National Mining Association

Lands Committee Priorities

Spring 2023

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MINING LAW REFORM

PRIORITY A – CONGRESS

Background:

Over the past three decades, legislation to amend the Mining Law has been introduced every Congress. The legislation generally is punitive in nature, containing gross retrospective royalties, taxes on the movement of materials, duplicative environmental standards and greater restrictions on land access.

- Interagency Working Group on Mining Regulations, Laws and Permitting

A White House convened an interagency working group (IWG) is also considering recommendations for congressional amendments to the Mining Law. In conjunction with a Feb. 22, 2022, White H6ouse event on "Securing a Made in America Supply Chain for Critical Minerals," DOI issued (1) a press release announcing the launch of the IWG on reforming hardrock mining laws, regulations and permitting policies in the United States; and (2) the "Biden-Harris Administration Fundamental Principles for Domestic Mining Reform." The IWG issued a request for information for public comment to inform their recommendations in March 2022. In August 2022, NMA submitted comments in response to the IWG request for information on federal hardrock mining laws, regulations, and permitting. While the comments do extensively address the specific questions raised by the IWG related to topics such as conversion to a leasing system, royalties, financial assurance and permitting, the first half of the comments is designed to demonstrate the urgent need for action to shore up our mineral supply chains. The comments urge government policies that promote domestic mineral production and processing. In particular, the comments highlight the need to address our biggest self-imposed policy bottleneck — our inefficient and prolonged permitting system.

- Legislation

In April 2022, ahead of the 150th anniversary of the General Mining Law, Senator Martin Heinrich (D-N.M.) and House Natural Resources Committee Chairman Raúl Grijalva (D-Ariz.) introduced bills to amend the General Mining Law in their respective chambers. Senator Heinrich bill carries over several concerning provisions included in past iterations 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. Former Chairman Grijalva reintroduced his Mining Law bill that includes 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.

- Litigation

In May 2022, the United States Court of Appeals for the Ninth Circuit (9th 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.* The 9th Circuit 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.

Status:

- IWG

In Nov. 2022, the NMA recently submitted supplemental comments to the Interagency Working Group's (IWG) request for information (RFI) on federal hardrock mining laws, regulations and permitting. The NMA's supplemental comments address several new questions raised in materials provided by Department of the Interior (DOI) contractors subsequent to the August 30 close of the comment period on the RFI. The NMA supplemental comments primarily focus on matters not addressed in our Aug. 30 RFI comment submission including possible elimination of notice-level exploration activities, the use of the Surface Mining Control and Reclamation Act as an analogue for hardrock mining and debarring operators from mining on federal lands. We also elaborated on our earlier comments related to financial assurance, best practices and standards, perpetual water treatment and components of a Good Samaritan program.
The release of the IWG recommendations is expected in early 2023.

- Legislation

Senator Heinrich and Representative Grijalva are likely to introduce legislation similar to the 2022 legislation around the May anniversary of the Mining Law.

- Litigation

In Feb. 2023, a court in Nevada applied the same line of reasoning from the Rosemont decision to claims on Bureau of Land Management (BLM) lands but remanded the permit back to the agency instead of invalidating it. Additionally, briefing will begin in 2023 in Earthworks' appeal of the Oct. 2020 U.S. District Court for the District of Columbia decision in *Earthworks vs. Department of the Interior* that reaffirmed important rights of miners to explore and operate on federal lands pursuant to the Mining Law. The litigation was stayed throughout 2022 as the DOI considered first an Earthworks' petition for rulemaking that directly relates to the two DOI regulations challenged in this case and then awaited the IWG

recommendations. The NMA, an intervenor in the litigation, successfully pushed the court to stop waiting for the IWG report and allow the case to move forward.

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

REGULATIONS GOVERNING HARDROCK MINING ON FEDERAL LANDS

PRIORITY A –FOREST SERVICE AND BLM

Background:

- Forest Service

On Sept. 13, 2018, the Forest Service published an Advance Notice of Proposed Rulemaking (ANPR) requesting comment on the need for revisions to its locatable minerals regulations under 30 CFR Part 228A (228A regs). Among the contemplated revisions is one that was recommended by the National Academy of Sciences nearly 30 years ago – a provision that would bring the agency's 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.

On October 15, 2018, NMA submitted comments on the Forest Service ANPR identifying potential revisions that could expedite permitting, including adoption of notice-level exploration activities similar to those utilized by BLM.

Right before the Biden inauguration, the Forest Service released on its website the prepublication version of revisions to its locatable minerals regulations under 30 CFR Part 228A (228A regs). The stated intent of the revisions is to "better govern operations under the mining laws" and "to improve the efficiency of Forest Service regulation . . . including the review and approvals for plans of operations." The fate of the proposal, including appearance in the Federal Register, is unclear given the change in administration.

- BLM

In Sept. 2021, Earthworks, several tribes and other conservation groups filed submitted a petition for rulemaking with DOI to urge the department to "bring hardrock mining regulations and policy into the 21st century." The petition recites a "parade of horribles" including the age of the Mining Law, perceived loopholes in

the Clean Water Act and Resource Conservation and Recovery Act, tailing dam failures, misleading toxic release inventory data, and abandoned legacy mine sites to justify specific changes to BLM's hardrock mining regulations. DOI wrapped consideration of the petition into the efforts of the IWG (see above entry on Mining Law for background on IWG efforts).

Status:

- Forest Service

According to the Fall 2022 Regulatory Agenda, The Forest Service is scheduled to propose revisions of its 228A locatable mineral regulations in Oct. 2023.

- BLM

The release of the IWG recommendations, which may include regulatory changes is expected in early 2023.

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 Act (FLPMA) have been abused in terms of need and scope, much like recent and controversial national monument designations. Wilderness 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 the Federal Land Policy and Management Act.

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. Specifically, NMA pushed back on the legality of the designation of Sagebrush Focal Areas (SFAs), which occurred after the expiration of the comment period for the draft

environmental impact statement, thereby preventing public input on the use of SFAs.

In 2019, BLM formally announced the cancellation of the withdrawal. The agency agreed with many of the arguments raised by NMA, noting 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. In conjunction with the cancellation, BLM terminated the associated NEPA process, meaning the draft environmental impact statement (EIS) for the withdrawal was not finalized. 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. The BLM issued a notice of reinitiation of this process in August 2021.

- Twin Metals Withdrawal

The Twin Metals mining project is located in Superior National Forest, roughly nine miles southeast of Ely and about five miles outside the Boundary Waters Canoe Area Wilderness. The project would be an underground mine primarily for copper and nickel, but also to collect 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. Trump reversed course, shelved the study and renew the leases. In Dec. 2019, Twin Metals submitted its plan of operations. The Biden administration reversed course again and in June 2022 proposed to withdrawal 225,504 acres in the SNF. NMA submitted comments in Aug. 2022 opposing the withdrawal.

Status:

- Sage Grouse Mineral Withdrawal

The BLM is currently reviewing comments received during the scoping process and will issue a new draft EIS shortly.

- Twin Metals Withdrawal

In Jan. 2023, the DOI finalized the withdrawal of over 200,000 acres of mineral rich land in the Superior National Forest in Minnesota. According to the U.S. Geological Survey, the Duluth Complex in this area contains one of the world’s largest undeveloped deposits of nickel, copper and platinum-group metals. The withdrawal is primarily aimed at stopping the Twin Metals project.

REVISED SAGE GROUSE PLANS

PRIORITY A – BLM AND FOREST SERVICE

Background:

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, varying levels of restriction on coal leasing and other leasable minerals, and most notably, the recommended withdrawal of approximately ten million acres of land from new mining claims in core sage grouse areas. The Fish and Wildlife Service's (FWS) decision not to 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 Oct. 2017, the Trump administration began reviewing the 2015 plans. In conjunction with the decision to reopen the sage grouse land use plans for potential amendment, BLM also cancelled the 10-million-acre sage grouse focal area (SFA) mineral withdrawal, finding it "was unreasonable in light of the data that showed mining affected less than .1 percent of sage-grouse-occupied range." In May 2018, BLM proposed its revisions to the 2015 plans and the Forest Service followed suit later that same year. NMA submitted comments to both agencies that highlighted the legal and procedural shortcomings of the sage grouse land use plans in which the FWS was able to trump the federal land management agencies and elevate conservation at the expense of other multiple uses.

On March 15, 2019, BLM issued the Records of Decision finalizing the Trump Administration's revised land use plans. Important changes that allow more development on certain federal lands included: removal of mandatory compensatory mitigation; abandonment of the "net conservation gain" standard; removal of SFAs which were previously designated to support the since-rescinded 10-million-acre withdrawal; 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 on July 31, 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 same court, however, issued a decision on Feb. 11, 2021, that vacated BLM's 2017 cancellation of the proposed withdrawal of 10 million acres identified as SFA in six western states from location and entry under the Mining Law. The decision does not immediately reinstitute the withdrawal but remands the matter to BLM for consideration of whether the withdrawal is needed for sage grouse conservation. The court further directs BLM to reinitiate the National Environmental Policy Act (NEPA) process to evaluate the environmental impacts of a withdrawal. If BLM re-proposes the withdrawal, NMA will resurrect our multi-prong campaign in opposition to the proposed withdrawal to highlight 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.

Status:

In August 2021, BLM issued a Federal Register notice announcing that it will reinitiate consideration of whether the 10 million acre mineral withdrawal to conserve priority greater sage-grouse habitat is necessary, beginning with preparation of a new EIS for public comment. Timing of the draft EIS and comment period is uncertain.

In Sept. 2021, DOI filed a status report notifying the U.S. District Court for the District of Idaho of the current status of the BLM and Forest Service evaluations of sage-grouse policies. The status report confirmed that the BLM is evaluating the plan amendments issued in 2019 that were preliminarily enjoined by the court, as well as the six supplemental Environmental Impact Statements (EIS) and Records of Decision (ROD) issued at the end of 2020 and the beginning of 2021, respectively. Subsequently, in Nov. 2021, BLM issued its Notice of Intent to prepare the EISs. Comments were due on Feb. 7, 2022. NMA's 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. The NMA's comments also highlighted some of the wide-ranging conservation activities that members are engaged in to conserve sage-grouse and its habitat, to show that mining and sage-grouse conservation can occur simultaneously. The BLM is expected to issue a new draft EIS initiating a new comment period in Summer 2023.

NEPA REFORM

PRIORITY A – CEQ AND OTHER AGENCIES

Background:

Spurred in part by the August 2017 issuance of Executive Order (EO) 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," several federal agencies began to

evaluate revisions to their NEPA processes. While the DOI and the Forest Service's efforts were critically important, the Council of Environmental Quality's (CEQ) efforts were paramount since CEQ regulations bind all other agencies. The Biden administration is already taking steps to reverse some of these reforms.

CEQ issued a proposed rule in proposed rule in Jan. 2020 that adopted many of NMA's recommendations 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.

The Biden administration is affirmatively pulling those reforms back. CEQ has begun 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 discussed how the CEQ's phase 1 proposal appears to be more a kneejerk rush to reversal than a thoughtful assessment of the 2020 changes and whether any of them merit retention. NMA urged CEQ to discontinue the announced two-step process and instead propose all changes to the 2020 rule in one rulemaking as part of a broader analysis of how to best effectuate the goals of NEPA while ensuring efficient processing of permits. The comments also detailed the mining industry's experience with protracted NEPA delays and escalating costs associated with NEPA compliance. Finally, the comments rebutted CEQ's rationale for reverting back to the pre-2020 regime. CEQ finalized its phase 1 rulemaking in April 2022.

Status:

CEQ: CEQ's phase 2 rulemaking is under review by the Office of Management and Budget (OMB) and is expected to be published in early 2023. Phase 2 will include broader changes such as the requirement to assess climate change in NEPA

documents. In early 2022, CEQ reached out to NMA to discuss the next phases of rulemaking, which gave us the opportunity to stress the importance of timely NEPA reviews and permitting decisions, especially with supply chain constraints for all the minerals needed for the administration's infrastructure goals. The NMA plans to request a meeting with CEQ and OMB to discuss the phase 2 rulemaking while it is undergoing interagency review.

TRIBAL CONSULTATIONS AND ENGAGEMENT

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

Background:

Beginning with the Jan. 2021 presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the Biden-Harris Administration has signaled renewed interest in the importance of tribal engagement. Deb Haaland's position as the first indigenous Secretary of Interior has also elevated tribal views, making it a priority on its own merits rather than just a subset of the broader environmental justice topic.

In Nov. 2021, the White House held a Tribal Nations Summit to discuss critical issues that affect Tribal communities and Indian Country. Outcomes of the Summitincluded:

- A Tribal Treaty Rights Memorandum of Understanding signed by the numerous federal departments and agencies that . affirms the agencies' commitment to protect tribal treaty rights, reserved rights and similar tribal rights to natural and cultural resources, and states the parties' intent to enhance interagency coordination and collaboration to protect treaty and reserved rights..
- 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.
- A 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.

The White House hosted another Tribal summit in Dec. 2022, which spurred a flurry of actions related to how federal agencies engage with Tribal Nations and Alaska Native Corporations. The breadth of these announcements, which include new consultation policies, further commitments on Tribal co-stewardship of federal lands, guidance on elevation of indigenous knowledge in federal decision-making, proposed revised water quality standards regulation that protect Tribal reserved rights and much more is described in a Nov. 30 White House fact sheet.

Status:

As part of the 2022 summit the president release a "Memorandum on Uniform Standards for Tribal Consultation" that imposes baseline standards for all federal agencies that conduct such consultations. Pursuant to the memo, steps in process must include designating an agency point of contact, determining whether consultation is appropriate, providing adequate notice and compiling a record of the consultation that explains how tribal input influenced or was incorporated into the agency action. Please note, the wording of the memo will likely predetermine the answer of whether consultation is appropriate since it encourages agencies to "still engage in Tribal consultation even if they determine that a policy will not have Tribal implications, and should consider doing so if they determine that a policy is of interest to a Tribe or Tribes."

In accordance with the presidential 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 and reflects recommendations that will be part of the forthcoming report from the IWG on Mining Laws, Regulations and Permitting.

TRIBAL RULEMAKING AND GUIDANCE

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

Background:

- NAGPRA

The Biden administration hired a new full-time investigator to enhance oversight and compliance with the Native American Graves Protection and Repatriation Act (NAGPRA) for the first time. This initiative also included consultation with 71 Tribal Nations on improvements to the NAGPRA regulations.

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

The National Park Service (NPS) first issued the Tribal Cultural Properties (TCP) Bulletin 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 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.

From 2011 to 2013, in response to ever-increasing requests for additional assistance on TCP identification and evaluation, NPS held listening sessions around the country to gather comments. NPS hosted webinars and participated in conferences and meetings with Federal and state agencies, Native Americans, Native Hawai'ians, Native Alaskans, and preservation organizations. Most comments received asked for clarification on just what is eligible as a TCP and just how the federal review process (Section 106 consultation) applies to TCPs.

From 2014 to 2017, NPS developed a revised draft that to include plain language and successful nominations as examples. In mid-2017, the update initiative was halted. The NPS is now relaunching that effort to revised the TCP Bulletin. The 2017 draft has been further revised to enhance plain language and include additional examples and images.

- Tribal Co-Stewardship of Public Lands and Waters

In Sept. 2022, the DOI released new guidance to improve federal stewardship of public lands, waters, and wildlife by strengthening the role of Tribal governments in federal land management. The guidance is intended to further the directives from Secretarial Order 3403 which outlines how DOI and the Department of Agriculture will strengthen Tribal co-stewardship efforts. New guidance from the BLM, the National Park Service (NPS), and the FWS outlines how each bureau will facilitate and support agreements with Tribes to collaborate in the co-stewardship of federal lands and waters. In the announcement, the DOI stated it is committed to ensuring that decisions relating to co-stewardship will continue to advance safeguards for traditional subsistence, cultural practices, trust interests, and treaty rights for Tribes.

Status:

- NAGPRA

The NAGPRA regulations were proposed at the end of 2022 and largely attempted to clarify the 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 to submit comments given the potential impacts on the mining industry. 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.

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

The NPS published an updated draft of the TCP Bulletin on Oct. 27,2022 and is accepting comments until April 30, 2023. Among other things, the draft TCP Bulletin expands on the definition of "traditional cultural place," and stresses 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.

- Tribal Co-Stewardship of Public Lands and Waters

DOI bureaus developed bureau-specific guidance as outlined below:

BLM: The BLM notes in its guidance that it has substantial leeway to design co-stewardship arrangements, and that the Office of the Solicitor will be consulted on a case-by-case basis to ensure that any potential co-stewardship complies with all applicable laws. The BLM states that it cannot cede to a Tribe any inherently Federal function or otherwise exceed BLM's legal authority. The guidance also notes that individual BLM offices will identify opportunities for co-stewardships within six months of issuance of the guidance.

NPS: The NPS guidance states that it will strive to engage in co-stewardship where Federal lands or waters, including wildlife and its habitat are located within or adjacent to an Indian or Alaska Native Tribe's lands, or an Indian or Alaska Native Tribe has subsistence or other rights, including treaty-reserved rights; or interests in Federal lands or waters, even when that Indian or Alaska Native Tribe's lands are not adjacent to those Federal Lands or Waters; or the Native Hawaiian Community has rights or interests in those Federal lands or waters. The NPS included non-federally recognized Tribes, a distinction from the BLM and the FWS guidance.

FWS: The FWS intends to use strategies to address the co-stewardship of species and their habitats that often extend beyond the reserved and trust lands and include habitat on Federal and private lands at ecosystem, landscape, and watershed scales. The FWS also will ensure that decisions made related to the Federal stewardship of lands, waters, and wildlife include the consideration of safeguarding interests of any affected Tribes, Alaska Native Corporations, Alaska Native Organizations, and the Native Hawaiian Community.

M OPINIONS

PRIORITY A – DOI SOLICITOR'S OFFICE

Background:

The DOI's Office of the Solicitor performs the legal work for the Department and the Solicitor serves are 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.

As an example, the M Opinion issued by former Solicitor Leshy in 1997 relating to millsite claims for hardrock mining operations on federal lands took the position that the Mining Law of 1872 and its implementing regulations allow for only one millsite of no more than 5 acres per mining claim. This novel legal opinion, at variance with the historic interpretation of the statute, would provide a framework to invalidate otherwise valid mining claims. To implement Leshy's Opinion, BLM published proposed regulations in 1999 that would not only codify his 1997 analysis, but would further restrict claimants by allowing only one 5-acre mill site for each twenty acres of claimed mining land. Recognizing the proposed rule's potentially devastating effects to the mining industry, Congress prohibited the BLM from using the 1997 Opinion to deny any patent applications or plans of operations submitted prior to May 1999.

Fortunately, Solicitor Leshy's approach was overturned by a 2003 M Opinion issued by former Deputy Solicitor Walston which removed the single millsite per claim requirement. Deputy Solicitor Walston's M Opinion determined, as BLM had recognized for decades, that the Mining Law does not categorically limit the number of mill sites that may be located in association with a mining claim. Instead, the statute limits mill sites to the number necessary to support the mining claim, with each mill site covering no more than five acres. BLM subsequently issued a rule in 2003 codifying the long-standing agency practice that Deputy Solicitor Walston upheld as the correct interpretation of the mill site provisions of the Mining Law.

The sweeping policy changes made by these M Opinions demonstrates the significant impact they can have on how DOI agencies carry out their statutory and regulatory duties and the scope and nature of regulations that often follow them.

Several M Opinions impacting the mining industry have been issued during the current administration. On June 30, 2017 then Acting Solicitor Jorjani issued an M Opinion (M-37046) withdrawing a previous M Opinion (M-37039) issued on December 21, 2016 which had determined that the Secretary and the BLM had the authority to require mitigation measures that result in a net conservation gain benefit. The Acting Solicitor's opinion determined that the broad, net conservation

gain standard ignored the fact specific circumstances under which mitigation measures are appropriately determined pursuant to the laws and regulations enforced by the Department.

Two additional Jorjani M Opinions (M-37049 and M-37050) followed on Dec. 22, 2017. The first withdrew a previous opinion (M-37036) in which the former solicitor concluded that the BLM had the discretion to either grant or deny hardrock mineral lease renewal applications filed by Twin Metals Minnesota. The 2017 M Opinion concluded that M-37036 improperly interpreted the Twin Metals' leases and that the original leases issued in 1966 provide Twin Metals with a nondiscretionary right to a third renewal, subject to the United States' right to impose reasonable terms and conditions as authorized by the 1966 leases. The second M Opinion (M-37050) clarified that the MBTA does not prohibit incidental take of listed species. The memorandum replaced M-37041 issued by Solicitor's Office under the previous administration which concluded that the MBTA's prohibition on take included incidental take.

After the unfavorable decision by the United States District Court for the District of Arizona in *Center for Biological Diversity et. al. v. U.S Fish and Wildlife Service et. al.*, NMA urged the Solicitor's Office to undertake an M Opinion to provide additional clarification regarding rights conveyed by the Mining Law to owners of unpatented claims and the ability to use surface resources to further the development of those claims. The Rosemont decision which overturned the Forest Service's approval of Rosemont Copper Mine's plan of operations conflicts with more than a century of legal precedent, including numerous U.S. Supreme Court decisions, related to the Mining Law.

Status:

On August 17, 2020, DOI issued a new solicitor's opinion, M-37057, "Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872." In its broadest terms, the opinion clarifies that reasonably incident mining uses on open lands are authorized by the Mining Law and its statutory right of free access under 30 U.S.C. § 22. While the opinion never cites the flawed 2018 Rosemont decision, the opinion will be useful in preventing future similar misconstruction of the rights provided under the Mining Law.

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.

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.

Status:

In Jan. 2022, the DOI announced 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.

LAND USE PLANNING: GENERAL

PRIORITY B – BLM

Background:

In response to the Congressional Review Act overruling of BLM's 2016 final Land Use Planning 2.0 rule, BLM at some time will revise its Land Use Planning Regulations. The Trump administration had indicated its intent to include provisions to ensure identification of, and consideration of access to, mineral resources upfront in the process.

Status:

While the Trump administration had targeted June 2021 for proposed BLM revisions to streamline and clarify land use planning processes and improve coordination among federal, state, and local government entities, the latest federal government Unified Agenda of Regulatory Actions, contain no mention of any BLM activity

related to land use planning. Anecdotally, however, NMA members have heard from some BLM state offices that activities have begun internally.

ENDANGERED SPECIES ACT REFORM

PRIORITY B – FWS

Background:

After the Trump administration took office, 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 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 are proposing 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 proposing 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 recissions.

- 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.

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.

Status:

- Endangered Species Act Regulations

The FWS finalized its recission of the definition of habitat and the process for excluding critical habitat earlier this year. Following these recissions, 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 9th 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 compensatory 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.

- Migratory Bird Protection Act Regulations

According to the Fall 2022 regulatory agenda, a proposed rule will be published in March 2023. 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.

- 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. According to the Fall 2022 regulatory agenda, a final rule will be published in September 2023.

STATE LAND 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:

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.