and petition to extend the withdrawal when it expires.” (Governor's Consistency Review at 15) (citing Rock Springs RMP FEIS at B-33) (action text for management action #7492). The State repeats its concerns that this action text is pre-decisional. (Governor's Consistency Review at 15-16). Instead of addressing this inconsistency, the State Director used a different example that better fits its argument but ignores the crucial issue presented by management action #7492. (See BLM State Director's Response at 7-8).

The State Director's red herring response is unpersuasive. The State Director used a different example, management action #7013. (See *id.*) Unlike management action #7492, this management action states, “Retain the existing 40-acre mineral withdrawal.” (Rock Springs RMP FEIS at B-26). The State Director used this example to support its theory that “[I]ands that have already been withdrawn are identified in Map 3-17 and some management actions identify the intent to retain or renew the withdrawal as it expires for the continued protection of the resource from locatable mineral entry.” (BLM State Director's Response at 8).

The State Director's answer is non-responsive. The State is not concerned about BLM proposing to retain existing withdrawals. The State raised an inconsistency with the management action, which proposed both to pursue a mineral withdrawal and then to retain it once it had expired. The Director should remand to the State Director for an actual response to the issue raised.

F. The State Director never responded to the Governor's concern that closing an area for mineral leasing is unnecessary if BLM is pursuing an application for mineral withdrawal.

The State Director never responded to the point that if BLM plans to pursue a mineral withdrawal, closing the same areas to mineral leasing is unnecessary.⁵ (Governor's Consistency Review at 16). To pursue a withdrawal, BLM would file an application. 43 U.S.C. § 1714. Within thirty days of receipt of an application for withdrawal, the Secretary of the Interior must publish a public notice of the proposed withdrawal in the Federal Register. *Id.* Once the notice is published, the lands will be "segregated from the operation of the public land laws to the extent specified in the notice." *Id.* When BLM applies for withdrawal and notice is published a two-year segregation period will begin. *See id.* § 1714(b)(1). If a withdrawal is warranted under the separate process, then the same goal of closing the area to mineral leasing will be accomplished.

If BLM decides to withdraw its application for withdrawal due to information gathered in the separate process, it raises questions about how advisable closing the area to mineral leasing is. Therefore, closing the area to mineral leasing improperly puts a thumb on the scales. Either BLM feels pressured to justify its decision in the RMP, or BLM risks casting doubt on its decision to close the area to mineral leasing. Accordingly, the Director should remand to the State Director to

⁵ The State still maintains that closing the area to mineral leasing only can be done through the withdrawal process. See Section IV.B. However, if BLM continues to proceed with closing areas to mineral leasing, doing so while proposing the same area for mineral withdrawal is unnecessary.

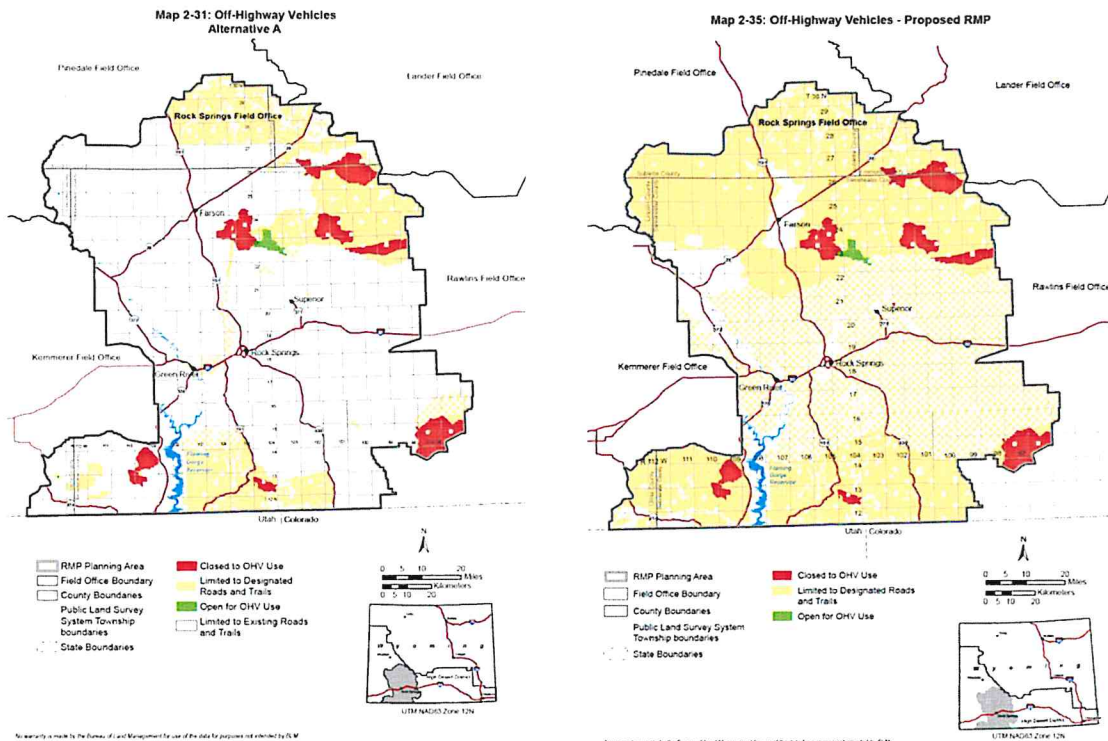
consider this issue for the first time with directions to release an alternative where proposed withdrawal and closure to mineral leasing are mutually exclusive. And this new alternative must be released for public comment as explained in Section II above.

G. The State Director improperly dismissed the lack of range of alternatives for off-highway vehicles argument.

The Consistency Review identified a lack of variation among the alternatives for off-highway vehicles (OHV). The EIS has no alternative that differs more than five percent, let alone a “reasonable range of alternatives.” (Governor’s Consistency Review at 28-29). The State Director responded that further route designations will be made in an implementation-level Travel and Transportation Management Plan, which will be evaluated separately. (BLM State Director’s Response at 11). However, this statement ignores that the “approval of a resource management plan, plan revision, or plan amendment constitutes formal designation of off-road vehicle use areas.” 43 C.F.R. § 8342.2(b). Accordingly, BLM should have considered alternatives that opened more areas to OHV use or utilized the “existing” travel routes category.

The State Director’s second response that the 1997 Green River RMP interchangeably used the terms “existing” and “designated” for travel routes is self-contradictory. (BLM State Director’s Response at 11). Immediately after insinuating that these terms are the same, the State Director cites the 1997’s RMP’s definition of “existing roads and vehicle routes.” (*Id.*) These two definitions are very different. (*Compare id.*) (citing the 1997 RMP for existing roads and vehicles routes are “routes existing prior to the date of designation, constructed or created by the frequent passage of motor vehicles, or receive regular and continuous use.”); (*with* Rock Springs RMP FEIS at GL-7) (“designated roads and trails” are those “roads and trails that are specifically identified

by the BLM as the only allowable routes for motor vehicle travel in the specific area involved.”). Further, as can be seen from the No Action to the Proposed RMP alternatives (depicted below), these management options are different.



The State Director deflected from addressing the rest of the Governor's concerns by stating the issues were “not ripe for discussion, as legal arguments are outside the scope of a Governor's consistency review when considering 43 CFR § 1610.3-2(e), and due to the fact that BLM is still in a pre-decisional phase with a forthcoming ROD.” (BLM State Director's Response at 12). The State Director's response was improper for three reasons.

First, BLM has addressed federal inconsistencies raised by other states in the past. *See* 82 Fed. Reg. 6634, 6635 (Jan. 19, 2017) (Director responding to the State of Alaska's inconsistencies with federal law); *see also* 78 Fed. Reg. 4435, 4436-37 (Jan. 22, 2013) (responding to State of Alaska's inconsistencies with federal Wild and Scenic Rivers policy). The State similarly raised

inconsistencies associated with BLM's previous findings and raised concerns regarding FLPMA, NEPA, and the Mineral Leasing Act (MLA). Yet, the State Director declined to respond even though BLM provided responses to other states under similar circumstances. *See* 82 Fed. Reg. 6634, 6635 (Jan. 19, 2017). Apparently, the State Director has decided to treat the State differently in responding to the Consistency Review.⁶

Second, the State Director did not provide any legal support for the position that BLM can withhold a response to the Consistency Review for "pre-decisional" purposes. (*See, e.g.*, BLM State Director's Response at 12). The State identified inconsistencies with BLM's proposed course of action as anticipated by its land planning regulations. *See* 43 C.F.R. § 1610.3-2(e). The BLM Handbook states that "[a]ny responses from a Governor on consistency must be resolved before the BLM issues a ROD." (BLM Land Use Planning Handbook H-1601-1 at III.A.12). The State Director does not cite a single authority that allows him to not respond to entire sections of a consistency review. (*See, e.g.*, BLM State Director's Response at 12). Nor can the State Director rely on some newly created pre-decisional privilege. The State did not ask BLM to render a premature decision, it simply raised inconsistencies that the State Director was obligated to address. Therefore, the State Director cannot hide behind a pre-decisional cloak to avoid responding to the Consistency Review.

Third, the inconsistencies with federal law identified within the Consistency Review are within the scope of the review because it is a State policy that "[t]he federal government shall comply with federal law when administering federal lands." Wyo. Stat. Ann. § 9-14-502(b)(i). It

⁶ The State Director relied on federal authorities in its answers. If the State Director can rely on federal authorities in their response, the federal inconsistencies raised by the State remain relevant, ripe, and appropriate for consideration.

is also State policy that “[t]he federal government arbitrarily restricting significant amounts of federal lands from public use is contrary to managing federal land under the principles of multiple use and sustained yield.” *Id.* at § 9-14-502(b)(ii). The Governor also explained its interest in BLM following federal law regarding OHV designations because its Wyoming Trails Program constituents would be affected. (Governor’s Consistency Review at 28-29). The State Director disregarded the State policy. The Director should remand the Consistency Review so the State Director can evaluate this and other inconsistencies that the State Director used the same argument for.

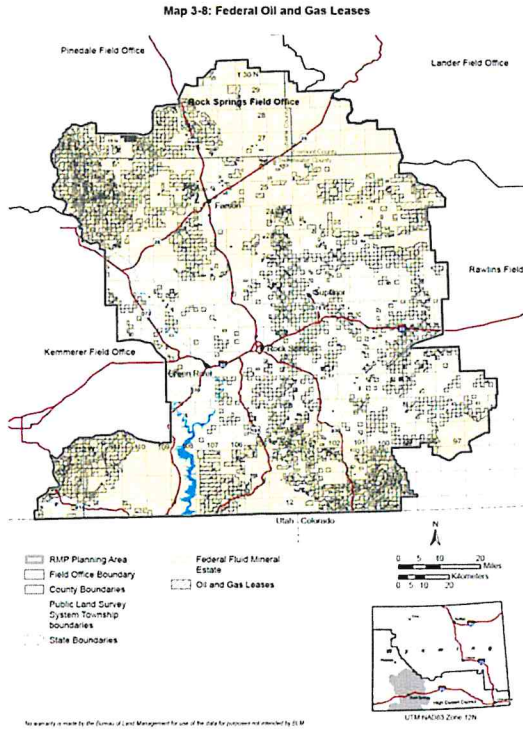
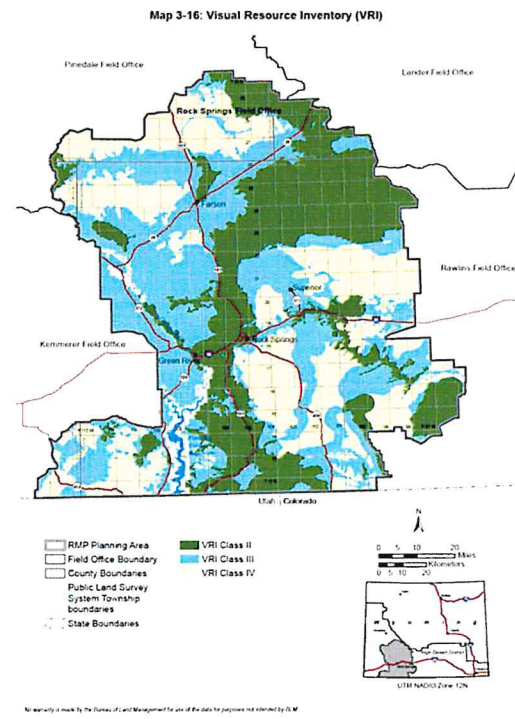
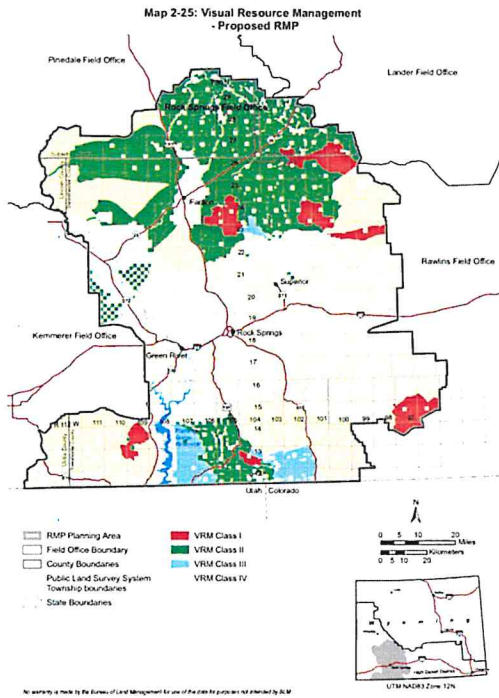
Lastly, FLPMA requires BLM to “assist in resolving, to the extent practical, inconsistencies between **Federal and non-Federal Government plans**, and shall provide for a meaningful public involvement of State and local government officials” in developing land use plans. 43 U.S.C. § 1712(c)(9) (emphasis added). BLM regulations require the Director to accept a governor’s recommendations if they decide “that [the recommendations] provide for a reasonable balance between the national interest and the State’s interest.” 43 C.F.R. § 1610.3-2(e); (*see also* BLM Land Use Planning Handbook H-1601-1 at I.E.1) (“BLM’s plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law and FLPMA provisions.”).

If BLM’s proposed decision is inconsistent with federal law and its guidance, BLM cannot argue that its proposed decision is in the “national interest.” *See* 43 C.F.R. § 1610.3-2(a) (“resource 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 ... so long as the guidance and resource management plans are also consistent with the purposes, policies and programs **of Federal laws and regulations** applicable to the public lands”) (emphasis and

ellipses added). BLM's actions being contrary to federal law is especially damaging when BLM fails to cite to any written statement in law or policy that supports its claimed "national interest." Thus, when the decision is contrary to federal law and BLM guidance, the State's interests should prevail and BLM should adopt the State's recommendations.

H. The State Director pointing to the Visual Resource Inventory Map does not address the Governor's identified inconsistency.

In his Consistency Review, the Governor pointed out that the visual resource management (VRM) objectives are inconsistent with its Visual Resource Inventory (VRI) and would interfere with BLM allocated resources (for example several oil and gas leases). (Governor's Consistency Review at 29-31). The State Director responded with, the "visual resource inventory (VRI) is considered, along with BLM's allocated resources, in the assignment of VRM Classes I through IV, which prescribe VRM objectives." (BLM State Director's Response at 13). Reiterating the applicable standard is non-responsive to the Governor's identified issue that the VRI and allocated resources do not align with the VRM objectives. (Governor's Consistency Review at 29-31); (*see also* Map 2-25, 3-16, 3-8) (showing development in areas allocated as VRM Class II and little correlation between the VRI and VRM values). The Director should remand to the State Director for an actual response or should direct the State Director to amend the EIS and proposed RMP to address the inconsistency. If the Director tells the State Director to amend the EIS, the Director should also direct the State Director to release the updated rationale/VRM objectives to public comment.



I. The State Director's contention that RMPs need to be consistent with state and local programs so long as the RMP is also consistent with federal laws and regulations when opposing the State's Visual Resource Management objective argument is circular and unclear.

When addressing the EIS's VRM objective, the Governor's Consistency Review pointed out that the interference with oil and gas development and their ROWs conflicts with County land use planning. (Governor's Consistency Review at 30) (citing Sweetwater County Federal Land and Resource Plan at 17-18). The State Director responded by quoting 43 C.F.R. § 1610.3-2(a) that RMPs only need to be consistent with local plans if the RMPs are also consistent with federal laws and regulations. (BLM State Director's Response at 13). However, the State Director does not point to a single federal law or regulation inconsistent with the county plan in its response. This is non-responsive unless the State Director expects the State to read its mind. The Director should remand to the State Director for an unambiguous statement that does not require the State to guess.

Further, even more egregious than claiming that federal inconsistencies are outside the scope of the consistency review is the claim that the county inconsistencies are. The State Director declined to address the inconsistency with Sweetwater County's land use plan by stating that the "remaining legal arguments presented in this section regarding the least amount of restriction are not ripe for discussion, as legal arguments are outside of the scope of a Governor's consistency review and because BLM is still in a pre-decisional phase with a forthcoming ROD." (BLM State Director's Response at 13). However, county plans are entirely ripe for discussion – it is one of the explicit purposes of the Governor's Consistency Review. 43 C.F.R. § 1610.3-2(e) ("the State Director shall submit to the Governor of the State(s) involved, the proposed plan or amendment and **shall identify any known inconsistencies with State or local plans, policies or programs.**

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The Governor(s) shall have 60 days in which to identify inconsistencies and provide recommendations in writing to the State Director.”) (emphasis added). Thus, it is baffling that the State Director declared the county's plan as outside of the scope of the Consistency Review. The Director needs to remand to the State Director with instructions to respond to this inconsistency.

IV. The State Director's responses to several of the inconsistencies identified by the Governor were insufficient.

A. The State Director's response regarding the impacts of the ACECs and other management protections that overlap the same values missed an important aspect of the problem.

The Governor's concern was that “BLM's failure to examine the cumulative impacts of the ACECs and other management protections weakens any determination that any given ACEC is ‘required.’” (Governor's Consistency Review at 5). The EIS does not analyze whether an ACEC was still required to prevent and protect against irreparable damage after consideration of other management protections already within the plan. The State believes that the other proposed management protections provide more than enough environmental benefits that an ACEC is no longer required.

BLM's failure to provide analysis of the effects of overlapping management actions is fatal. An agency must consider reasonably foreseeable effects in its NEPA analysis. *See Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017); *see also Center for Biological Diversity v. U.S. Dep't of the Interior*, 72 F.4th 1166, 1178 (10th Cir. 2023) (“NEPA obligates federal agencies ‘to consider every significant aspect of the environmental impact of a proposed action.’”) (citation omitted). A person of ordinary prudence would consider whether a proposed ACEC met the statutory definition when reaching a decision. *See id.* (“Effects are reasonably foreseeable if they are ‘sufficiently likely to occur that a person of ordinary prudence would take [them] into account

in reaching a decision.””) (citation omitted). Therefore, overlapping management actions is a reasonably foreseeable effect that must be considered.

Likewise, the missing analysis invalidates the public's ability to comment. “A public comment period is beneficial only to the extent the public has meaningful information on which to comment ... Informed public input can hardly be said to occur when major impacts of the adopted alternatives were never disclosed.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009); *see also* 43 U.S.C. § 1712(f) (“The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of public lands.”).

Even if the analysis in Appendix T and U provided the requisite analysis on the impacts of overlapping management designations, these appendices are hardly the “hard look” required under NEPA. (*See* BLM State Director's Response at 3) (claiming that cumulative impacts and comparison of impacts are located in Appendix T and U respectively). The analysis is too general and says nothing about whether the ACEC is required. For example, a section that discusses overlap says “lands with wilderness characteristics generally overlap other special management areas, for example ACECs, and management of those other designations would have beneficial impacts on wildlife and fisheries ... similar to the effect described under Alternative A.” (Rock Springs RMP FEIS at U-47); (*see also id.* at U-104). First, “beneficial impact” is not even close to “required ... to prevent and protect irreparable damage.” Second, if the effects are similar to the no action alternative, then the status quo is fine and nothing else is “required.” Even if the analysis

existed, “[c]onclusory statements regarding impacts without adequate discussion do not meet the required ‘hard look’ under NEPA.” *Center for Biological Diversity*, 72 F.4th at 1178.

Some examples that the State has already mentioned in its Consistency Review might bring some clarity regarding the type of analysis the State is looking for – overlap with existing stipulations, Wyoming’s Executive Order for Greater Sage Grouse Core Area Protection, Wilderness Study Areas, and the National Trails Management Corridor. For example, the Pine Springs ACEC, Oregon Buttes ACEC, Greater Sand Dunes ACEC, and portions of Steamboat Mountain ACEC overlap with wilderness study areas. (*See* Governor’s Consistency Review at 7). Another pertinent example is that the South Wind River and Steamboat Mountain ACECs overlap with the National Trails Management Corridor. (*Id.*). These effects must be analyzed because an EIS serves “as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g). BLM’s guidance recommends that the agency conduct “a thorough and well-documented estimation of effects analysis.” (BLM Areas of Critical Environmental Concern Manual, MS-1613, .22.C.) (Rel. 1-1541). Therefore, the Director should require the EIS be amended to include the requisite analysis.

B. The State Director’s response regarding the degree or intensity of ACEC management is rushed and incomplete.

First, BLM incorrectly limited the issue to the Steamboat Mountain ACEC. (BLM State Director’s Response at 3). While Steamboat Mountain ACEC was used as an example, the Consistency Review framed the issue as a more generalized concern. The language in the consistency review was “BLM must consider the degree or intensity of management attention ... For example, BLM unnecessarily expanded and placed more restrictions on the Steamboat Mountain ACEC.” (Governor’s Consistency Review at 8). The “for example” indicated that the

degree or intensity of management was not limited to the Steamboat Mountain ACEC. As further evidence, the Governor provided another example of an ACEC that should be analyzed with less intense management protection – the South Wind River ACEC. (Governor's Consistency Review at 8).

Second, the State Director quotes the Land Use Planning Handbook, without identifying where mineral development was identified as a threat and restricted. (BLM State Director's Response at 4). This handbook is nonresponsive to the raised inconsistency regarding the Steamboat Mountain ACEC, which questioned the drastic expansion and imposing management actions like going from ROW avoidance to ROW exclusion. (Governor's Consistency Review at 8).⁷ Regardless, the rationale falls apart for other ACECs in the planning area. The full quote from the Land Use Planning Handbook states:

Areas closed to leasing. (These are areas where it has been determined that other land uses or resource values cannot be adequately protected with even the most restrictive lease stipulations; appropriate protection can be ensured only by closing the lands to leasing.) Identify whether such closures are discretionary or nondiscretionary; and if discretionary, the rationale.

(Land Use Planning Handbook, H-1601-1, Appendix C). Thus, this exception only applies if BLM has (1) shown that land uses or resource values cannot be adequately protected with even the most restrictive lease stipulations and (2) provided the rationale for closing the area to leasing if the closure is discretionary.

An example of an ACEC that contradicts the State Director's use of this handbook is the South Wind River ACEC. While the EIS claims that closing to mineral leasing could "provide protection" and "benefit" wildlife, there is no determination that other land uses or resource values

⁷ The State Director's rationale for the expanded Steamboat Mountain ACEC is deficient for the same reasons identified in Section IV.D below.

cannot be adequately protected even with the most restrictive lease stipulations. (*See, e.g.*, Rock Springs RMP FEIS at U-39; U-56). Similarly, no alternative considers anything beyond excluding the area for ROW and surface disturbing activities and closing the area to mineral material sales. (Rock Springs RMP FEIS at 2-129). Not only does it undermine BLM's position that resources could not be protected under the most stringent lease stipulations but it further illustrates the point that BLM needs to consider more alternatives in the degree or intensity of its management action for ACECs. (*See* BLM Areas of Critical Environmental Concern Manual, MS-1613, .22.B.1.) (Rel. 1-1541).

If BLM wants to justify its closure of areas to mineral development using its Land Use Planning Handbook, BLM must provide an in-depth analysis of alternatives that would open the area with Controlled Surface Use (CSU) or NSO stipulations and explain why these cannot adequately protect land uses or resource values.⁸ (*See* Land Use Planning Handbook, H-1601-1, Appendix C). The rationale is especially necessary because closing the area to leasing is discretionary. (*See id.*) This example also undercuts the State Director's assertion that it "considered a variety of restrictions for each individual ACEC proposal, targeting restrictions to land use allocations that would impact the relevance and important values." (BLM State Director's Response at 5).

Accordingly, the Director needs to either correct the EIS and RMP or provide a legally defensible rationale.

⁸ The South Wind River ACEC and other ACECs also belie the State Director's response to the Governor's multiple-use argument.

C. The State Director's response regarding its deficient ACEC proposal is insufficient.

In its consistency review, the State pointed out that the Federal Register notice with the proposed ACEC designations was insufficient because it contained only an ACEC name, acreage, and a list of vague values. (Governor's Consistency Review at 11). The federal regulations require the State Director to "publish a notice in the Federal Register listing each ACEC proposed and specifying the resource use limitations, if any, which would occur if it were formally designated." 43 C.F.R. § 1610.7-2(b) (2017). The State Director responded that it indicated the name, acreage, and values identified. (BLM State Director's Response at 5). Then he stated that the proposed management prescriptions were analyzed through the four alternatives in the Draft EIS. (*Id.*) This explanation merely repeats the inconsistency identified by the Governor. The State Director does not attempt to claim that BLM specified the resource use limitations in the Federal Register notice as required by regulation. *See* 43 C.F.R. § 1610.7-2(b) (2017).

D. The State Director misunderstands the request to correlate the ACEC size to the relevant resource.

The State Director explained how BLM broke several ACECs into "portions" for separate evaluation. (BLM State Director's Response at 4). However, the State pointed out using BLM manuals and a county use plan that BLM should limit the boundaries to the resource being protected. (Governor's Consistency Review at 9-10). Since the size of an ACEC should be as necessary to protect the important and relevant values within the context of the management prescriptions, the Director should remand to the State Director with instructions to update the RMP to provide data showing where the protected values are located and limit the ACEC boundaries around those resources.

Further, as explained in Section IV.A, not only is BLM out of compliance with its guidance, it is now out of compliance with its regulations. The 2024 regulations require that the special management attentions “would not be prescribed if the relevant and important values were not present.” 43 C.F.R. § 1610.7-2(d)(3)(ii). Since BLM has not mapped where the values are located within the ACEC, it is hard to imagine how BLM can claim that the special management protections were only prescribed because of their presence. Thus, BLM's approach of analyzing large blocks of land for any values present regardless of mapped location is deficient.

E. The State Director improperly treats FLPMA's mandate to ensure consistency with local plans as a mere obligation to respond to the county's comments.

The State Director claims that it responded to the county's detailed consistency analysis by stating “in response to public comment, including the referenced analysis for each plan for Alternative B, the BLM interdisciplinary team reviewed the updated county plans in relation to the Proposed RMP. BLM did respond to the issues within this section that are relevant to the State of Wyoming's or County plans, policy, programs.” (BLM State Director's Response at 9). However, this response by the State Director uses the incorrect standard.

Instead, FLPMA mandates:

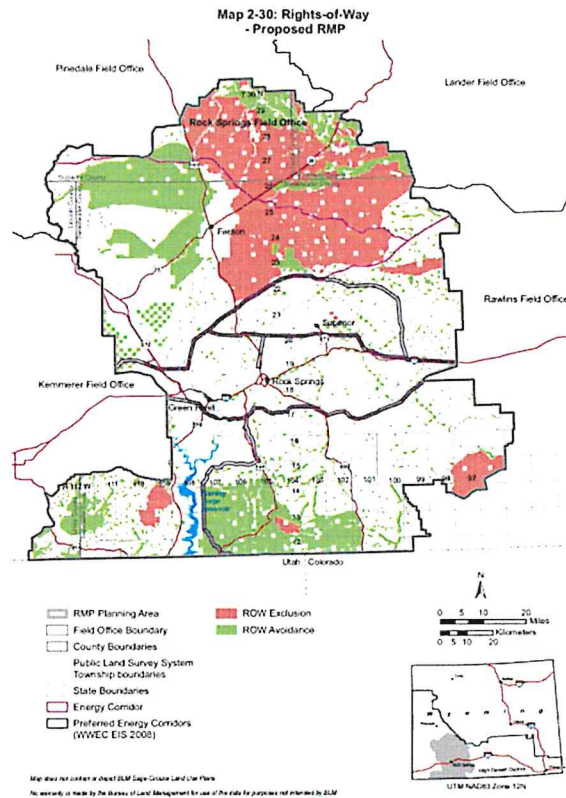
In implementing this directive, the Secretary shall, ... assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. ... Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(c)(9) (ellipsis added). Ensuring consistency requires more than a response to comment. Unless BLM determines that redressing the identified inconsistencies would be

inconsistent with federal law, BLM needs to ensure consistency with county plans. (*See* BLM Land Use Planning Handbook H-1601-1 at I.E.1) (“BLM’s plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law and FLPMA provisions.”). Under FLPMA, the Director should remand to the State Director to resolve all identified inconsistencies with county plans to the maximum extent practicable.

F. The State Director improperly treats State lands as an island.

During its consistency review, the State pointed out that BLM-administered lands surrounded a significant amount of State trust lands, which could be impacted by BLM’s proposed restrictive land management actions. (Governor’s Consistency Review at 23-24). The State Director responded that the RMP does not cover lands not managed by BLM and that it will respect valid and existing rights. (BLM State Director’s Response at 9-10). However, BLM ignores that actions on its administered lands, which sometimes surround state parcels, will affect neighboring lands.



For example, Map 2-30 shows that around the Golden Triangle and throughout the proposed Steamboat Mountain ACEC, BLM has proposed ROW exclusion. These potentially ROW-excluded lands surround state lands. The ROW exclusion would affect the State's ability to generate revenue.

The State generates revenue from these lands by charging for the use of State trust lands for mineral leasing; grazing and agricultural leasing; easements; temporary use permits; special use leasing; renewables leasing; and much more. The EIS itself recognizes the impacts of ROW exclusion areas on development. For example, the EIS states that these ROW exclusion areas limit the development of renewable energy resources. (Rock Springs RMP FEIS at 4-134, 4-136-137).

Thus, the State Director's response does not get to the heart of the issue. Accordingly, the Director must remand the issue to the State Director.⁹

G. The State Director's dismissal of the Wyoming Oil and Gas Conservation Act was improper.

The State Director responded to the State's concerns about the proposed alternative's effect on Wyoming's obligations under the Wyoming Oil and Gas Conservation Act by stating that the MLA is discretionary and does not require leases to be granted. (BLM State Director's Response at 10). However, even if the MLA and leasing are discretionary, BLM must make its RMPs consistent with state and local laws to the maximum extent practicable. *See* 43 U.S.C. §1712(c)(9). Thus, BLM should still consider whether the potential of closing areas to fluid mineral leasing or creating blanket NSO stipulations could lead to either a violation of the Wyoming Oil and Gas Conservation Act or limit WOGCC's ability to comply with the Act's requirements.

Further, whether the MLA and the Secretary's duty to conduct lease sales is discretionary is currently under review in the Wyoming District Court. *See Wyoming v. Haaland*, 22-cv-247 (D. Wyo.). Besides, "[l]ease sales shall be held for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A); *see also Forest Guardians*, 174 F.3d at 1187 (stating that "[t]he Supreme Court and [the Tenth Circuit] have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command").

Similarly, while the location of lease parcels subject to sale is discretionary, closing the area still impacts Wyoming's ability to comply with the Wyoming Oil and Gas Conservation Act.

⁹ The State Director's response regarding the National Trails Management Corridor and the overlap of the area with the Normally Pressured Lance Natural Gas Development Project of 2018 fails for similar reasons. (BLM State Director's Response at 14). Like state lands, the State Director only considered lands in isolation and did not consider how other management actions surrounding that parcel could affect development.

The State Director's response ignores if an area is open for leasing under an RMP anyone interested can submit an expression of interest. (*See, e.g.*, BLM Competitive Leases Manual, MS-3120, .31.B) ("Anyone interested in obtaining a lease for eligible lands that are available for lease through the competitive leasing process may submit an informal expression of interest to the proper BLM office requesting that the lands be offered for oral auction."). Operators frequently submit expressions of interest for a federal parcel within the State's designated drilling and spacing unit. Similarly, it is BLM policy that "[l]ands available for competitive leasing that are being drained or are subject to drainage also will be offered by competitive leasing as expeditiously as possible." (*Id.* at .06). Thus, closing the areas to leasing has an impact and needs to be analyzed for consistency. The Director should find that closing the areas is not an appropriate balance between the State and national interest.

H. The State Director's response regarding the National Trail Management Corridor contradicts its guidance.

In its response, the State Director admits that it did not consider any valid existing leases when proposing to designate the National Trail Management Corridor. (BLM State Director's Response at 13-14) ("the restricted width narrowing to one-quarter mile on each side of the ruts and swales is based on the compromised setting of the designated trail segments through that area and is unrelated to consideration of any valid existing leases. The NHT Corridor is intended to protect the resources, qualities, values and associated settings of the trails and BLM determined the sufficient width to be five miles on each side of the trail, particularly due to the multiple NHTs that run parallel and/or overlap through the northern portion of the field office."). However, BLM's guidance requires it to consider mineral rich areas, industrial development, and private operations. (BLM Management of National Scenic and Historic Trails and Trails Under Study or

Recommended at Suitable for Congressional Designation Manual, MS-6280, 4.2.D.2.iii). Further, the National Trail Management Corridor alternatives should consider “[m]inimizing the adverse impacts, to the extent practicable, on adjacent landowners, users, and operations.” (*Id.* at 4.2.D.2.ii.c); (*but see* BLM State Director’s Response at 15) (“The BLM did not analyze any alternatives limiting protections of some segments of trails due to their location within specific mineral development areas, only limitations related to the designation status of the NHTs.”). Thus, under its guidance, the State Director must consider where the Known Sodium Lease Area crosses the National Trails Management Corridor.

Compounding this issue is the failure to consider the misalignment of BLM’s Kemmerer Field Office’s RMP’s National Historic Trail Corridor and the NHTs in the Rock Springs Field Office. (Governor’s Consistency Review at 33-34). This creates inconsistency along their shared border, including the portion that overlaps with the National Trail Management Corridor and with the Known Sodium Lease Area. The failure to analyze the impacts with the misaligned corridor boundaries across field offices is arbitrary and capricious. Accordingly, the Director should remand to the State Director.¹⁰

Other existing development that was ignored was the Normally Pressured Lance Natural Gas Development Project. Not only is this contrary to BLM guidance, but it also contradicts the Governor’s Task Force which had consensus from multiple interest groups that “No new exclusions or avoidance for fluid mineral development and rights of ways in areas operating under existing and approved record of decision.” (Governor’s Consistency Review at 33). Even if the EIS does not affect valid existing rights, like the state parcels, the parcels within the Normally

¹⁰ The State repeats its arguments that the identified issues are not outside the scope of the Governor’s Consistency Review.

Pressured Lance Natural Gas Development Project could be affected by management actions in nearby parcels. Thus, BLM was required to analyze alternatives to minimize adverse impacts on the project. (See BLM Management of National Scenic and Historic Trails and Trails Under Study or Recommended at Suitable for Congressional Designation Manual, MS-6280, 4.2.D.2.ii.c).

The trigger mechanism to designate new trails under management action #7017 should be rewritten to require analysis before it is managed with the National Historic Trails management prescriptions. (Governor's Consistency Review at 35). BLM's guidance requires multiple considerations and attempts to avoid inconsistent uses. (See, e.g., BLM Management of National Scenic and Historic Trails and Trails Under Study or Recommended at Suitable for Congressional Designation Manual, MS-6280, 4.2.D.2.iii). Accordingly, the Director should remand to the State Director with instructions to remove management action #7017.

I. The State Director's response regarding the recognition of DEQ is disingenuous.

The State Director claimed that it could not modify its management actions (Ex. #1300) because the EIS already established in its planning criteria that the RMP will comply with applicable laws so updating it to require compliance with Wyoming laws was unnecessary. Also, the State Director stated the list would not have been "conducive to the BLM's decision-making regarding comparison among the alternatives." (BLM State Director's Response at 15-16).

However, these rationales are untenable for three reasons. First, BLM's arbitrary finding of a fix being "unnecessary" is far from ensuring consistency to the maximum extent practicable. 43 U.S.C. § 1712(c)(9). Second, throughout the management actions BLM has pointed to applicable laws. (See Rock Springs RMP FEIS at 2-8, 2-15) (management action # 1302, management action #2200). If BLM thought legal compliance was implied, why does BLM make

it explicit elsewhere? A reasonable reader could read into BLM's selective silence. For example, for management action #1300 BLM could have at the very least compromised and changed its regulations to make clear that activities resulting in surface discharge would only be authorized if allowed under applicable laws. For instance, "Authorize new activities resulting in the surface discharge of produced water only where compatible with other resource objectives[, applicable laws and regulations,] and in consultation with stakeholders."

Third, at least for management action #1300, there is only one alternative. (Rock Springs RMP FEIS at 2-8). Thus, it is unclear what the State Director means when he says that clarifying the language to better recognize the DEQ's primacy would jeopardize BLM's ability to compare alternatives. Thus, the Director should remand to the State Director for reconsideration.¹¹

J. BLM must incorporate cooperator's data.

In the Consistency Review, the Governor raised the issue that BLM failed to consider information brought by the cooperating agencies to the maximum extent possible. (Governor's Consistency Review at 37). The State Director recognized that the data for its reasonably foreseeable development (RFD) scenario was outdated. (BLM State Director's Response at 16). Even if WOGCC was not a cooperator, the failure to incorporate WOGCC's data is problematic because agencies must use realistic modeling inputs, especially when challenged. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053-54 (D.C. Cir. 2001); *see also Center for Biological Diversity*, 72 F.4th at 1178 ("The agency's 'hard look' analysis must utilize 'public comment and the best available scientific information.'"). Agencies also must be attuned to new data and "deal with newly acquired evidence in some reasonable fashion." *Portland Cement Ass'n v. EPA*, 665

¹¹ The State repeats its arguments that the identified issues are not outside the scope of the Governor's Consistency Review.

F.3d 177, 187 (D.C. Cir. 2011) (citation omitted). When an agency is presented with better or more recent data, the agency must either use that data or reasonably explain its decision not to. *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1020-23 (D.C. Cir. 1999) (remanding where agency “inadequately explained” decision to rely on an outdated dataset that pre-dated known trend); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015) (“agencies do not have free rein to use inaccurate data” and ignoring “new and better data” violates the APA).

Even the specific example of available information WOGCC pointed out to BLM to make BLM's analysis more accurate was not incorporated. The State pointed out that WOGCC told BLM that the federal royalty rate (12.5%) the agency used was old. (Governor's Consistency Review at 37). The EIS currently uses the old federal royalty rate. (Rock Springs RMP FEIS at N-8) (“The estimates for Federal Mineral Royalties were based on the current total royalty rate of 12.5% of market value.”).

BLM responded to WOGCC that the information was “out of scope” because there “is insufficient information to determine how the royalty rate increase will impact federal oil and gas development given how dynamic and complex the global oil market is.” (Rock Springs RMP FEIS at W-372). BLM's response here was dismissive, but the State Director went further in its response to the Governor's Consistency Review by stating that “Information that BLM deemed relevant to the analysis was incorporated and the EIS was updated as appropriate.” (BLM State Director's Response at 16). However, an outdated input is undeniably relevant.

Similarly, when WOGCC pointed out that BLM's calculations of direct oil and gas emissions were based on outdated data that likely grossly overstated emissions, BLM responded that “even if conditions have changed in the intervening years, the baseline data is adequate to compare conditions and differentiate resource impacts among the alternatives.” (Rock Springs

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RMP FEIS at W-371). Once WOGCC challenged BLM's data, BLM had an obligation to address it. *See Appalachian Power Co.*, 249 F.3d at 1053-54.

Compounding the error is that WOGCC is a cooperating agency. BLM is required to consider, to the maximum extent possible, information provided by cooperating agencies. 40 C.F.R. § 1501.7(h)(2). BLM making an arbitrary decision of whether the data is "relevant" is far from incorporating information to the "maximum extent possible." For example, BLM fails to address the Burns and Grubert study provided by WOGCC that described how the Green River Basin's methane intensity was generally the lowest in the U.S.

Lastly, BLM failed its duty to cooperators by not meaningfully meeting with cooperating agencies for over two years and changing the preferred alternative without reengaging cooperators. "When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful." *International Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp.2d 1249, 1262 (D. Wyo. 2004) (quoting *Wyoming v. USDA*, 277 F.Supp.2d 1197, 1219 (D. Wyo. 2003)). The Governor's Task Force which included individuals from multiple interest groups unanimously agreed (Agreement in Principle 23) that BLM failed to meaningfully meet with cooperating agencies. Further, BLM was required to "[d]etermine the purpose and need, and alternatives in consultation with any cooperating agency." 40 C.F.R. § 1501.7(h)(4). BLM's changing of the preferred alternative without consultation with the cooperators is against the regulations in place at the time BLM acted.

RECOMMENDATIONS

BLM should adopt the recommendations and proposed actions in the State's Governor's Consistency Review and those identified in this appeal. (*See* Governor's Consistency Review at

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38). The State's proposed approach is acceptable because it does not create inconsistencies with State law and local land use plans, and is consistent with federal law. It also provides a reasonable balance between national and State interests.

The State Director opted not to address a number of the deficiencies that were identified in the Consistency Review. If the Director does not take the State's recommendations, BLM must still resolve the issues identified throughout the Consistency Review and this appeal, which means that further review and comment is required.

Because the State Director did not adequately respond to several issues raised in the Consistency Review (or opted not to respond at all), the Director should also require the State Director to reconsider the Consistency Review after BLM provides the proposed RMP language to the Governor's Office as required by federal regulation. *See* 43 C.F.R. §§ 1610.3-2(e); 1610.4-7.

CONCLUSION

For the above reasons, the Governor's recommendations provide the most reasonable balance between national and State interests. The State looks forward to BLM's response.

Sincerely,



Mark Gordon
Governor of Wyoming

MG:nr:kh

cc: Andrew Archuleta, State Director
Bureau of Land Management, Wyoming State Office
5353 Yellowstone Rd., Cheyenne, WY 82009

Encl: Governor's Consistency Review with Exhibits via email and physical copy/USB drive