



National Mining Association  
Lands Committee Priorities  
Spring 2025

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## MINING LAW CLARITY

### PRIORITY A – CONGRESS

#### **Background:**

For hardrock mining companies operating on federal lands, certainty regarding the interpretation and implementation of the Mining Law is paramount. Over the past three decades, legislation to amend the Mining Law has been introduced in every Congress. Routinely, the legislation is punitive in nature, containing gross retrospective royalties, taxes on the movement of materials, duplicative environmental standards and greater restrictions on land access.

- Unfavorable Legislation:

We anticipate that key democrats such as Senator Martin Heinrich (D-N.M.), ranking member on the Energy and Natural Resources Committee and former House Natural Resources Committee Ranking Member Raúl Grijalva (D-Ariz.) to introduce their perennial bills to amend the General Mining Law in conjunction with the May 10 anniversary of the Mining Law. Senator Heinrich will like carry over several concerning provisions found in past iterations of legislation including a 5-8 percent royalty on the gross income from mining for production of all locatable minerals; a prospective annual land use fee equal to four times the claims maintenance fee on each 20 acres of federal lands; and a prospective annual abandoned mine land reclamation fee of 1-3 percent of the value of production from hardrock minerals mining operations that applies to all operations, whether on federal, state or private lands. Rep. Grijalva's [bill](#) will likely similarly mirror past iterations of his legislation to include: greater authorities to close lands to mining; conversion of the Mining Law's locatable claim system to a leasing system; a lower threshold for federal land management agencies to reject a mine proposal; and a 12.5 percent royalty on new mining operations and an 8 percent royalty on existing operations, as well as a new seven cent per ton tax on displaced material.

- Favorable Legislation:

The Mining Regulatory Clarity Act is legislation vital to reverse the Rosemont decision issued by United States Court of Appeals for the Ninth Circuit (9<sup>th</sup> Circuit). Recall, in May 2022, the 9<sup>th</sup> Circuit [affirmed](#) a lower court's [fundamentally flawed decision](#) vacating the U.S. Forest Service's record of decision for the Rosemont Copper Mine's plan of operations. *Center for Biological Diversity et. al. v. U.S Fish and Wildlife Service et. al.* 33 F.4th 1202 (9th Cir. 2022) The decision conflicts with more than a century of legal precedent, including numerous U.S. Supreme Court decisions, in misconstruing rights conveyed by the Mining Law to owners of unpatented claims and the use of surface resources to develop those claims.

On Feb. 12, 2025, Senators Catherine Cortez Masto (D-Nev.) and Jim Risch (R-Idaho) introduced [S. 544](#). The House version, [H.R. 1366](#), was introduced on Feb. 14

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by Representatives Mark Amodei (R-Nev.) and Steven Horsford (D-Nev.).

- Biden Administration Initiatives: IWG on Mining Regulations, Laws and Permitting:

In 2022, the Biden administration convened an Interagency Working Group (IWG) on Mining Regulations, Laws and Permitting that was charged with providing recommendations for congressional amendments to the Mining Law. In August 2022, NMA submitted [comments](#) in response to the IWG request for information on federal hardrock mining laws, regulations, and permitting. The comments extensively addressed the specific questions raised by the IWG related to topics such as conversion to a leasing system, royalties, financial assurance and permitting, but also demonstrated the urgent need for action to shore up our mineral supply chains. The comments urged government policies that promote domestic mineral production and processing. In particular, the comments highlighted the need to address our biggest self-imposed policy bottleneck — our inefficient and prolonged permitting system.

On Sept. 12, 2023, the IWG released a [report](#), “Recommendations to Improve Mining on Public Lands,” which contained 65 separate recommendations. The recommendations were divided into three categories – policies that can be implemented quickly, ones that require rulemakings, and those that require congressional action. While some of the recommendations address low-hanging permit improvements (e.g., additional funding for land management agencies, broadened use of the Nevada Bureau of Land Management permitting process model, pre-application meetings, and project tracking), potentially problematic recommendations included:

- Conversion of the Mining Law’s locatable system to a leasing system;
- Imposition of a 4-8 percent net royalty;
- Imposition of a dirt tax similar to the 7 cent per ton proposed during the Obama administration;
- Use of the federal land management planning process to identify areas where hardrock mining is presumptively appropriate/inappropriate;
- Creation of statutory incentives to encourage meaningful efforts to obtain Tribal concurrence;
- Requirement for an exploration plan rather than a notice if activities will impact Tribes (including sites of religious or cultural significance), require a Clean Water Act permit, impact protected species or designated habitat; and
- Prohibition of operations that would need perpetual water treatment.

In Feb. 2024, BLM [announced](#) draft [Mining Performance Metrics](#) informed by recommendations in the IWG report. The metrics are intended to measure and track the timely and effective permitting of mineral exploration and development projects on BLM-managed lands. The proposed metrics almost entirely focused on documentation of permitting steps rather than finding ways to reduce permitting delays as Congress requested. The NMA’s April 2024 [comments](#) noted that while

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the BLM's draft performance metrics have the potential to marginally improve the permitting process for mining projects on federal lands, the metrics simply fail to meet the permitting efficiency requirements of the Infrastructure Investments and Jobs Act. The NMA's comments suggested improvements to the draft metrics, including the timely review of projects and decisions, implementing the Fiscal Responsibility Act Permitting requirements, and meaningful transparency with permitting data.

- Litigation:

Earthworks: In Spring 2023 in *Earthworks'* appealed the Oct. 2020 U.S. District Court for the District of Columbia [decision](#) in *Earthworks vs. Department of the Interior*, 496 F. Supp. 3d 472 (D.D.C. 2020), that reaffirmed important rights of miners to explore and operate on federal lands pursuant to the Mining Law. Earthworks appeal to the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) argued that the Mining Law must be interpreted to impose a limit on the number of millsites an operator can use to support mining activities on federal lands. The NMA's July 2023 [reply brief](#) demonstrated that the Mining Law contains no express limitation and in fact, that Congress provided for the use of millsites in explicit recognition that the economic viability of a mine often depends upon the ability to use surrounding land to support mining activities. The brief also disproved Earthworks claim that DOI had long-interpreted the Mining Law as imposing a millsite ratio as articulated in a 1997 Clinton-era Solicitor Opinion. In June 2024, the DC Circuit issued a [decision](#) in the Earthworks case providing a major victory for the mining industry. The DC Circuit upheld the 2020 lower court decision, finding that the DOI properly interpreted the Mining Law's millsite provision as imposing no numerical limit on the number of millsites a claimant can acquire.

On Sept, 23, 2024, Earthworks filed a rehearing petition requesting D.C. Circuit rehear the case. The [NMA](#) and the [federal government](#) submitted briefs in opposition. Specifically, the NMA argued that rehearing of the decision is inappropriate because (1) there is no conflict among federal circuit courts regarding the millsite provision, (2) the case presents no question of exceptional legal importance and (3) the court correctly determined the plain language of the millsite provision contains no limit on the number of millsites a claim owner may locate.

### **Status:**

- Legislation:

*Mining Law Reform Legislation*: The NMA, through the Mineral Policy Task Force, will continue its strategy in opposition of any punitive Mining Law legislation, including engagement with hill allies, education on the importance of mining to our economic and national security, and grass-roots campaigns.

*Mining Regulatory Clarity Act (Rosemont fix) Legislation*: As discussed above, bicameral and bipartisan legislation was introduced in Feb. 2025. The NMA will

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continue working to generate additional bipartisan cosponsors in the House and Senate and advocate for advancing the bill in both chambers as stand-alone legislation, through appropriations or as part of larger, must-pass bills.

- IWG:

With the change in administration, it is unlikely that most of the Biden-era recommendations will have traction. The BLM, however, shortly before the end of the Biden administration released its final [Mining Performance Metrics](#). While the metrics are improved from the draft, but the lack of accountability for improving the permitting process remains noticeably absent. In conjunction with the release of the metrics, BLM [announced](#) additional policies and guidance documents to improve coordination and engagement on mineral projects through "pre-plan coordination." The effort is intended to build on the model developed by BLM's Nevada office to shorten review timelines and allow potential conflicts to be addressed early on. BLM published a new [Instruction Memorandum](#) (IM) to encourage pre-plan submittal meetings for operators seeking authorizations for plans of operations or modifications to facilitate discussion of plan contents and information needed to support National Environmental Policy Act (NEPA) analyses.

The IM includes several attachments that provide further information on the process. [Attachment 1](#) contains recommendations on types of information to provide to the BLM during the pre-plan process and encourages the development of a project timeline and schedule. [Attachment 2](#) provides a concrete example of types of state/federal agreements that the BLM has found useful for coordinating the roles and responsibilities of each agency's permitting requirements. [Attachment 3](#) provides an example of a project-specific memorandum of understanding (MOU) to further delineate roles and responsibilities between cooperating agencies and the mining operator. The MOU includes methods for resolving conflicts to ensure the project stays on track.

- Litigation:

Earthworks: On Nov. 6, 2024, the D.C. Circuit denied the rehearing request. Earthworks has until March 5, 2025, to decide whether to file a petition with the U.S. Supreme Court.

## REGULATIONS GOVERNING HARDROCK MINING ON FEDERAL LANDS

### PRIORITY A –FOREST SERVICE AND BLM

#### **Background:**

- Forest Service Locatable Mineral Regulations:

The NMA has long sought a revision to the U.S. Forest Service's (Forest Service) locatable minerals regulations under 30 CFR Part 228A (228A regs) to address smaller scale exploration activity. In fact this change was recommended by the National Academy of Sciences nearly 30 years ago to allow exploration activities impacting 5 acres or less to proceed under a notice similar to the BLM approach. BLM utilizes a 15-day timeframe for determining a notice is complete and the operator may conduct notice-level operations once it has submitted the required financial guarantee. In contrast, exploration projects on Forest Service lands can wait years to secure necessary approvals. During the first Trump administration progress was made with a 2018 [Advance Notice of Proposed Rulemaking](#) (ANPR) that NMA supported in [comments](#) on the ANPR. of notice-level exploration activities similar to those utilized by BLM.

- Forest Service Cost Recovery Rulemaking:

On June 13, 2023, the Forest Service [proposed](#) new fees to recover the agency's costs for processing proposals related to mineral activity on National Forest System lands. The proposal impacts both locatable minerals under the Mining Law and leasable minerals under the Mineral Leasing Act. The fees would be designed to include costs for actions such as environmental review and analysis, monitoring authorized activities, and other processing-related costs. On Aug. 17, 2023, the NMA submitted [comments](#) stressing the need for improved customer service and streamlining of efforts by the Service in its minerals program. The comments also outlined the regulatory uncertainties of fee estimates and non-fixed fees for permittees, especially for monitoring activities.

- Forest Service Interim Final Rule on Financial Assurance:

On Oct. 30, 2023, the Forest Service issued an [interim final rule](#) that amends the agency's locatable mineral regulations to provide additional financial assurance options for funding reclamation. The stated purpose of the rule is to supplement the existing financial assurance mechanisms – surety bonds, cash and negotiable securities – with those allowed by policy such as letters of credit or trust funds, the latter being particularly important in the context of long-term reclamation obligations. Much of the interim rule is devoted to the use of trusts to fund long-term financial assurance (LTFA) obligations. The interim rule determined a broader range of investment options should be allowed in order to realize the advantages and benefits of the use of income-earning accounts.

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The NMA submitted [comments](#) on Dec. 29, 2023, generally in support of finalization of the Forest Service's interim final rule. The NMA highlighted the additional clarity about the ability to require funding for long-term post-closure obligations, which bolsters the defensibility of the Forest Service's financial assurance requirements by addressing head-on the criticisms that most of the requirements for long-term funding were articulated through policy or guidance as opposed to regulations.

### **Status:**

- Forest Service Locatable Mineral Regulations:

The NMA will engage with the Trump administration to seek revisions to the regulations to allow exploration activities impacting 5 acres or less to proceed under a notice similar to the BLM approach.

- Forest Service Cost Recovery Rulemaking:

The Fall 2024 regulatory agenda indicated a final rule is scheduled to publish in June 2025. Under the Trump administration, it is unclear if the Forest Service will continue with the same rulemaking, extend the comment period, or propose a new rule.

- Forest Service Interim Final Rule on Financial Assurance:

The Fall 2024 regulatory agenda indicated a final rule is scheduled to publish in Sept. 2025. With the incoming Trump administration, it is unclear if the Forest Service will continue with the same rulemaking, extend the comment period, or propose a new rule.

- Potential BLM Regulatory Changes:

With the change in administration, the NMA will evaluate the opportunity for revisions to BLM regulations that could provide for more certainty or efficiencies for mining companies conducting activities on federal lands.

## WITHDRAWALS

### PRIORITY A – DOI AND FOREST SERVICE

#### **Background:**

Currently, new mining operations are either restricted or banned on more than half of all federally-owned public lands. Given the vast amount of federal lands already closed to mining operations, caution should be exercised when determining whether additional lands should be placed off limits. Over the last two decades, large-scale (>5000 acres) mineral withdrawals under the Federal Land Policy and Management

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Act (FLPMA) have been abused in terms of need and scope, much like recent and controversial national monument designations. Wilderness and wild and scenic designations remain a concern as well.

- Sage Grouse Mineral Withdrawal:

In September 2015 as part of the Obama-era sage grouse conservation plans, BLM proposed to withdraw approximately 10 million acres of sage grouse habitat in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming from new mining operations. The withdrawal would have been the largest ever in the history of FLPMA. The NMA mounted a multi-prong campaign in opposition to the proposed withdrawal that highlighted the lack of necessity for the proposed withdrawal in order to conserve the species and its habitat, the importance of federal minerals that would be withdrawn, the high mineral potential of many of the proposed withdrawal areas, and the legal shortcomings of the proposal.

In 2019, BLM formally announced the cancellation of the withdrawal. The agency noted that recent analysis and data demonstrated that future mining was not a significant threat to sage grouse habitat and that the withdrawal was unreasonable in light of the data that showed mining affected less than .1 percent of sage-grouse-occupied range. The cancellation was vacated by court order in February 2021, and BLM was ordered to consider whether the withdrawal is needed for sage-grouse conservation, including reinitiation of the NEPA process. In August 2021, BLM issued a Federal Register [notice](#) announcing that it will reinitiate consideration of whether the 10 million acre mineral withdrawal is necessary, beginning with preparation of a new EIS for public comment. Subsequently, in Nov. 2021, BLM issued its [Notice of Intent](#) to prepare the EISs. NMA's Feb. 2022 [comments](#) stressed, among other things, the importance of U.S. mining to fulfill the administration's agenda and reiterates the BLM's multiple-use mandate under the Federal Land Policy and Management Act.

- Twin Metals Withdrawal:

The Twin Metals project is located in Minnesota's Superior National Forest seeking to primarily mine copper and nickel, but also cobalt, palladium, platinum, gold and silver. Consideration of the Twin Metals project has seesawed between administrations. In the final days of the Obama administration, the federal government rejected two mineral leases owned by Twin Metals and began a study that could have led to a 20-year ban on mining within the Rainy River watershed. BLM under the first Trump administration reversed course, shelved the study and renewed the leases. In Dec. 2019, Twin Metals submitted its plan of operations. The Biden administration reversed course again and in June 2022 proposed to withdraw 225,504 acres in the forest. NMA submitted comments in Aug. 2022 opposing the withdrawal. The acreage was formally withdrawn in Jan. 2023.

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- Wilderness Study Areas:

Over twelve million acres of BLM land inventoried and determined to contain wilderness characteristics were not recommended as suitable for wilderness management by the President in 1991. More than 30 years later, these lands remain subject to non-impairment management as if they had been recommended for wilderness management by the FLPMA §603 process or had been designated as wilderness by Congress.

### **Status:**

- Sage Grouse Mineral Withdrawal:

The NMA will engage with the Trump administration to cancel or significantly revise what would have been the new draft EIS for the Sage Grouse Mineral withdrawal.

- Twin Metals Withdrawal:

We anticipate both legislative and policy actions in support of the Twin Metals Project. House Energy and Mineral Resources Subcommittee Chairman Pete Stauber (R-Minn.) is likely to quickly reintroduce the Superior National Forest Restoration Act to rescind the BLM mineral withdrawal and reinstate mineral leases and permits in the Superior National Forest. The Trump administration is also expected to reinstate the mineral leases.

- Wilderness Study Areas:

Lands determined to be unsuitable for wilderness designation should be managed under the multiple use mandate of FLPMA rather than as *de facto* wilderness. The NMA will seek opportunities with the new administration to return these areas to multiple use.

## REVISED SAGE GROUSE PLANS

### PRIORITY A – BLM AND FOREST SERVICE

### **Background:**

Approach to sage grouse conservation has varied over the last few presidential administrations. In 2015, the Obama administration finalized revisions to most of the BLM and Forest Service western land use plans to implement measures to conserve, enhance, and/or restore sage grouse habitat. Although the plans differed widely among regions/state, common components included: providing the highest level of protection for priority management habitat areas, minimizing disturbance in general habitat management areas and varying levels of restriction on coal leasing and other leasable minerals. The Fish and Wildlife Service's (FWS) decision not to

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list the sage grouse as endangered under the Endangered Species Act (ESA) was primarily based on the protections put in place by the plans.

In 2018, the Trump administration proposed [revisions](#) to the 2015 plans and the Forest Service followed suit later that same year. The revisions were finalized in 2019 when the BLM issued the [Records of Decision](#). Important changes that allow more development on certain federal lands included: removal of mandatory compensatory mitigation; abandonment of the “net conservation gain” standard; certain modifications to lek buffers; and increased flexibility with respect to no surface occupancy stipulations and density caps. Similar actions were taken by the Forest Service, which issued its [Records of Decision](#) in July 2019.

On Oct. 16, 2019, however, a federal district court judge [enjoined](#) BLM from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon. As a result, the 2015 sage-grouse plans remain in effect until the court lifts the injunction. To address the court decision, in Feb. 2020, BLM released six draft [supplemental environmental impact statements](#) (SEISs) for comment. In April 2020, NMA submitted its [comments](#) in support. In Nov. 2020 issued the [final SEISs](#) followed by Jan. 2021 records of decision. The court has not taken any action in response to the final SEISs.

The Biden administration began its own initiative for sage grouse conservation. In March 2024, the BLM [announced](#) the availability of draft RMP Amendments (RMPA) and a Draft EIS for GRSG Rangewide Planning. As the RMPA would amend 77 BLM land use plans encompassing nearly 121 million acres across 10 Western states, the agency’s potential restrictions on resource development in GRSG habitat could significantly impact mining activities. The NMA’s June 2024 [comments](#) expressed serious concern over the BLM’s failure to critically evaluate impacts to mining and functioning state and local conservation programs for GRSG at a sufficient level of detail as required by NEPA. The BLM also ignored the Federal Land Policy and Management Act (FLPMA) requirement for management of the federal lands under the principle of multiple use and sustained yield; the Mining Law provisions governing the rights to explore and develop locatable minerals on federal lands; the Mineral Leasing Act provisions promoting the mining of federal coal; and other legal obligations.

In Nov. 2024, BLM [announced](#) its final EIS and RMP. Subsequently, the NMA [protested](#) the final EIS and RMP as an attempt to recklessly hasten the process before the change in administration. Many states also filed protests and submitted governors’ consistency reviews urging changes before a record of decision was issued.

### **Status:**

In January 2025, the BLM [finalized](#) the plans for the states of Oregon and Colorado. The BLM indicated it was able to resolve all potential inconsistencies identified by the Governor of Oregon, and that the state of Colorado did not file a consistency

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review. The BLM was unable to finalize the plans for eight other states due to either the ongoing Governor's consistency reviews for each state's plans, or other outstanding administrative processes. For those eight states, until a Record of Decision is signed the BLM will continue to manage GRSG on public lands under the 2015 plans. The BLM's failure to finalize all the plans for GRSG under the Biden administration provides opportunities to further shape additional changes in the Trump administration, including advocating for management pursuant to the 2020 final SEISs.

## NEPA REFORM

### PRIORITY A – CEQ AND OTHER AGENCIES

#### **Background:**

Various presidential administrations have tried to put their own imprint on implementation of NEPA.

- Trump 1.0 CEQ NEPA Regulations:

Under the first Trump administration, the Council on Environmental Quality (CEQ) issued a Jan. 2020 [proposed rule](#) that adopted many of the recommendations NMA made in comments on an advanced notice of proposed rulemaking. NMA submitted additional [comments](#) in March 2020 to underscore the need and legal basis for key aspects of the proposal, including: restoring the procedural objectives of NEPA, enhancing coordination of NEPA reviews and consolidating reviews into a single decision, increased project proponent involvement throughout the NEPA process, timelines and page limits for environmental impact statements and environmental assessments, application of the functional equivalence doctrine, and narrowing reviews to significant issues that are consistent with the purpose and need of each project by revising key definitions. On July 16, 2020, CEQ issued its [final reforms](#), which went into effect on Sept. 16, 2020.

- Biden CEQ NEPA Regulations: Phase 1:

The Biden administration affirmatively pulled back the Trump reforms. CEQ began a 2-phase process to address concerns regarding consideration of climate change, environmental justice; and enhanced public participation. CEQ's Oct. 2021 [phase 1 rule](#) focused on three changes to the 2020 NEPA regulations: (1) restoring the requirement that federal agencies evaluate all relevant environmental impacts, including direct, indirect and cumulative impacts particularly when addressing climate change and impacts to "environmental justice" communities; (2) allowing agencies to develop and analyze alternative approaches, including those that will not meet the stated objectives of the proposed project; and (3) clarifying that while agency NEPA procedures need to be consistent with CEQ regulations, agencies have the discretion and flexibility to develop procedures beyond the CEQ's requirements. NMA's Nov. 2021 [comments](#) asserted the phase 1 proposal was a kneejerk rush to

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reversal rather than a thoughtful assessment of the 2020 changes and whether any of them merit retention. Nonetheless, CEQ finalized its phase 1 rulemaking in April 2022.

- Biden CEQ NEPA Regulations: Phase 2:

In Aug. 2023, CEQ published its phase 2 [proposed rule](#). The proposal fails to implement the NEPA provisions contained in the Fiscal Responsibility Act on scope of NEPA analyses and timeframes. The proposed rule also removed language acknowledging the procedural nature of NEPA and created impermissibly outcome driven requirements that would unfairly hinder mining. The NMA submitted [comments](#) to CEQ on Sept. 29, 2023, outlining a number of legal and policy concerns with the proposed rule. The NMA also joined in coalition [comments](#) with the U.S. Chamber of Commerce and other industry allies to urge CEQ to focus on predictability, efficiency, transparency, and stakeholder input when finalizing the proposed rule. In May 2024, CEQ [finalized](#) its NEPA phase 2 rule.

- Congressional Action:

Congress, in particular the House of Representatives, continues to pursue oversight of CEQ for their lack of implementation of the NEPA reforms included in the included in the July 2023 [Fiscal Responsibility Act](#).

- CEQ Greenhouse Gas Guidance:

In Jan. 2023, CEQ issued interim [guidance](#) regarding how to evaluate greenhouse gas (GHG) emissions and climate change as Federal agencies conduct environmental reviews under NEPA. The interim guidance updated CEQ's [2016 guidance](#) and identified and explained steps that agencies should take when analyzing a proposed action's climate change effects under NEPA. Specifically, CEQ directed agencies to quantify the reasonably foreseeable GHG emissions of a proposed action and all alternatives; disclose and provide context for GHG emissions and climate impacts associated with the proposed action and each alternative; and analyze reasonable alternatives that would reduce GHG emissions.

The NMA submitted [final comments](#) on the interim guidance in April 2023. The NMA's comments reiterate the importance of efficient NEPA permitting to achieve the Biden-Harris administration's goals and explain how CEQ's guidance, as written, will likely lead to greater uncertainty and delays in permitting. NMA's comments explain that the guidance would drastically alter the required analyses of agency decisions on which NMA members rely by adding further inefficiencies to the NEPA process, adding significant costs, creating additional avenues for parties to challenge projects, and ultimately delaying projects. Importantly, the comments explain that NMA's members do not object to the assessment of GHGs in NEPA documents as long as the analysis is appropriately bounded. The NMA's comments reiterate that the scope of NEPA is limited by the scope of the agency's statutory authority, especially when considering the reasonably foreseeable effects of the action.

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- NEPA Under Second Trump Administration:

President Trump's Unleashing American Energy day-one executive order (EO) instructs CEQ to provide guidance on implementing NEPA to federal agencies, and to propose rescinding the Biden-era CEQ's NEPA regulations. This EO appears to be in response to the D.C. Circuit decision in [Marin Audubon Society v. Federal Aviation Administration](#) that held CEQ has no authority to write NEPA regulations. Notably, the *Marin Audubon* decision was followed a Feb. 3, 2025, federal district court decision in [Iowa v. Council on Env'tl. Quality](#) that vacated the Biden Administration's final 2024 CEQ NEPA Phase 2 [rule](#), including on the ground that CEQ lacks rulemaking authority. In vacating the CEQ's phase 2 rule, the *Iowa* judge noted that the 2020 Trump administration CEQ regulations were now back in effect. The administration is acting quickly to execute on the EO with the Feb. 20, 2025 release of (1) the [pre-publication version](#) of an interim final rule (IFR) to remove its NEPA regulations and (2) [guidance](#) to federal agencies to expedite permitting processes and meet NEPA deadlines established in the Fiscal Responsibility Act of 2023 (FRA). CEQ will provide a 30-day comment period on the IFR once it is published in the Federal Register.

- CEQ Greenhouse Gas Guidance:

The guidance is still in effect even though it is interim guidance. However, the guidance is likely to be rescinded under the Trump administration's executive order regarding unleashing American energy, among others. The Feb. 2025 CEQ guidance makes no specific mention of greenhouse gases or climate considerations.

- Supreme Court *Amici Curiae* on Scope of NEPA:

In Sept. 2024, the NMA joined an *amici curiae*, or friend of the court, [brief](#) to the U.S. Supreme Court asking for greater clarity and parameters around NEPA reviews by federal agencies. The Court is set to hear *Seven County Infrastructure Coalition v. Eagle Co.* this upcoming term with the underlying question of whether NEPA requires federal agencies to study environmental impacts over which they have no regulatory authority.

In the brief, the NMA argued that NEPA is not currently functioning as intended by Congress for informed agency decision making. By requiring NEPA analyses of actions and effects outside of an agency's authority to control, federal agencies are forced to stray from NEPA's purpose for informed decision making. We emphasized that the current circuit court split exacerbates the need for proper NEPA guardrails and outlines how regulated entities, such as the mining industry, overwhelmingly bear the brunt of the unintended consequences and subsequent litigation from outside parties. We also explained that in attempting to "litigation proof" NEPA documents, federal agencies do a disservice to the public and regulated community by drafting environmental impact statements that are thousands of pages long and analyze issues wholly outside of the federal agency's expertise. We highlighted that

these NEPA documents are often duplicative of state and local agency environmental reviews, and result in additional strain on federal agency resources. The Court has not yet set a date for oral arguments.

## TRIBAL CONSULTATIONS AND ENGAGEMENT

### PRIORITY A – BLM, FOREST SERVICE, EPA, CORPS AND OTHERS

#### **Background:**

The Biden administration devoted significant time and resources on improving tribal engagement. Building off the Jan. 2021 presidential [Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships](#), the Nov. 2021 White House Tribal Nations Summit resulted in a number of new policies including: a [Tribal Treaty Rights Memorandum of Understanding](#); a [memorandum](#) recognizing Indigenous Traditional Ecological Knowledge (ITEK) as one of the important bodies of knowledge that contributes to the scientific, technical, social, and economic advancements of our nation; an [MOU](#) signed by DOI, the Department of Agriculture, the Department of Energy, the Department of Transportation, EPA, ACHP, CEQ, and the Tennessee Valley Authority to create a framework through which the agencies can protect Tribal sacred sites. Similarly, in conjunction with the 2022 summit, the president released a ["Memorandum on Uniform Standards for Tribal Consultation"](#) that imposes baseline standards for all federal agencies that conduct such consultations.

In accordance with the uniform standards memo, DOI issued new [policies](#) and [procedures](#) to strengthen its Tribal consultation process. These policies are designed to encourage early and transparent consultation and establish a model for seeking consensus. DOI's actions apply across the board to activities conducted on federal lands that implicate Tribes. Another [announcement](#) specifically addressed DOI and Forest Service consultation in the context of hardrock mining on federal lands.

- IWG Recommendations related to Tribal Consultation:

In Sept. 2023, a series of recommendations related to tribal consultation were included in the IWG recommendations. In fact, 13 of the 65 IWG recommendations directly relate to tribal engagement with a number of others touching upon tribal issues more tangentially. The recommendations are a combination of policy, regulatory and legislative measures including:

- ✓ Enactment of legislation to require meaningful, robust, and early consultation between the Federal government and Tribal governments;
- ✓ Improvement of agency consultation procedures and training;
- ✓ Providing adequate resources for Tribal consultation;
- ✓ Issuance of new policy guidance on NHPA implementation;

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- ✓ Providing additional protections for Tribal cultural sites, sacred sites, and resources;
- ✓ Development of a system for automatic Tribal notification when notices or plans are proposed in an area of Tribal interest;
- ✓ Requirement of submission of exploration plans instead of notices when operations would impact Tribal resources or treaty rights, listed species;
- ✓ Incorporation of Indigenous Knowledge (IK) during the environmental and permitting review for an exploration plan, mine plan of operations, or associated permit;
- ✓ Inviting Tribes to participate as cooperating agencies in the NEPA process;
- ✓ Inclusion of Tribes in pre-application meetings, and allow Tribes to review baseline information in updating and expanding the BLM Nevada permitting process;
- ✓ Inclusion of Tribes in the determination of appropriate financial assurance levels and post-mining land use;
- ✓ Providing funding to Tribal Governments to allow them to more effectively engage in reviews of mining proposals and shared monitoring of operating mines; and
- ✓ Encouragement of additional Federal and private sector support for Tribally-led assistance organizations.

Pursuant to the IWG recommendations, the BLM announced a new [Instruction Memorandum](#) (IM) on “Notifying Tribal Governments of the Bureau of Land Management’s receipt of exploration notices under 43 CFR Part 3809; Surface Management”. The purpose of the IM is to establish guidance for actions BLM will take to implement one of the 2023 recommendations from the IWG related to Tribal engagement. Under the policy, when a BLM Field Office (FO) receives a new exploration notice, it will send a notification letter to each Tribe that has historically expressed an interest in the area or adjacent vicinity during previous BLM projects.

The FO will use the preferred Tribal contact method to send the notification [letter](#) along with a map of the exploration area and a [“frequently asked questions”](#) document. If the maps provided by the mining operator contain proprietary information, the FO can either redact that information or create a new map attachment for the letter. The FO will send out the Tribal notification letters within five calendar days of receiving a new exploration notice. The IM clarifies that BLM’s notification to Tribal governments under the new policy does not constitute acceptance of the notice-level operations or otherwise change the regulations and requirements and does not constitute formal government-to-government consultation.

### **Status:**

- [IWG Recommendations](#):

Given the change in administrations, it is expected that there will be a decreased focus on tribal issues and impacts. The next steps to implement these

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recommendations are unclear at this juncture but we will continue to provide input and comments as opportunities arise.

- NMA Tribal Toolkit:

To help NMA members navigate the consultation process, the NMA is preparing a tribal engagement tool kit. The NMA has completed review of the draft with a small set of peer reviewers and recently requested feedback from the broader NMA membership. The toolkit will be available to members by first quarter of 2025, but we do anticipate that it will need periodic updating or supplementation.

## TRIBAL RULEMAKING AND GUIDANCE

### PRIORITY A – BLM, FOREST SERVICE, EPA, CORPS AND OTHERS

#### **Background:**

- NAGPRA:

The Biden administration had a renewed focus on compliance with the Native American Graves Protection and Repatriation Act (NAGPRA) and proposed regulations at the end of 2022 to clarify processes for the disposition and repatriation of Native American remains, funerary objects, or objects of cultural patrimony for museums and federal agencies to comply with specific timelines. The NMA joined with other mining industry groups in [submitting comments](#) on the [proposed rule](#) to modify the current regulations under NAGPRA in Feb. 2023. Potentially problematic provisions included the broadening of the definition of “sacred object” expanding the number of persons that require notification upon the discovery of human remains, broadening the interpretation of what is a final agency action under the Administrative Procedures Act, and extending the stop-work period under NAGPRA. The NAGPRA final rule was [published](#) in Dec. 2023.

- National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties:

The original purpose of the National Park Service’s (NPS) Tribal Cultural Properties (TCP) Bulletin was to provide guidance on nominating buildings, structures, objects, sites, and districts believed to have traditional cultural significance for inclusion in the National Register of Historic Places. The TCP Bulletin has been updated numerous times over the years. It was updated in 1992 to address concerns that properties of importance to Tribes or Native Hawaiian Organizations (NHOs) were being excluded from listing by virtue of the fact that religious properties are not typically eligible for listing in the National Register. It was again updated in 1998 to re-state that TCPs are not a new property type nor an additional level of significance.

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NPS held numerous listening sessions from 2011 to 2013, in response to ever-increasing requests for additional assistance on TCP identification and evaluation. As a result, from 2014 to 2017, NPS developed a revised draft that to include plain language and successful nominations as examples. In mid-2017, the initiative was halted but was relaunched by the Biden administration with an updated draft of the TCP Bulletin released in Oct. 2022. The draft TCP Bulletin expanded on the definition of “traditional cultural place,” and stressed traditional knowledge as an independent line of evidence provided by the people who are the authorities in their culture and the connection that culture has to a place. The draft TCP Bulletin also reframes the “integrity of relationship” as “is the relationship essential?” and provides examples of addressing integrity.

An updated draft Bulletin was [published](#) in Jan. 2024 for comment. The NMA’s [comments](#) suggested three changes: (1) additional clarity on the issue of confidentiality under the National Historic Preservation Act Section 304 and other federal information laws; (2) additional clarity on the inconsistent guidance on traditional knowledge use; and (3) to not treat ineligible archeological sites as TCPs so as to not overwhelm federal agencies in the evaluation process.

### **Status:**

- [NAGPRA](#):

The NMA will evaluate opportunities with the new administration to reconsider a roll back of any overreaching provisions of the final rule.

- [National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties](#):

The NMA will evaluate opportunities with the new administration to reconsider any necessary changes to the Bulletin.

## LAND USE PLANNING: GENERAL

### PRIORITY A – BLM, USFS, FWS

### **Background:**

- BLM Conservation and Landscape Health Proposed Rule

While there have been no concrete proposals to revise BLM’s overarching land use planning regulations, BLM did issue a [proposed rule](#) on conservation and landscape health that would overhaul the way the agency manages federal lands under FLPMA. The BLM contends that the proposed rule would advance its mission to manage public lands for multiple use and sustained yield by prioritizing the health and climate resilience of ecosystems across those lands. Signaling a potentially

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dramatic shift in how public lands will be managed, the proposed rule “clarifies” that conservation is a use on par with other uses of public lands under FLPMA’s multiple-use and sustained-yield framework and prioritizes designating Areas of Critical Environmental Concern (ACECs) and avoidance of impacts to federal lands.

The NMA submitted [comments](#) on the proposed rule and outlined significant concerns with how it would undermine the multiple use and sustained yield mandate under FLPMA. The NMA’s comments reiterate concerns previously raised on the BLM’s 2016 rule, BLM Planning 2.0 which was voided under the Congressional Review Act, regarding the prioritization of Areas of Critical Environmental Concern, the flawed mitigation hierarchy, and the BLM’s decision not to complete an environmental assessment under the National Environmental Policy Act. Further, the NMA’s comments stress the uncertainties with the BLM’s proposed implementation of new conservation leases, and the expansion of the rangeland health standards that have historically only been used for grazing. Other important points in the comments highlight the legal flaws and practical implications of the proposed rule, including the BLM’s inability to manage the workload it has currently.

On Feb. 9, 2024, the NMA met with OMB to express concerns about the BLM’s rulemaking approach.

The BLM [published](#) its final Conservation and Landscape Health rule on May 9, 2024. Although the final rule contains many of the same concepts as the proposed rule, a few notable revisions are discussed below.

- **New Objectives**: The BLM added four additional objectives to the proposed rule’s initial six. The four additional objectives include: to provide for healthy lands and waters that support sustainable outdoor recreation experiences for current and future generations; prevent permanent impairment or unnecessary or undue degradation of public lands; improve engagement and co-stewardship of public lands with Tribal entities and promote the use of Indigenous Knowledge in decision-making; and advance environmental justice through restoration and mitigation actions.
- **New Definitions**: While the final rule alters some definitions that were originally in the proposed rule, such as “conservation”, “Indigenous Knowledge” and “unnecessary or undue degradation”, the final rule does completely omit two definitions, and includes nine newly defined terms. The BLM removed the definition of “best management practices”, contending that the term is not generally used for describing mitigation measures. The definition of “land enhancement” was also removed because it allegedly caused confusion. Newly defined terms include “ecosystem resilience”, “in-lieu fee program”, “intactness”, “land health”, “mitigation bank”, “mitigation fund”, “significant causal factor”, “significant progress” and “watershed condition assessment”.
- **Restoration**: The final rule emphasizes the importance of restoration in achieving multiple use and sustained yield, and requires a consideration of

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the causes of degradation, the recovery potential of an ecosystem, and the allowable uses in the governing land use plan in determining restoration actions. Restoration is prioritized in resource management planning and emphasizes consultation with Tribes to identify opportunities for co-stewardship or collaboration to maintain intact landscapes.

- Leasing: In a change from the proposed rule, the BLM removed the term “conservation leases” and has renamed them to “restoration and mitigation leasing.” As proposed, conservation leases would have been used for either restoration or mitigation. The final rule additionally enables conservation districts and state fish and wildlife agencies to hold leases. Fortunately, and likely a reaction to the Securities and Exchange Commission’s Recent Proposal on Natural Asset Companies (NACs) (See NMA memo on NACs [here](#)), the BLM clarified that restoration and mitigation leases may not be held by a foreign person as defined by regulation. More concerning, the BLM included language that will likely be ripe for abuse by Environmental Non-Governmental Organizations ENGOs to put lands off limits for certain uses. The language addresses cost recovery and rents for the leases, and provides that BLM may waive or reduce the costs, fees, and rents of a lease if it is not used to generate revenue, and the lease will enhance ecological or cultural resources or provide a benefit to the general public.
- Mitigation: The mitigation hierarchy as imagined in the proposed rule is largely intact in the final rule. However, newly defined terms used in this section include “additional,” “commensurate,” “durable,” and “timely.”
- Land Health Standards: The BLM clarifies in the final rule that the land health standards, while primarily for grazing, will be applied using those existing standards for each program, not just for grazing. Moving forward, BLM contends that national standards will be completed pursuant to procedures set out in the final rule and will then be applied to all programs.
- Land Health Evaluations: The final rule was updated to require that authorized BLM officers complete a watershed condition assessment and land health evaluation every 10 years. Watershed condition assessments replace “land health assessments” from the proposed rule, and characterizes the resource conditions. Watershed condition assessments and land health evaluations are intended to be broader than the language in the proposed rule. Further, appropriate actions are outlined that may be deployed to address practices and uses that are determined to be significant causal factors to degradation. The example provided by BLM indicates that if a governing resource management plan identifies degraded lands for solar development and those areas are not meeting the standards, the authorized officer should consider that land use planning decision in determining the appropriate action. In that circumstance, BLM says it would typically not be appropriate to deny solar or wind use altogether, although design features or other mitigation measures may be applied.

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- Areas of Critical Environmental Concern: Changes from the proposed rule include: providing for the BLM to implement temporary management for potential ACECs identified outside of an ongoing planning process, with public notice and periodic reevaluation; codification of research natural areas as a type of ACEC designated for the primary purpose of research and education on public lands; a presumption that all areas found to meet all three ACEC criteria will be designated in the resource management plan; a management standard that requires BLM to administer designated ACECs in a manner that conserves, protects, and enhances the relevant and important values; and a definition for the term “irreparable damage.”

The BLM also announced next steps in the rule’s implementation in Aug. 2024. Among the initiatives, the BLM announced the intent to develop a federal advisory committee to advise on the Public Lands Rule, and several guidance documents intended to support clear and consistent implementation of the Public Lands Rule.

### Guidance Documents:

The BLM released four Instruction Memoranda (IMs), two Manuals, and an Information Bulletin (IB) to help provide policy direction while BLM continues to hear from and work with stakeholders and partners to determine best practices and additional guidance that may be necessary in the future. Please note that several of these documents reference separate attachments that can be accessed through the links to the primary documents. The guidance documents are linked below.

- [Restoration Prioritization and Planning IM](#)
- [Watershed Condition Assessments IM](#)
- [Development and Revision of Land Health Standards IM](#)
- [Restoration Mitigation Leasing IM](#)
- [Areas of Critical Environmental Concern \(ACEC\) Manual](#)
- [Inventory & Monitoring of Ecological Resources Manual](#)
- [Land Use Planning and the Conservation and Landscape Health Rule IB](#)

### Litigation:

On July 12, 2024, the NMA, along with a broad coalition of other associations [challenged](#) the regulation in the U.S. District Court for the District of Wyoming. While the complaint contains numerous arguments regarding the rule’s fatal flaws, the overarching objection is the BLM’s conversion of FLPMA from a “statute for managing the productive use of lands into one of non-use, prioritizing conservation values above, and to the exclusion of, the exclusively productive activities that FLPMA has governed for nearly half a century.” In the rule’s creation of a system of mitigation and restoration leases, BLM claims the power to set aside land for conservation, a power that Congress has reserved to itself or elsewhere has granted in only tightly limited circumstances. The NMA and member companies Barrick Gold and the Navajo Transitional Energy Company provided declarations supporting the challenge to outline the harms to the industry of placing more lands off limits to mining.

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The complaint additionally highlights the improper use of areas of critical environmental concern (ACECs), the failure to conduct an appropriate environmental analysis pursuant to the National Environmental Policy Act (NEPA), and how the Congressional Review Act (CRA) resolution of disapproval of BLM's 2016 land use planning rule precludes the Landscape and Conservation Health rule. Regarding ACECs, the rule creates new presumptions for expanded designations and corresponding land-use restrictions without the opportunity for public comment that FLPMA expressly requires. The NEPA argument centers on BLM's use of a categorical exclusion to satisfy its obligations under that statute. The complaint contends that the rule unequivocally qualifies as a major federal action that required preparation of an environmental impact statement. The CRA section of the complaint explains that core elements of the rule are substantially the same as elements of the 2016 BLM rule, and therefore, are similarly precluded by the resolution of disapproval overturning the 2016 rule. On Sept. 10, the case was transferred to the District of Utah.

Congressional Action: Bicameral legislation directing the BLM to withdraw a proposed rule relating to conservation and landscape health and prohibits the BLM from finalizing, implementing, or enforcing the proposed rule or any substantially similar rule has been introduced in both the House of Representative and the Senate.

- Resource Management Plan Restrictions:

The BLM also has been using individual land use or resource management plans (RMPs) to place new limits on where minerals may be developed on federal lands. For example, the [North Dakota Field Office RMP](#), the [Buffalo RMP](#) in Wyoming, and the [Miles City RMP](#) in Montana all contained alternatives that would reduce the amount of federal coal that could be leased. NMA submitted comments in opposition to those restrictions.

Another example is the [Rock Springs RMP](#) revision, which increased protections on portions of a 3.6-million-acre swath of public lands in southwestern Wyoming including: Under the BLM's chosen alternative, nearly 760,000 acres will be closed to federal coal leasing and more than 900,000 acres will be withdrawn from mining operations under the mining law.

- USFS Notice of Intent to Amend all 128 Land Management Plans:

In Dec. 2023, the U.S. Forest Service (USFS) [published](#) a NOI to prepare an EIS to evaluate the effects of amending 128 land management plans. The intent of this review was to foster the long-term resilience of old-growth forest conditions and their contributions to ecological integrity across the National Forest System. While the stated focus of the NOI may not signal the need for the NMA's engagement, the tie to the Service's April 2023 [Advanced Notice of Proposed Rulemaking](#) (ANPR) on climate resilience reveals potential implications for the mining industry. The NMA's [comments](#) on the ANPR expressed concerns about the focus on conservation and

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ecosystem integrity and similarities with the Bureau of Land Management's recently [proposed rule](#) on conservation and landscape health.

The NMA's submitted [comments](#) on the NOI on Feb. 2, 2024, urging the USFS to exercise caution in its execution of the management plan amendments so not to ignore the plenary power of Congress to legislate the use of federal lands. The NMA's comments outlined the potential conflicts of prioritizing conservation with the USFS's multiple use mandates under both the Multiple Use Sustained Yield Act and the Federal Land Management Policy Act. The comments also encourage the USFS to account for the increased demand for domestically mined minerals and materials in its 128 land management plan amendments.

In July 2024, the USFS announced it [prepared](#) a draft Environmental Impact Statement (DEIS) for amendments to land management plans to address old-growth forests across the National Forest System. Of importance to the mining industry, the DEIS includes requirements that may lead to increased costs and timelines for permit approvals on USFS lands. Comments are due Sept. 20, 2024.

The DEIS acknowledged the concerns raised by the NMA and other stakeholders during the scoping period regarding how the USFS would address National Forest System lands for non-timber production activities, including mining, in the amendments. Therefore, the proposed amendments included exceptions in the alternatives if the responsible official determines that actions are necessary "to comply with other statutes or regulations, valid existing rights for mineral and energy resources, or authorizations of occupancy and use made prior to the amendment decision." The USFS noted this proposed exception would often apply to mineral and energy resources, as there are numerous laws, regulations, valid existing rights, and other existing authorizations that provide legal deference to allow those activities to occur where otherwise they would be restricted or prohibited.

### **Status:**

- Conservation and Landscape Health Rule:

In Dec. 2024, the NMA filed its [opening brief](#) arguing BLM exceeded its statutory authority under FLPMA by unlawfully: (1) establishing a new conservation leasing scheme that directly contravenes FLPMA by designating "conservation" a land "use" on par with the productive uses that FLPMA was designed to facilitate; (2) undermining Congress's carefully calibrated statutory scheme for the management of federal lands, through which it has retained for itself the power to direct that land be managed principally for conservation; (3) omitting any opportunity for public participation in conservation leasing decisions; and (4) allowing the designation of Areas of Critical Environmental Concern (ACEC) outside the ordinary land-use planning processes in FLPMA and applying no temporal limit such that the unofficial ACEC status can remain indefinitely until a new land-use process is completed. We expect that the new administration will put this case in abeyance given the likelihood the Trump Administration will not defend this rule and will be

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initiating a reconsideration of this rule next year.

- Resource Management Plan Restrictions:

Congressional Action: The NMA is working with congressional allies on opportunities to overturn the approval of the final RMPs.

- USFS Notice of Intent to Amend all 128 Land Management Plans:

At the end of the Biden administration, the Forest Service published a notice that it was withdrawing the proposed amendments to all 128 land management plans. It is unlikely that the Trump administration will undertake a new revision of the plans.

## M OPINIONS

### PRIORITY B – DOI SOLICITOR’S OFFICE

#### **Background:**

The DOI’s Office of the Solicitor performs the legal work for the Department and the Solicitor serves as the principal legal adviser to the Secretary. In addition to providing legal counsel to the Secretary, Assistant Secretaries, and agency heads, the Solicitor’s Office also issues legal opinions on matters falling under the jurisdiction of the Department. These opinions are intended to provide clarity on points of confusion or dispute regarding the Department’s statutory or regulatory obligations, but often carry significant policy implications and can dictate outcomes for years or decades following their publication.

For example, on May 16, 2023, the Solicitor’s Office issued a new legal opinion, [M-73077](#), “Use of Mining Claims for Waste Deposition, and Rescission of M-37012 and M-37057,” to respond to the district court remand of Lithium America’s Thacker Pass permit discussed above. While the Thacker Pass remand prompted the new opinion, it is broader in effect as it outlines the options available to mining companies similarly situated to Thacker Pass. While the solicitor’s opinion provides a path forward for Thacker Pass, applied more broadly it raises other questions, confirming the need for the bipartisan legislation already introduced in Congress that returns interpretation of the General Mining Law to the longstanding legal precedent that came before the Rosemont ruling, ensuring the fundamental ability to conduct responsible mining activities on federal lands.

The opinion outlines the options available to mining companies similarly situated to Thacker Pass that propose to place tailings or waste rock on mining claims without evidence of a discovery, creating a “rebuttable presumption against discovery.” First, that presumption may be overcome by sufficient evidence of mineralization. If the record does not contain such evidence, companies can conduct additional exploration to make this demonstration. However, the opinion fails to provide any metrics for determining what amount of evidence will suffice, which could leave

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much to BLM discretion.

Secondly, in cases where mineralization cannot be demonstrated, companies have the option of re-staking the lode claims where waste or tailings facilities were planned as millsite claims. Notably, the opinion does not impose any restrictions on the number of millsite claims that can be staked in conjunction with mining claims or otherwise reference the then-Solicitor John Leshy's 1997 Millsite Opinion.

Under the third and fourth options, companies could seek special use or other permits available under the Federal Land Policy and Management Act for their waste rock and tailings facilities. Authorizations divorced from the Mining Law, however, provide far greater discretion for federal land management agencies to deny approvals. The final option discussed is for companies to seek a land exchange to acquire needed acreage for waste rock and tailings. Given the length of time and resources involved in securing land exchanges, this option seems nearly unviable.

Unfortunately, the opinion also withdraws two previous helpful solicitor's opinions on ancillary use from 2005 and 2020 as depending on a rationale that conflicts with the new opinion and recent caselaw: (1) [M-37012](#), "Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations;" and (2) [M- 37057](#), "Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872." Even more troubling, the opinion notes the earlier opinions "wrongly imply that the Mining Law forecloses the Department from withholding approval for portions of a plan of operations if the operator can't, as a matter of law, demonstrate discovery."

### **Status:**

No new opinions specific to mining have been issued since May 2023.

## LAND ACCESS

### PRIORITY B – DOI AND FOREST SERVICE

#### **Background:**

The frequency of land use designations or restrictions has increased under the Biden administration, especially with Deb Haaland as Secretary of the Interior and the ambitious goal articulated in [Executive Order 13990](#) to protect at least 30 percent of our lands and waters by 2030. In May 2021, the White House and other federal departments and agencies released a [new report](#), entitled "Conserving and Restoring America the Beautiful" that lays out the administration's vision for moving forward with the "30x30 initiative." Rather than providing any concrete recommendations on criteria to identify such lands and waters, the report focuses primarily on the identification of principles to guide a decade-long national conservation effort.

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In Dec. 2021, the administration released its first [Year One Report](#) (Report) on the progress of the initiative. Most of the current progress is specific to localized urban areas, tribally led conservation and restoration priorities, wildlife migration corridors, increasing access to recreation, and voluntary conservation efforts. The Report also outlined the State of Lands, Waters and Wildlife, that summarized existing information about the recent conditions of, trends in, and threats to natural systems across America. These analyses are intended to provide an initial survey, with future annual reports building on the existing information to further conserve and restore lands and waters.

In Jan. 2022, the DOI announced the next steps on implementation of the initiative. As part of the initiative, the DOI, on behalf of an interagency working group, is requesting comments on the creation of an American Conservation and Stewardship Atlas (Atlas) to track a baseline of information on lands and waters that are conserved or restored. The NMA submitted [comments](#) stressing the importance of land access to ensure a secure supply of minerals for the nation and discouraging large scale mineral withdrawals. To date, no further updates have been provided on the initiative by this administration.

- [OMB Ecosystem Services Guidance](#):

In April 2023, the White House Office of Management and Budget (OMB) published [proposed guidance](#) for federal agencies assessing ecosystem services in benefit-cost analyses for regulatory actions. OMB believes this guidance is necessary for several reasons. First, nature “provides us with so many things without cost” and “these benefits...are not always fully captured in benefit-cost analysis, which the U.S. government has used for decades as a way to check that regulations and investments are making a positive impact on Americans’ lives.” Failing to “fully account for nature’s bounty” had led to the “under-valuing and erosion of our natural assets.” Second, some federal agencies have already taken actions to analyze the effects of regulations on natural assets and on the ecosystem services they deliver, but these actions have differed across agencies with respect to scope and focus. OMB believes that government-wide guidance will help facilitate interagency consistency and coordination on ecosystem service analyses in the context of benefit-cost analysis. Finally, OMB believes this guidance will help agencies that do not currently have these practices in place to develop their own expertise more quickly.

Notably, the draft guidance uses examples of rulemaking topics and industry sectors, including the mining industry, to illustrate the potential connections between regulatory actions, the ecosystem services changes that could result, and the positive or negative impacts those changes could have on human welfare.

The NMA joined a broad industry coalition to file [comments](#) on the proposed guidance outlining substantive concerns with how the guidance could be used to unfairly characterize regulatory actions involving mining as having only negative

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effects on the environment and human welfare, while ignoring the positive benefits of mining and access to affordable, reliable energy.

- National Nature Assessment:

In Aug. 2023, DOI published a published [draft prospectus](#) detailing plans to engage in the [First National Nature Assessment](#) (NNA1). The purpose of NNA1 is to provide an assessment of the country's lands, waters, and wildlife through the lenses of the economy, public health, security, equity, and conservation. These thematic interests were decided upon after concerted efforts at public and Tribal engagement. The topics explored in this proposed report are reminiscent of the [America the Beautiful Initiative](#) launched by the Biden-Harris Administration in 2022.

The NMA submitted [comments](#) on the draft prospectus supporting the intent to assess the knowledge regarding the status, observed trends, and future projections of nature in the U.S. and consequences of changes. However, the NMA's comments also stress that the mining industry is heavily engaged with natural resource management and analysis of environmental impacts, not only from a local perspective but regional perspectives, and urge the acknowledgement and inclusion of existing conservation initiatives by the mining industry in the NNA1.

- Conservation Areas:

The U.S. Fish and Wildlife Service (FWS) has increased the amount of "conservation areas" it designates. A conservation area is a type of national wildlife refuge that consists primarily or entirely of conservation easements on private lands. Most recently the FWS [proposed](#) the new Missouri Headwaters Conservation Area that would create a 5.7-million-acre conservation area that would protect wildlife habitat and open spaces. The NMA plans to comment on this proposed conservation area due to the number of mineral deposits in the area and valid existing mining claims.

- Natural Asset Company Listing by the Securities and Exchange Commission:

During the Biden administration, the Securities and Exchange Commission (SEC) [instituted proceedings](#) under the Securities Exchange Act of 1934 (Act) on whether to approve or disapprove a proposed rule change filed by the New York Stock Exchange, LLC (NYSE) to create a new listing standard for Natural Asset Companies (NACs). NACs would be corporations that hold the rights to the ecological performance produced by natural reserves (e.g., the value of natural assets and the production of ecosystem services) and have the authority to manage the areas for conservation, restoration, or sustainable management.

The NMA had concerns with the proposed rule that are pertinent to the mining industry. First, the proposal states that NACs would be prohibited from directly or indirectly conducting unsustainable activities, and explicitly includes traditional fossil fuel development and mining as examples of a prohibited activity that would lead to the degradation of the ecosystems it is trying to protect. Second, the

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proposal had significant similarities to the Bureau of Land Management's (BLM) recently proposed rule on [Conservation and Landscape Health](#) in that it explicitly contemplates owning rights to public lands for the conservation and management of sustainable uses, in contravention of the Federal Land Management and Policy Act's (FLMPA) multiple use mandate.

The NYSE ultimately withdrew its proposal for NACs after a sizeable campaign opposing the proposal from the mining industry, Congressional allies, governors, and other stakeholders. However, the NMA [submitted comments](#) as part of the record detailing the mining industry's commitment to conservation and the importance of minerals and coal to a modern society. The NMA argued that the NYSE failed to adequately address whether its proposal is consistent with the Securities and Exchange Act's requirements and raised significant concerns that the NYSE completely disregarded other federal land management and environmental statutes.

While the proposal was withdrawn, Intrinsic Exchange Group, the financial services firm that created the NAC concept and proposed it to the NYSE, told Politico that it would move ahead and find private equity or another public exchange to bring NACs to the markets. We will continue to monitor any developments, particularly involving other public exchanges and SEC involvement.

### **Status:**

To date, there have not been any updates to these initiatives since the Spring 2024 Environment and Lands Committee Meeting. The NMA expects that several of these proposals and initiatives will be rescinded or revised under the Trump administration.

## ENDANGERED SPECIES ACT REFORM

### PRIORITY B – FWS

### **Background:**

After the Trump administration took office under his first term, the FWS and the National Marine Fisheries Service (NMFS) initiated a review of the Obama-era 2016 regulations.

- [Endangered Species Act Regulations:](#)

In August 2019, FWS [finalized](#) its proposed 2018 ESA reforms to significantly realign the regulations with the ESA's primary objective to achieve species recovery, while avoiding unnecessarily expansive critical habitat designation and overly restrictive definitions that tie the hands of federal agencies when issuing project approvals. In 2020, the Trump administration proposed further ESA reforms, including an August 6 [proposed definition](#) of "habitat" and August 28

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[proposed](#) revisions to the process for excluding areas of critical habitat. NMA submitted [comments](#) in support of both the changes to the habitat definition and the [habitat exclusion process](#). These rules were finalized in Dec. 2020.

In October 2021, the FWS and NOAA published two proposed rules that would rescind ESA critical habitat regulations that were finalized under the previous administration. The Services proposed to rescind the regulatory definition of the term "[habitat](#)" under the ESA, following a re-evaluation of the finalized Dec. 2020 rule, and determining that habitat designations should be made on a case-by-case basis, using the best available science. The FWS is also proposed to rescind the finalized Dec. 2020 rule that outlined a process for [excluding](#) critical habitat under section 4(b)(2) of the ESA after a re-evaluation and determination that the conservation purposes of the ESA are better met by the FWS's previous approach to excluding critical habitat.

In Dec. 2021, NMA submitted comments on the Services' proposed rules to rescind the definition of the term "[habitat](#)" under the ESA and the FWS proposal to rescind the rule that outlined a process for [excluding](#) critical habitat under section 4(b)(2) of the ESA. NMA's comments on [rescinding the definition of habitat](#) and the comments [for rescinding the process for excluding critical habitat](#) stressed the underlying Administrative Procedure Act requirements that must be met to justify these reversals and the Services' failure to provide sufficient reasoning and analysis for the rescissions.

The FWS finalized its rescission of the definition of habitat and the process for excluding critical habitat earlier this year. Following these rescissions, a District Court Judge sided with environmental groups and vacated the three remaining ESA regulations that were finalized under the previous administration, without hearing the merits of the case. The 9<sup>th</sup> Circuit Court of Appeals stayed the District Court's Decision, and essentially reinstated the three rules while the lower court hears the case on the merits.

The FWS has also issued a new ANPR on compensatory mitigation, that is intended to mirror the EPA and Army Corps' wetland compensatory mitigation scheme. The NMA provided comments outlining the need for maximum flexibility in the mitigation scheme.

FWS proposed a new regulation that would allow experimental populations of listed species to be introduced in areas outside of their native habitat. The NMA provided comments as to why this was counterintuitive to the FWS's mission, and essentially would create an invasive species problem, while also not contributing to the conservation of listed species.

More recently, the FWS issued a proposed rule to clarify ESA section 10 permits for incidental take and enhancement of survival. The rule is intended to streamline and clarify permitting, but unfortunately will likely make the permitting timeline longer, as the requirements are even more onerous than what is currently in place.

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In June 2023, the FWS and NMFS [proposed](#) revisions to three rules related to the implementation of the Endangered Species Act (ESA) that were finalized in 2019 under the previous administration. The three proposed regulations revise, among other things, the [interagency consultation](#) process under section 7, the [criteria](#) for listing, reclassifying, and delisting species and designating critical habitat under section 4, and reinstate the [blanket 4\(d\) rule](#) for threatened species.

The NMA submitted comments on each proposed rule. The comments for section 7 are available [here](#); the comments for section 4 are available [here](#); and the comments for section 4(d) are available [here](#). The NMA's comments stress the need for regulatory certainty regarding ESA listed species as well as the need for efficient consultation under section 7. The comments also express concern that the proposed changes to the section 4 regulations will undermine the intent of Congress in enacting the ESA, conflict with the U.S. Supreme Court's unanimous ruling in *Weyerhaeuser v. U.S. Fish and Wildlife Service*, and unnecessarily complicate the ESA. Further, the NMA's comments urge against reinstating the blanket section 4(d) rule because it would jeopardize meaningful conservation for individual species and their habitats.

The FWS and NMFS finalized the section 4, 4(d), and 7 rules in April 2024. The three final regulations revise, among other things, the [interagency cooperation](#) process under section 7, the [criteria](#) for listing, reclassifying, and delisting species and designating critical habitat under section 4, and reinstate the [blanket 4\(d\) rule](#) for threatened species. The Services contend that the final rules will improve how the agencies implement the ESA from the 2019 revisions. Specific revisions to each section are outlined below:

- **Interagency Consultation:** The Services reverse regulatory revisions involving interagency consultation under section 7 of the ESA for any federal action that may affect listed species and their habitats. These revisions will likely lead to an increase in section 7 consultation timelines and costly mitigation strategies, in direct contradiction to the goals of the 2019 rule. The most troubling revision of the section 7 final rule allows the Services to now include measures outside of the action area of a project to minimize take, which will significantly expand the reasonable and prudent measures that can be included as part of an incidental take statement in a biological opinion. The Services also revise the definition of "environmental baseline," and "effects of the action." The Service also remove a section of the regulations that was added in 2019 to narrow the scope of activities that are reasonably certain to occur during section 7 consultation.
- **Criteria for Listing and Designating Critical Habitat:** The final changes to the ESA section 4 rule for listing species and designating critical habitat significantly roll back many changes from the 2019 revisions and will likely result in more land use conflicts going forward. First, the final rule restores the language that listing determinations are to be made "without reference to possible economic or other impacts of such determination." Second, the Services removed the reference to the "same" factors and standards when

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evaluating whether to delist or downlist a species that was in the 2019 rule. The 2019 rule language requiring the same factors was in response to [Friends of Blackwater v. Salazar](#) (691 F.3d 248 (D.C. Cir. 2012)), which confirmed that decisions to list and delist species shall be made in accordance with the same five factors. Finally, regarding the designation of critical habitat, the final rule removes the requirement that the Services consider unoccupied critical habitats only after a determination that occupied critical habitat would be inadequate.

- Blanket 4(d): The FWS reinstated the blanket 4(d) rule that the prior administration rescinded in 2019. Prior to the 2019 rule, the NMFS and FWS interpreted section 9 prohibitions to threatened species differently, but the 2019 regulations put the Services in alignment with how each treats threatened species. The FWS's reinstatement of the blanket 4(d) rule will allow the protections of section 9 of the ESA to apply automatically to threatened species, and again have NMFS and FWS interpreting the ESA differently. However, the FWS contends it will still promulgate species-specific rules tailored to the scope of the section 9 prohibitions. Separately, in recognition of Tribal sovereignty and managing Tribal lands, the final rule allows federally recognized Tribes the ability to aid, salvage, or dispose of threatened species. The FWS also extended the exceptions to the section 9 prohibitions to certain individuals from federally recognized Tribes for conservation activities for threatened species. Because NMFS and FWS treat threatened species and ESA 4(d) rules differently, it is unclear how these revisions will impact future species under jurisdiction of both Services, especially those species that have significant Tribal interests.

In the meantime, the NMA has worked with individual member companies on ESA specific issues to their operations. This includes commenting on specific species listings and critical habitat designations that may impede mining.

- Migratory Bird Treaty Act Regulations:

On Feb. 3, 2020, the FWS published a [proposed rule](#) designed to clarify that the Migratory Bird Treaty Act (MBTA) does not prohibit incidental take of listed species. The proposal notes that the construction of the statute, a comparison of the MBTA with other similar statutes including the ESA and the legislative history of the MBTA which centered entirely around intentional killing of migratory birds for their feathers, does not support application of strict criminal liability for incidental take. NMA submitted [comments](#) in support. On Jan. 7, 2021, the FWS finalized its MBTA [rule](#) with an effective date of Feb. 8. The Biden administration however, published a [notice](#) delaying the effective date until March 8. Simultaneously, FWS opened a 20-day comment period on "issues of fact, law, and policy raised by the MBTA rule published on January 7, 2021, and on whether that rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect." NMA submitted [comments](#) that supported the final 2021 rule as a straightforward approach to provide regulatory certainty for industry.

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In October, the FWS published a [final rule](#) revoking the previous administration's rule on the MBTA as it applies to incidental conduct resulting in the injury or death of migratory birds. The FWS will return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion starting Dec. 3, 2021. Simultaneously, the FWS published an [Advance Notice of Proposed Rulemaking](#) (ANPR) announcing the intent to solicit public comments as the FWS considers developing regulations to authorize the take of migratory birds. The FWS is considering authorizing incidental take using three mechanisms: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activity types; and (3) specific or individual permits. Comments are due Dec. 3, 2021. In the interim the FWS issued a [Director's Order](#) providing instructions to FWS employees on the prioritization of enforcement for specific types of activities. Also in Dec. 2021, NMA submitted [final comments](#) on FWS' ANPR to consider a program authorizing incidental take under the MBTA. NMA's comments expressly request that mining and mining-related activities be excepted from the prohibitions on incidental conduct under the MBTA.

- Bald and Golden Eagle Protection Act Regulations:

The FWS recently issued a proposed rule to revise existing regulations authorizing permits for incidental take of eagles and their nests. The NMA provided comments supporting a collaborative approach under the Bald and Golden Eagle Protection Act (BGEPA) that can ensure regulatory certainty for incidental take and minimize eagle mortality and disturbance. In light of the minimal impacts that the mining industry has on eagles and their nests, coupled with existing measures that mining companies already implement for eagle conservation during their operations, the NMA's comments expressly request that mining and mining activities be considered for inclusion in the proposed general permit for bald eagle disturbance and that the Service develop a general permit for golden eagle disturbance during resource development and recovery operations. The NMA also noted the current administrative burden on both Service employees and permittees and requested that the new permitting program be streamlined and require minimal oversight to avoid inconsistent application among different Service personnel. The FWS published a final rule in Feb. 2024.

### **Status:**

- Migratory Bird Protection Act Regulations:

The FWS withdrew the proposed rule from review, citing the need to review additional "technical comments". The NMA will continue to be engaged in the rulemaking and provide written comments showing that mining does not cause a significant amount of take. Given the prioritization of this rule in the first Trump administration, it is likely a new proposed rule will be proposed in the second Trump term.

## STATE LAND/LAND TRUST DEPARTMENT COMMUNICATIONS

### PRIORITY C – STATE LANDS DEPARTMENTS

#### **Background:**

In addition to the federal land management agencies under the Departments of the Interior and Agriculture, the multiple-use mandate under which mining operations are allowed to take place are impacted by the decisions of state lands departments and the role state land departments play in assisting federal land management objectives. State lands departments are often involved in or aware of federal land management decisions at the outset of the process and are well positioned to provide insight on upcoming federal initiatives and to impact federal land management for positive outcomes.

#### **Status:**

The NMA will proactively engage state lands departments to better understand and anticipate the federal issues that the states believe will affect multiple-use land management.