

July 2022

**COMMENTS TO INTERAGENCY WORKING GROUP (IWG) ON  
HARDROCK MINING REGULATORY REFORM**

*Re: Reform of Public Land Agency Regulations (U.S. BLM and Forest Service).*

Pursuant to the Federal Register Notice of March 31, 2022, 87 Fed. Reg. 18811-12, the undersigned sovereign Indian tribes and nations, indigenous organizations and conservation organizations, hereby respectfully submit the following overall proposals for reform of the regulations of the U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to strengthen and modernize BLM's regulations at 43 C.F.R. §§ 3800 *et seq.* and USFS regulations at 36 C.F.R. Part 228. Much of the following comments/proposals apply to both agencies' interpretations of the 1872 Mining Law and other federal public land and mining laws, while others apply more specifically to each agency's specific regulations and statutory authority.

These comments adopt and incorporate the Rulemaking Petition (and all attachments) submitted to the Interior Department by the coalition of Tribes, indigenous groups, and conservation groups, as noted in the March 31, 2022 Federal Register Notice. That Petition proposed specific regulatory and policy reform language which the IGA should consider as it proposes regulatory reform language. These comments also adopt and incorporate the comments submitted by various conservation groups to the Forest Service/Dept. of Agriculture's Notice of Advanced Proposed Rulemaking, FS-2018-0052, on 36 C.F.R. Part 228 Subpart A, Locatable Minerals, 83 Fed.Reg. 46451-46458 (Sept. 13, 2018)(submitted on or about October 15, 2018).

BLM's hardrock mining rules have not been significantly revised for over 20 years, the USFS's regulations not for nearly a half-century.<sup>1</sup> The Trump administration initiated, but did not complete, hardrock mining rules at both BLM and USFS. The Biden-Harris administration must move to update USFS and BLM mining policy with badly needed improvements to this regulatory framework to meet the policy commitments outlined in its mining reform principles. These rules must establish protections for environmental and cultural resources, require meaningful Tribal consultation, and seek to achieve the free, prior, and informed consent from impacted communities.

**I. Needed Reform of Federal Mining Policies/Regulations, Applicable to Both the Forest Service and BLM.**

*Both the BLM and Forest Service Have Broad Authority Over Mining on the Public Lands*

The BLM and USFS are often under the mistaken view that the agencies have limited authority to protect public resources when faced with exploration or mining proposals. That is wrong. As the

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<sup>1</sup> The Interior Department did briefly finalize new hardrock mining rules in the waning days of the Clinton Administration (65 Fed. Reg. 69,998 (Nov. 21, 2000)). Those rules were largely scrapped by the Bush Administration, with a few exceptions (e.g., rules on bonding and exploration notices) (66 Fed. Reg. 54,834 (Oct. 30, 2001)). Except for some minor revisions, the USFS' 36 CFR Part 228A hardrock mining rules have remained the same since they were initially promulgated in 1974.

Mining Law itself recognizes, all mining is subject to the federal and state regulation, “under regulations prescribed by law.” 30 U.S.C. §22.

As an overarching mandate for BLM’s management of public lands, FLPMA requires that BLM “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. §1732(b)(the “UUD standard”). “FLPMA’s requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law.” Ctr. for Biological Diversity v. Dept. of the Interior, 623 F.3d 633, 644 (9<sup>th</sup> Cir. 2010). This duty is “the heart of FLPMA [that] amends and supersedes the Mining Law.” Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 42 (D.D.C. 2003). BLM cannot under any circumstances approve a mining project that would cause UUD. 43 C.F.R. §3809.411(d)(3)(iii).

As part of preventing UUD, BLM must ensure that all operations comply with the Performance Standards found at §3809.420. See 43 C.F.R. §3809.5 (definition of UUD, specifying that failing to comply with the Performance Standards constitutes UUD). These Standards require BLM to ensure that all operations comply with all environmental protection standards, including standards for air and water. See 43 C.F.R. §3809.5 (definition of UUD includes “fail[ure] to comply with one or more of the following: . . . Federal and state laws related to environmental protection.”). In addition, the Department recently reiterated that “The obligation to prevent unnecessary or undue degradation also supports evaluation and imposition of mitigation” to protect public land resources. Solicitor Opinion M-37039, at 18-20 (Dec. 21, 2016)(“Subject: The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations through Mitigation”) (reinstated by M-37075 (April 15, 2022)).

For the Forest Service, the 1897 Organic Act directs the agency to “improve and protect” the national forests. 16 U.S.C. §475. It further requires the Secretary of Agriculture (through the USFS) to “make provisions for the protection [of the lands] against destruction by fire and depredations.” 16 U.S.C. §551. The USFS “will insure the objects of such [forest] reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.” Id. “[P]ersons entering the national forests for the purpose of exploiting mineral resources ‘must comply with the rules and regulations covering such national forests.’ 16 U.S.C. §478.” Clouser v. Espy, 42 F.3d 1522, 1529 (9<sup>th</sup> Cir. 1994).

Section 478 of the Act states: “Nothing in section . . . 551 of this title shall be construed as prohibiting . . . any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.” 16 U.S.C. § 478. But Section 478 does not limit USFS’s authority under Section 551 “to regulate their occupancy and use and to preserve the forests thereon from destruction.” Rather, that provision was added in the debate over the Act to ensure that the newly-created National Forests were not “withdrawn” or “reserved” from the filing of mining claims. Wilkinson and Anderson, “Land and Resource Planning in the National Forests,” 64 OREGON L. REV. 246-47 (1985)(citations omitted). “This provision to open the reserves to mining was later supplemented

to require miners to ‘comply with the rules and regulations covering such forest reservations.’ 30 Cong. Rec. 900 (1897).” *Id.* 50, n. 248. Thus, § 478 does not override the Act’s regulatory purpose “to preserve the forests from destruction.”

Thus, while the Organic Act “reserve[s] a role for prospecting and mining in national forests,” it fundamentally requires the “Secretary of Agriculture to protect national forests from ‘depredations’ and ‘destruction,’ 16 U.S.C. §551.” *Bohmker v. Oregon*, 903 F.3d 1029, 1038 (9th Cir. 2018). “In light of these provisions, ... holders of unpatented mining claims do not have an ‘unfettered’ right to explore and mine federal lands.” *Id.* “[F]ederal law does not show that Congress viewed mining as the highest and best use of federal land wherever minerals were found.” *Id.* at 1041. “Congress did not, and does not, intend mining to be pursued at all costs.” *Id.* at 1036. *See also Public Lands for the People v. U.S. Dep’t of Agric.*, 697 F.3d 1192, 1197 (9th Cir. 2012), quoting *Clouser*, (both affirming the Service’s broad authority to prohibit aspects of mining operations that fail to ensure environmental protection). Indeed, in *Clouser*, the Appeals Court had no problem affirming Forest Service restrictions on mining operations to the point of unprofitability. *Id.* at 1530.

Thus, the below regulatory reform proposals are well-within BLM and the Forest Service’s authority. Because much of BLM and USFS mining regulation and policy centers on the 1872 Mining Law and other laws that apply equally to both agencies, the following comments/issues apply to the needed reform of both agencies’ policies and regulations.

1. The Proper Scope of Federal Regulation of Mineral Operations Is Dependent on the Extent of Rights Under the Mining Laws

Current USFS and BLM policy assumes that all proposed locatable mineral operations are covered by statutory rights under the Mining Law, without the need for the operator/claimant to make any showing whatsoever that such statutory rights actually exist on the lands and claims proposed for operations. *See* M-37012, Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations (Nov. 14, 2005), M-37057, Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872 (Aug. 17, 2020), and Memo from Undersecretary Mark Rey, USDA (Sept. 22, 2003). This approach improperly limits BLM and USFS authority over proposed operations and is not consistent with the plain language of the Mining Law and federal public land law.

Under the Mining Law, use and occupation rights on mining claims are **not** automatic, but are based on whether the facts on the ground evidence the requisite discovery of a “valuable mineral deposit” on each claim: “All **valuable mineral deposits** in lands belonging to the United States ... shall be free and open to exploration and purchase, **and the lands in which they are found to occupation** and purchase.” 30 U.S.C. §22 (emph. added). “The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant.” *Belk v. Meagher*, 104 U.S. 279, 284 (1881). To qualify as a valuable mineral deposit, “it must be shown that the mineral can be extracted, removed and marketed at a profit.” *U.S. v. Coleman*, 390 U.S. 599, 602 (1968).

The Supreme Court has long held that the discovery of valuable minerals is indispensable to any enduring occupancy rights to a mining claim. “[I]t is clear that in order to create valid rights ... against the United States a discovery of mineral is essential.” Union Oil v. Smith, 249 U.S. 337, 346 (1919). “[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim.” Cole v. Ralph, 252 U.S. 286, 296 (1920). A mining claim covers roughly 20 acres. “‘Discovery’ of a mineral deposit, followed by the minimal procedures to formally ‘locate’ the deposit, gives an individual the right of exclusive possession of the land for mining purposes.” U.S. v. Locke, 471 U.S. 84, 86 (1985)(citing 30 U.S.C. §26). The occupancy “right” to a mining claim is thus only conferred on lands containing a valuable mineral deposit: “If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant ‘shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,’ 30 U.S.C. §26.” Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 575 (1987). “A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim.” Lara v. Secretary of the Interior, 820 F.2d 1535, 1537 (9th Cir. 1987). The “right to occupation and purchase of the lands” is limited to those lands “in which valuable mineral deposits are found.” Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964).

That was the recent holding of the Ninth Circuit Court of Appeals in Center for Biological Diversity v. U.S. Fish and Wildlife Service, --- F.4th ---, 2022 WL 1495007 (9th Cir, May 12, 2022). The Court of Appeals affirmed the District of Arizona’s decision in Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F.Supp.3d 738 (D. Ariz. 2019), which invalidated the Forest Service’s approval of a large open pit copper mine on mostly federal land, known as the “Rosemont Mine.”

The Appeals Court squarely rebuffed the government’s and mining industry’s argument that mining claimants have a statutory right to occupy federal lands, absent evidence that the lands covered by mining claims were found to contain the requisite discovery of a valuable mineral deposit. The court rejected BLM/USFS’s practice of never inquiring into the validity of any of the mining claims based on the claimant’s assumed rights on its mining claims covering ancillary facilities such as waste dumps, tailings, heap leaching, etc., away from the actual mine pit.

The court also rejected the argument that under Section 612 of the Multiple Use and Surface Resources Act, 30 U.S.C. §612, claimants had a right under the mining laws to dump waste rock on their mining claims because the dumping would be “reasonably incident” to mining the pit.

“In the absence of a discovery of a valuable mineral deposit, Section 22 gives a miner no right to occupy the claim beyond the temporary occupancy necessary for exploration.” Center for Biological Diversity, 2022 WL 1495007, at \*3 (emphasis added). “[V]alidity of a mining claim is a necessary prerequisite to post-exploration occupancy of a claim.” Id. at 11. “That is, the right of ‘occupation’ depends on valuable minerals having been ‘found’ on the land in question. See 30 U.S.C. §§ 23, 26. If no valuable minerals have been found on the land, Section 22 gives no right of occupation beyond the temporary occupation inherent in exploration.” Id. at 12.

In addition, the Ninth Circuit highlighted the fact that the Forest Service in the Rosemont case – just like BLM does in other cases – relied on the Interior Department’s Solicitor’s Opinions, issued in 2005 and 2020, to support the agency’s argument that it need not inquire into whether the waste

dump lands contained the discovery of a valuable mineral and thus in effect assume the claims were valid. Like it did with the rest of the government's arguments under the Mining Law, the Court did not defer to the agency's erroneous position, and indeed noted that the Interior Department "had taken a different position four years earlier [in 2001]." Center for Biological Diversity, 2022 WL 1495007, at \*10. Accordingly, "we give limited weight to the 2020 Opinion letter, because on the issue as to which the Government asks for deference, the Solicitor has taken inconsistent positions." *Id.*

The Ninth Circuit also rejected the argument that waste and tailings dumps are not "occupation" under the Mining Law, or somehow not "permanent." Indeed, the Court quoted the Department of Justice's brief (representing the Forest Service), which had argued that "after mining ends and reclamation is completed, Rosemont will no longer have the Service's authorization to occupy the surface of those lands." *Id.* at 13, quoting Federal brief.

"The Government is wrong on two counts. First, discovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration. As soon as exploration on a claim is finished, the right to continue to occupy that claim is contingent on the discovery of valuable minerals, whether or not the occupation will be permanent." *Id.* at 13. "Second, Rosemont's occupancy with its waste rock would, in effect, be permanent." *Id.* The Court could not have been more clear in rejecting the government's argument: "The argument that the proposed occupation would not be permanent does violence to the English language." *Id.*

These comments, and the Ninth Circuit's decision, track the proper regulatory approach that was outlined in the Secretary's and Solicitor's Memorandum M-37004 entitled Use of Mining Claims for Purposes Ancillary to Mineral Extraction (Jan. 18, 2001). The 2001 Memorandum correctly distinguished the agencies' authority over operations based on verified rights under the Mining law, with operations not based on any statutory rights:

First, the validity of the claim affects the discretion the Secretary has in considering whether to approve a proposed plan of operations. Second, it affects the kind of environmental analysis that must be carried out under NEPA. Third, on certain public lands, such as those withdrawn from the operation of the Mining Law, claim validity affects whether the Secretary has the authority to approve any mining activity at all.

When the Secretary considers a proposed plan of operations involving valid mining claims and valid mill sites, the Secretary must respect the rights that attach to these valid claims and mill sites while at the same time complying with the statutory mandate to "prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). ... When reviewing a proposed plan of operations involving mining claims or mill sites that are not valid (or when unclaimed public lands are involved), however, the Secretary has broader discretion, because there are no rights under the Mining Law that must be respected.

2001 Memorandum at 11. The federal court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 48 (D.D.C. 2003), relied on M-37004 with approval, holding that:

Before an operator perfects her claim, because there are no rights under the Mining Law

that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner's proposed plan of operations. Accordingly, the system may be properly described in the following manner:

When the Secretary considers a proposed plan of operations involving valid mining claims and valid mill sites, the Secretary must respect the rights that attach to these valid claims and mill sites while at the same time complying with the statutory mandate to “prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. § 1732(b) ... When reviewing a proposed plan of operations involving mining claims or mill sites that are not valid (or when unclaimed public lands are involved), however, the Secretary has broader discretion, because there are no rights under the Mining Law that must be respected.

Id. at 48 (quoting M-37004 at 11).

Federal courts have recognized the agencies’ broad authority to require proposed users of federal land, including mining claimants, to submit all information necessary for the agency to determine the operator’s rights as well as the proposed operation’s impacts to public land resources. “The BLM may require information beyond that submitted with an initial MPO [Mining Plan of Operations]. [I]nsofar as BLM has determined that it lacks adequate information on *any* relevant aspect of a plan of operations, BLM not only has the authority to require the filing of supplemental information, it has the obligation to do so.” Center for Biological Diversity v. Dept. of the Interior, 623 F.3d 633, 644 (9th Cir. 2010)(internal citations omitted).

The proposed language does not require that a full claim validity examination be conducted by BLM/USFS for every plan of operations. Rather, as described in the 2001 Ancillary Use Memorandum, BLM/USFS would review the information submitted by the operator in order to properly ascertain its regulatory authority and discretion:

Even though BLM does not routinely do validity determinations before decisions are made on proposed plans of operations, it is, for reasons explained above, important that the Secretary understand the amount of discretion that exists before making a decision whether to approve a proposed plan of operations. Therefore, at least a preliminary inquiry should be made regarding whether an operator’s proposed use of its mining claims raises legitimate questions about whether the claims are valid. This preliminary inquiry should be relatively straightforward, based on an analysis of the information provided by the operator in a proposed plan of operations. No detailed examination on the ground and no full-blown mineral report or formal validity determination is necessary. What is necessary is for BLM to ensure that the proponent of the plan of operations shows what kinds of facilities and operations will take place on what claims or mill sites.

Whether the proposed use of a mining claim calls its validity into question will necessarily turn on the facts.

M-37004 at 14.

As the District Court discussed at Rosemont, the agency needs to focus on the facts on the ground

in order to determine the scope of federal regulatory authority. Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F.Supp.3d 738 (D. Ariz. 2019).

The Forest Service argues that it is not required to conduct a validity determination before approving a mining plan of operations. However, a validity determination differs significantly from establishing a factual basis upon which the Forest Service can determine rights. A validity determination invokes a separate administrative procedure carried out by the BLM (which is within the Department of the Interior). **In contrast, the Forest Service** (which is within the Department of Agriculture) **merely needed a factual basis to support Rosemont’s assertion of rights**. Such a finding would not preclude another individual from bringing an adverse proceeding to determine mineral rights, or the Government from initiating a validity determination. As referenced above, the fact that Rosemont proposed to dump 1.9 billion tons of waste on its unpatented claims on 2,447 acres of the Coronado National Forest was a potent indication that Rosemont’s unpatented claims on the land in question were invalid (i.e., if Rosemont was voluntarily proposing to bury its unpatented claims under 1.9 billion tons of its own waste, there is a strong inference that there is no valuable mineral deposit lying below the waste site).

Id., at 761-62 (emphasis added). Under basic principles of administrative law, “Any decision made without first establishing the factual basis upon which the Forest Service could form an opinion on surface rights would entirely ignore an important aspect of the problem. *See State Farm*, 463 U.S. at 43. [Motor Vehicles Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)].” Center for Biological Diversity, at 757-58.

Lastly, the federal court’s recent decision in Earthworks v. U.S. Dept. of the Interior, 2020 WL6270751 (D.D.C. 2020), does not undermine or otherwise affect the sound legal rulings by the Ninth Circuit at Rosemont. In that case, the court upheld the Department’s decision not to require additional fees on mining operations for which claim validity had not yet been determined, saying that the practice was not “impermissible.” Id. \*12. In doing so, the court relied on the Department’s current practice of not conducting validity exams for every mining plan and the potential costs to the agency if that were the case. Id. The court did note, importantly, that the Department has the authority to review claim information and base its regulatory oversight on that determination. Id. \*11, quoting Mineral Policy Center, 292 F.Supp. 2d at 47-48. Any interpretation of Earthworks, however, that would support the agencies’ assumption of claim validity when approving a mining plan of operations, as detailed above, would violate the Mining Law. The Department’s policy contained in the 2005 and 2020 Opinions, and the regulation upheld in Earthworks – that BLM is not required to conduct a validity exam in every case – is not binding on future agency rulemakings. Nor does Earthworks hold, or even suggest or imply, that the information submittal requirements and BLM’s review of the scope of its regulatory authority noted in the 2001 Ancillary Use Memorandum and the Ninth Circuit at Rosemont would violate the rights of claimants under the Mining Law.

## 2. There Is No Right Under the Mining Laws to Conduct “Reasonably Incident” Operations

Related to its rulings rejecting the federal government’s arguments on the Mining Law, the Ninth Circuit also invalidated the argument that, under the Surface Resources Act of 1955, 30 U.S.C. § 612, mining claimants such as Rosemont had a right to use the mining claims for waste dumping because these uses were “reasonably incident” to mining of the minerals in the pit. The Court

summarized the government's position:

[T]he Service concluded in the ROD that Section 612 of the Multiple Use Act gives Rosemont the right to dump waste rock on its mining claims as a “use[ ] reasonably incident” to its mining operations, irrespective of any rights Rosemont may or may not have under the Mining Law. The Service concluded that if Rosemont has the right under Section 612 to occupy its mining claims with its waste rock as a “reasonably incident” use, the Service's authority to regulate or forbid such occupancy would be only the limited authority set forth in Part 228A regulations.

Center for Biological Diversity, 2022 WL 1495007, at \*10. The Court noted the agency's shifting position on this: “In the district court, the Government defended the Service's rationale, arguing that Section 612 authorizes Rosemont to dump its waste rock on its mining claims as a “use[ ] reasonably incident” to Rosemont's mining operations. However, the Government has now abandoned its argument that the Service properly relied on Section 612.” Id.

The Court then held that “neither Section 612 nor the Mining Law provides Rosemont with the right to dump its waste rock on thousands of acres of National Forest land on which it has no valid mining claims.” Id. at 11. The Court then concluded that “Section 612 of the Multiple Use Act does not authorize uses of mining claims beyond those authorized by the Mining Law.” Id. The Court agreed with the government that “Section 612 ‘did not change the lands to which the Mining Law applied or specify where mining operations may or may not occur.’” Id. Thus, because the agency's ROD was based on the position that Rosemont had a right to dump its waste because that was “reasonably incident” to mining, the Court held “that the Service improperly relied on Section 612 to support its decision.” Id.

The Ninth Circuit's ruling regarding Section 612, rejecting the federal government's legal position that claimant's had a statutory right to conduct “reasonably incident” uses on their claims, also applies to both agencies. Indeed, the Forest Service relied on the Interior Department's Solicitor's Opinions on “reasonably incident uses” the same exact way BLM does elsewhere. See above discussion on Center for Biological Diversity, 2022 WL 1495007, at \*10, where the Ninth Circuit gave “limited weight to the 2020 Opinion letter, because on the issue as to which the Government asks for deference, the Solicitor has taken inconsistent positions.” Further, both BLM and Forest Service regulations are based on the same language regarding “operations authorized by the mining laws.” Compare 43 C.F.R. Part 3809 (BLM) with 36 C.F.R. Part 228A (USFS).

Importantly, that the Rosemont case dealt with the Forest Service's approval of waste dumping, rather than BLM's, does not diminish its applicability to both agencies. The fact that BLM's authority over mining centers on the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§1701 et seq., while the USFS's derives from other laws such as the Forest Service Organic Act of 1897, 16 U.S.C. §§ 478, 482, 551, does not change the fact that both the District Court's decision, and now the Ninth Circuit's decision, were based on the Mining Law and Section 612 of the Multiple Use/Surface Resources Act. Indeed, except for a general introductory paragraph describing the Organic Act, the Ninth Circuit's ruling contains no ruling on the Organic Act. Center for Biological Diversity, 2022 WL 1495007, at \*4. It is entirely focused on the Mining Law and Section 612. The fact that the permit review and environmental standards under FLPMA (such as the prohibition against “unnecessary or undue degradation,” 43 U.S.C. § 1732(b)) differs from the Forest Service's duty under the Organic Act to protect against “depredations” to public

land, does not change this fact or make inapplicable the Ninth Circuit's rulings on the Mining Law and Section 612.

In addition, a claimant may not legitimately assert rights under the Mining Law when its claims contain mere "common varieties" of rock which are not locatable under the Mining Law. *See* Surface Resources and Multiple Use Act of 1955, 30 U.S.C. § 611. The "Common Varieties Act," prohibits the filing of mining claims that contain only common minerals: "No deposit of common varieties of sand, stone, gravel ... shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." 30 U.S.C. §611. "[T]his Act ... was intended to remove common types of sand, gravel, and stone from the coverage of the mining law." Coleman, 390 U.S. at 604.

For example, for BLM lands, FLPMA gives DOI/BLM full discretion and authority over activities proposed on public lands, including activities that under the Mining to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). Where locatable mineral activities are concerned, however, Congress has limited BLM's authority to "preventing unnecessary or undue degradation" of public resources (UUD), but **only if** the application of BLM's broad discretion/authority "impair[s] the rights of any locators or claims under that Act [the 1872 Mining Law]." 43 U.S.C. § 1732(b). This puts the burden on the locator/operator to show that it has "rights under the Mining Law" if it wants to narrow BLM's authority just to preventing UUD. Otherwise, BLM has broad discretion and may deny proposed activities under its broad responsibility under FLPMA to protect public lands.

*The IWG should thus recommend rescission of the 2005 and 2020 Memorandums and reinstatement of the 2001 Memorandum, in compliance with the Ninth Circuit's legal holdings. Specific regulatory language proposals, regarding the BLM's 43 C.F.R. Part 3809 regulations and the USFS' 36 C.F.R. Part 228 regulations, are contained in the September 2021 Rulemaking Petition (DOI) and 2018 rulemaking responses to USFS, and track the above discussion, as now supported by the Ninth Circuit's Rosemont decision.*

### 3. The Agencies Are Not Restricted by the Surface Resources Act's "Material Interference" Language

Relatedly, the agencies improperly interpret Section 612 to severely limit their ability to impose mitigation, project denial, and other conditions if such actions would "materially interfere" with a company's financial consideration, relying the Surface Resources Act/Multiple-Use Mining Act of 1955, 30 U.S.C. § 612, enacted to restrict the unauthorized use of mining claims, to argue that it cannot "materially interfere" with any activity "reasonably related to mineral exploration, extraction, or processing.

That law, however, does not stand for the proposition that miners have a "right" to permanently use/occupy mining claims divorced from the fundamental prerequisite of the discovery of valuable mineral deposits. "One of the purposes of the Act was to eliminate some of the abuses that had occurred under the mining laws. . . . But Congress did not intend to change the basic principles of the mining laws." Converse v. Udall, 399 F.2d 616, 617 (9th Cir. 1968). The 1955 Act had two

purposes: (1) eliminating unauthorized use of mining claims by allowing only “prospecting, mining or processing operations and uses reasonably incident thereto,” and (2) allowing USFS/BLM to permit non-mining uses on mining claims, by eliminating the mining claimant’s exclusive right to use/possess claimed lands. U.S. v. Curtis-Nevada Mines, Inc. 611 F.2d 1277, 1281-1283 (9th Cir. 1980)(discussing congressional history and intent of Act). Thus, the Act was a restriction on mining, not an expansion of mining rights that somehow eliminated the requirement that rights to permanent use/occupancy of mining claims be based on the discovery of valuable minerals.

The “material interference” language relied on by the agencies comes from the provision removing the claimant’s exclusive possession by allowing non-mining uses of these lands. 30 U.S.C. § 612(b). However, contrary to the agencies’ view, this provision does not limit the agency’s authority to regulate mining operations. Rather, this limitation applies to the agency’s direct use of the lands covered by mining claims, or to the issuance of “permits and licenses” for other uses of mining claims. “[A]ny use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.” Id. Nothing in this law limits USFS authority to regulate mining operations to just those measures that do not “materially interfere” with mining.

The Ninth Circuit has recognized that this “no material interference” provision applies not to USFS’s regulation of mining to protect public resources, but to the other uses allowed by USFS on claims. “[T]he other uses by the general public cannot materially interfere with the prospecting and mining operation.” Curtis-Nevada, 611 F.2d at 1285. The recent Rosemont decision held the same thing. Center for Biological Diversity, 2022 WL 1495007, \*11 (“Section 612(b) limits the rights of a mining claim owner by permitting third parties to use the surface of the land, **so long as those uses** do not ‘endanger or materially interfere ... with mining or processing operations or uses reasonably incident thereto.’ Id. § 612(b).”)(emphasis added).

The Ninth Circuit has confirmed that agency regulation of mining to protect public resources is not strictly limited by economic considerations. In Clouser, the court affirmed the ability of the agency to restrict mining even to the point that the project would no longer be economically viable. “Virtually all forms of Forest Service regulation of mining claims—for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity.” 42 F.3d at 1530 (limiting claimant to pack-mule access). Under the Mining Law, “If the costs of compliance [with environmental protections] render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected.” Great Basin Mine Watch, 1998WL1060687, \*8.

#### 4. The Agencies Should Properly Apply the Millsite Site Provision of the Mining Law

The Interior Department should issue a new Solicitor’s Opinion that corrects the current erroneous interpretation of the Millsite provision of the Mining Law, 30 U.S.C. §42, that would align the regulations with the congressional intent behind mill site claims. Millsite claims are those made for non-mineral land not contiguous to a mineral deposit for mining-related purposes, like processing ore. This revision would clarify that 1 mining claim earns the claimholder exactly 5 acres for a

millsite. Thus, millsite claims in excess of 5 acres per mining claim would be deemed invalid. This revision would remove confusion and confirm that BLM must exercise their authority to manage milling, processing, waste, or other mine-related activities to protect non-mineral resources such as Indigenous cultural and religious uses, wildlife, hunting, fishing, water quality, historic and cultural sites, and recreation.

The Mining Law's millsite provision states:

(a) Vein or lode and mill site owners eligible

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith,...; but no location made on and after May 10, 1872, of such nonadjacent land shall exceed five acres....

30 U.S.C. § 42 (emphasis added). A similar provision applies to millsite use associated with placer mining claims. § 42(b). The proposed millsite language corrects the errors in the current millsite provision, which does not accurately reflect the language of, and congressional intent for, § 42 of the Mining Law, 30 U.S.C. § 42. Instead, the current language improperly grants mine operators rights to use non-mineral public lands whenever the operator deems occupation of those lands beneficial to the mining operations located on mineral lands elsewhere. The 1872 Mining Law, however, does not authorize such rights on non-mineral lands, which have led to widespread harm of public resources and lands.

The Department of the Interior is the primary federal agency charged with interpreting the provisions of 1872 Mining Law. Beginning in 1993, DOI began a comprehensive review of patent applications under the Mining Law. As a result of this review, the Department's Solicitor, with concurrence by Interior Secretary Babbitt, issued DOI's interpretation of the millsite provision of the Mining Law, 30 U.S.C. § 42. Memorandum M-36988, "Limitations on Patenting Millsites Under the Mining Law of 1872," November 12, 1997 ("1997 Millsite Opinion"). The 1997 Opinion stated in relevant part:

The Mining Law of 1872 provides that only one millsite of no more than five acres may be patented in association with each mining claim. ... In addition, the Bureau [BLM] should not approve plans of operation which rely on a greater number of millsites than the number of associated [mining] claims being developed unless the use of additional lands is obtained through other means.

1997 Opinion, at 2. DOI's interpretation of § 42 has important ramifications across the West because facilities such as large waste rock and tailings dumps, and toxic reagent chemical processing "heaps," often cover thousands of acres beyond the open pit mine itself, especially at larger mine sites typical of those developed in more recent history.

Under the proposed interpretation, which tracks the 1997 Opinion, millsite claims in excess of 5 acres per mining claim would be deemed invalid and in excess of the strict acreage limits in § 42. The proposed interpretation removes the confusion inherent in the existing language and confirms that federal land management agencies must exercise the full scope of their authority

to manage mine-related activity and protect non-mineral public land resources such as Native American cultural and religious uses, wildlife, hunting and fishing uses, water quality, historic and cultural sites, and recreation. As shown in the Rulemaking Petition, the current interpretation of § 42 results in significant, irreparable, and permanent damage to these invaluable public resources and unnecessarily hamstring federal agencies from exercising their full management authority as expressed in their organic statutes.

A comprehensive historical, legal, and policy analysis supporting the return to the correct interpretation of Section 42, along with specific regulatory language (in DOI's regulations), is contained in Attachment 4 to the Rulemaking Petition.

5. Activities Not Authorized by the Mining Laws Are Governed by FLPMA Title V and the BLM and USFS Special Use Permitting Regulations

Because activities on federal land that are not covered by valid claims are not “authorized by the mining laws,” they should be regulated as special uses under BLM’s regulations at 43 C.F.R. Part 2900/2920 and USFS regulations at 36 C.F.R. Part 251. The Interior Department’s special use FLPMA regulations apply whenever activities are not “authorized” by other laws. “Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part.” 43 CFR §2920.1-1. The same is true for the Forest Service. As the Arizona federal court recently held: “the regulations state that mining activities on Forest Service land are permitted only as specifically authorized by the Mining Law of 1872. As Rosemont has no rights under the Mining Law as to the land at issue, it follows that the regulations certainly do not create independent rights that do not exist under the Mining Law.” Center for Biological Diversity, 409 F.Supp.3d at 749.

As the Ninth Circuit held in Rosemont, operations are not “authorized by the mining laws” absent evidence that the claims meet the prerequisites for statutory rights under the Mining Law, and thus are either regulated as a matter of discretion or are properly considered special uses/rights-of-way under FLPMA Title V and the BLM and USFS special use regulations.

The Ninth Circuit remanded the case back to the Forest Service so the agency can properly regulate the mine and decide whether to authorize the operations proposed on lands without evidence of claim validity, now based on the fact that the company’s ancillary uses/waste dump are not “authorized by the mining laws.” Center for Biological Diversity, 2022 WL 1495007 at \*16. Thus, whether these activities are regulated under the Part 228A regulations, or the special use Part 251 regulations, will be determined on remand. Either way, however, approval of these activities is a matter of discretion, as they are not covered by any rights under the Mining Law, or by any limits on the agency’s discretion.

This mirrors the D.C. District Court’s decision in Mineral Policy Center v. Norton, 292 F.Supp.2d 30 (D.D.C. 2003), where the court held that, unless the lands meet the prerequisites of the Mining Law (that use/occupancy rights apply only to mining claims containing valuable mineral deposits), all post-exploration activities are subject to all FLPMA requirements for the proposed use/occupancy of the lands: “if there is no valid claim and the claimant is doing more than engaging in initial exploration activities on lands open to location, the claimant’s activity is not explicitly

protected by the Mining Law or FLPMA.” 292 F.Supp.2d at 50.

Requiring waste dumps, pipelines, electrical facilities and transmission lines, and other infrastructure to obtain the necessary FLPMA Title V approvals also fulfills BLM’s overall public land protection and multiple use mandates. Under FLPMA Title V, Section 504, the agency may grant a Right-of-Way (ROW) as a matter of discretion. 43 U.S.C. §§ 1761-1771. A right-of-way that “may have significant impact on the environment” requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. *Id.* § 1764(d). A Title V special use permit/ROW “shall contain terms and conditions which will . . . (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* § 1765(a).

The Interior Department has ruled that pipelines and associated infrastructure, including those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. “[A] right-of-way must be obtained prior to transportation of water across Federal lands for mining.” Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) citing Desert Survivors, 96 IBLA 193 (1987). *See also* Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998) (“construction of a road, was subject not only to authorization under 43 Subpart 3809, but also to issuance of a right-of-way under 43 C.F.R. Part 2800.”); Wayne D. Klump, 130 IBLA 98, 100 (1995) (“Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations].”).

The Interior Board of Land Appeals has expressly rejected the argument that rights under the mining laws apply to pipelines and roads associated with water delivery:

Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). *As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration.* Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).

*BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited.*

The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the

conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. *There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.*

Desert Survivors, 96 IBLA 193, 196 (1987) (emphasis added). The same analysis applies to water, tailings, and power either delivered to, or conveyed from, the project sites. The leading treatise on federal natural resources law confirms this rule: “Rights-of-way must be explicitly applied for and granted; approvals of mining plans or other operational plans do not implicitly confer a right-of-way.” Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21.

Lastly, for operations on public lands not authorized by valid rights under the mining laws, including but not limited to, those operations obtaining any approvals, including a special use permit or right-of-way, should, like other extractive users of public lands, pay fair market value for the use of public lands pursuant to the Federal Land Policy and Management Act, (FLPMA), 43 U.S.C. 1701 et seq.

6. Both Agencies Should Eliminate the Allowance of “Notice Level” Operations to Escape Public Review and Consultation with Tribes

Both the BLM and USFS allow smaller-scale operations to avoid any public review under NEPA, consultation with Tribes under the National Historic Preservation Act (NHPA), and Executive Orders mandating government-to- government consultations. Notice-level operations do result in significant damage to public and Tribal resources. Thus, applicants for all mining-related land uses, regardless of surface disturbance acreage, should submit either a plan of operations or special use permits/rights- of-way applications.

Notice-of-Intent (NOI) level operations should no longer be permitted. Such operations set forth an arbitrary acreage cutoff for public review, even though impacts can be extensive depending on the affected resources (as discussed herein). Because the current regulations allow notice level operation to bypass public review under the National Environmental Policy Act (“NEPA”), consultation with Tribes and Nations under the National Historic Preservation Act (“NHPA”) and Executive Orders mandating government-to-government consultations, even when they may significantly affect resources, BLM should eliminate this level of operations. As shown below, notice level operations may and indeed do result in significant damage to public and Tribal resources. As such, applicants for mineral-related uses of public lands should submit either a plan of operations or special use permits/rights-of-way applications under FLPMA.

BLM regulations allow operations under an NOI for “exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed.” 43 C.F.R. §3809.21(a). Forest Service regulations are broader, requiring a plan of operations instead of a NOI only “If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources.” 36 C.F.R. §228.4(a)(4).

A glaring example of how problematic notice level operations are exploration projects that have occurred in the Big Sandy River Valley in Arizona. Despite these lands being home to sacred

places, including hot springs, ceremony sites, and ancestral burials for the Hualapai, exploration operations moved forward without any tribal outreach or consultation.

The fact that these operations were happening was a surprise to the affected tribe and only brought to light when a Hualapai man stumbled upon the activity four years ago. As part of these operations, within close proximity to Hualapai land and sacred springs now called Cofer Hot Springs, the company bulldozed a network of roads and drilled nearly 50 test holes more than 300 feet deep on sacred lands. Now, the company is proposing to expand its exploration operations, surrounding the sacred hot springs on three sides. The lack of consultation and any public process for notice level operations has placed these sacred lands and religious practices of the Hualapai at risk and is entirely incompatible with NHPA and Executive Orders that are to ensure legitimate and substantive consultations between governments.

The lack of public and Tribal process is compounded by the short 15-day timeline that notice level operations set for BLM and USFS review and the assumption that after 15-days have passed, an operator can move forward with activities regardless of whether it has heard from the agency or not.

Because the agencies do not manage lands solely for the use of hardrock mining, this fails to ensure that other resource values and needs are considered and protected from potential harm or impacts that notice level activities could cause. For example, recently in Nevada, a company moved forward with NOI exploration activities in sensitive habitat for a highly endemic species, Tiehm's buckwheat, for which endangered species status is warranted. 86 Fed. Reg. 29975 (June 4, 2021). Even though this species was recognized by BLM at the time of the exploration activities as a BLM sensitive species, BLM failed to ensure that these activities would not cause harm to the species and its habitat. As stated in the U.S. Fish and Wildlife Service's recent 12-month finding for Tiehm's buckwheat: "Mineral exploration has already impacted Tiehm's buckwheat habitat by contributing to the spread of saltlover (*Halogeton glomeratus*), a nonnative invasive plant species, within all subpopulations of the species. Mineral exploration activities can result in disturbance to natural soil conditions that support Tiehm's buckwheat and encourage spread of saltlover, which alters the substrate by making the soil more saline and less suitable as habitat for Tiehm's buckwheat." 86 Fed. Reg. 29976-77.

Despite these grave impacts, because these exploration activities were "notice level operations" there was never any public notice or opportunity to comment, which would have helped identify the need for measures to protect the species and its habitat from negative impacts, but also would have provided BLM more time to review the proposed operations and to require the operator to comply with specific measures that could have potentially reduced impact to the species and its habitat. This unfortunate situation exemplifies how insufficient the current regulations are in listing only a few specific areas where a plan of operations is always required. This list is not and cannot be sufficiently comprehensive to cover sensitive areas and resources from harm. Accordingly, notice level operations should be eliminated, and in doing so, the present regulations delineation of types of areas requiring a plan of operations is no longer necessary. *See* 43 C.F.R. § 3809.11 (current regulations).

Additional problems with notice level activities are that multiple activities or operations get

segmented so they stay within the arbitrary notice acreage threshold and it is not unusual that these activities go right up to the acreage disturbance threshold. This happens despite current regulations stating that an operator “must not segment a project area by filing a series of notice for the purposes of avoiding filing a plan of operations.” 43 C.F.R. § 3809.21. Because notice level activities do not go through public notice and comment, it cannot be known for certain how often this occurs, and it is nearly impossible, if not impossible, to timely correct improper segmentation. When the public becomes aware of such activities on the ground it is often too late to do anything as the activities are already being undertaken, or are completed.

There is no legal reason why USFS and BLM cannot and should not require the submittal of a Plan of Operations (“PoO”) for all operations above casual use. Adopting PoOs for all operations above casual use is consistent with protecting public land resources and is consistent with the agencies’ approach to other extractive uses, such as oil and gas. For example, USFS requires holders of oil and gas leases to submit a Surface Use Plan of Operations (“SUPO”) for all applications for permits to drill (“APD”) on the lease – regardless the size or level of impact. “No permit to drill on a Federal oil and gas lease for National Forest System lands may be granted without analysis and approval of a surface use plan of operations covering proposed surface disturbing activities.” 36 C.F.R. § 228.106. Thus, the fact that a mining claim may have an arguable right to explore for minerals under the Mining Law does not mean that the claimant should be excused from submitting a proposed PoO for USFS review and approval. Holders of a valid oil and gas lease also have certain property rights in the leasehold as well, yet have long been required to submit a SUPO.

In short, eliminating notice level operations is necessary to uphold government-to-government consultation and transparent decision-making processes, to halt segmentation of activities so as to evade transparent review and approval, and to ensure that BLM’s and USFS’s review and approval of all hardrock mining activities do not run afoul of the agencies’ public land management and protection responsibilities.

#### 7. Expand Public Review Opportunities for Mining-Related Proposals

Much of the current regulatory system for the agencies consideration of mineral-related is done without adequate public review opportunities. As noted above, an operator’s and the agencies’ ability to escape public and Tribal review under the NOI system should be eliminated. Regarding PoOs that will be submitted, upon receipt of a PoO, the agencies should immediately post the PoO and all supporting information online for public review. Any claims by the applicant that portions of the PoO contain confidential business information should be carefully scrutinized, with the overall goal of full public review. Receipt of the PoO should begin the agency and public review process, including scoping under NEPA, consultation with Indian Tribes under the National Historic Preservation Act (“NHPA”) and related federal Executive Orders and requirements, consultation and compliance with the Endangered Species Act, etc.

Another problem is bonding, where the public is currently shut out of the discussion of the adequacy of the proposed bonds until the decision to approve the project has already been made. The agencies should require the submittal of the Financial Guarantee/Financial Assurance/Bond mechanism/instrument for any application seeking to use federal lands and this should be

required to be submitted with the applicant's initial application (i.e. PoO), and re-submitted for any alternative that might be proposed or reviewed by the applicant or the agencies during the NEPA process. Similarly, re-submission should be triggered when a PoO is substantially modified as well. The FG/FA/Bond amount and mechanism must also contain sufficient detail for the USFS and the public to judge its adequacy.

#### 8. Environmental and Cultural Resource Protection Standards Must Be Strengthened

Although BLM and USFS authority over mining is governed by different statutes (BLM, FLPMA; USFS, Organic Act, NFMA), there are overarching elements of improved environmental and cultural resource protections that apply to both agencies. Additional discussion is provided below for each agency (as well as in the Rulemaking Petition to DOI/BLM). At a minimum, the following requirements and standards should apply to both USFS and BLM.

##### *(1) International Best Practices Include Ensuring Free, Prior and Informed Consent of Indigenous Peoples*

The United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") on December 16, 2010, and UNDRIP Article 32 mandates that nation states consult with Tribal Nations "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Securing the free, prior and informed consent of Indigenous Peoples early in the process should be a requirement for project or agency decisions that would impact their resources, and permitting agencies must adopt provisions reflecting this principle. In 2013, the Advisory Council on Historic Preservation ("ACHP") developed a plan to support UNDRIP.<sup>1</sup> BLM and USFS should also incorporate the principles of UNDRIP early on in the scoping process. FPIC also should apply to any re-mining of waste materials or other projects or federal policies meant to support a circular economy. The transition to clean energy sources must not come at the expense of Indigenous peoples, their resources, or their culture.

Additional requirements are necessary to ensure policies, rules and permitting decisions fully consider and address the concerns of Tribal Nations. At a minimum, these requirements should address -- consistently, across the agencies -- what meaningful and robust consultation means, what actions require consultation, when consultation should occur, and who should be involved in consultation.

##### *(2) Tribes and local communities must be engaged early in the process*

For meaningful consultation to occur, federal agencies must have a thorough understanding of the inherent rights of Indigenous Peoples set forth in the UNDRIP, treaties, federal statutes and case law. Policies and procedures related to consultation should make clear that the primary goal of consultation is to achieve consensus or consent, so that agencies will be required to undertake a good faith effort to reach common agreement with the Tribal Nation on how to proceed.

The agencies should develop clear processes for documenting the consultation, ensuring protection of culturally sensitive information, complying with Tribal laws or protocols governing consultation, and implementing a certification process at the completion of consultation for both parties to agree that meaningful consultation occurred. In the decisionmaking process, an agency must document how tribal input was addressed and incorporated. If an agency is unable to fully address Tribal concerns, it should clearly explain its reasoning.

The timing of consultation is also integral to ensuring it is meaningful and robust. Meaningful and robust consultation is a dialogue that requires the two-way exchange of information, including federal agencies sharing internal reports, analysis, deliberations and pre-decisional documents with the Tribal Nation. Additionally, every agency within the DOI must be aware of its responsibility to meaningfully engage with Tribal Nations in their decision-making and there must be consistency among agencies in the process. The entire process must be fully transparent and consultation meetings should include federal decision-makers who actively participate.

Consultations should occur throughout the evolution of the project, entailing constant and continuous communications between the parties. Agencies should ensure that all information, including the potential impact of the decision, is provided to the Tribal Nation and is presented in a manner and form that is understandable to our communities and is culturally appropriate. DOI should work with Tribal Nations to customize consultations and communications that respect the sovereign status of each Tribal Nation and enhance Federal-Tribal communication. If necessary, information should also be presented orally and in our language.

Indigenous communities have a vast amount of cultural, historical, and geographical knowledge about their ancestral territory and practices, including sacred sites, which, if properly valued and appropriately protected from disclosure, can help ensure that decisions avoid negative impacts and reduce the risk of subsequent disagreement. Trust is essential and trust is built on relationships—every effort should be made to build relationships on an ongoing basis even before a project or decision is contemplated. This ongoing consultation activity would allow local agency decisionmakers to know in advance when their decisions will impact Tribal interests. Tribes must be provided with adequate funding for capacity building and to ensure full and effective participation throughout the process. Tribes should be remunerated for costs associated with consultations, such as providing ready access to technical expertise, attending consultations, conducting studies, and producing reports. The process must be free from intimidation, coercion, manipulation or undue influence.

Agency headquarters must also establish mechanisms or processes to ensure that regional and district offices carry out these edicts. Commitments from headquarters about consultation policies and processes must be carried out on the ground with consistency and transparency.

*(3) Native American Treaties. Operations cannot adversely affect rights guaranteed by treaties between the United States and Native American Tribes or Nations, including rights to resources on public land such as rights to fish, hunt, gather or otherwise use public land.*

The agencies' duties to honor treaties supersedes any statutory duties or claimants' rights under the Mining Law. The U.S. Supreme Court, in its seminal 1905 decision in United States v. Winans, 198 U.S. 371 (1905), and its 2018 affirmance in Washington v. United States, 138 S. Ct.

1832 (2018), has confirmed that rights reserved under treaties (such as fishing rights) include meaningful protections against interference, whether resulting from fishwheels that interfere with the ability of treaty fishermen to catch fish or culverts that hinder fish passage and thereby diminish the number of fish available for harvest.

In affirming the treaty fishing rights under the Stevens treaties of the 1850s, the Ninth Circuit recently stated:

The United States may abrogate treaties with Indian tribes, just as it may abrogate treaties with fully sovereign nations. However, it may abrogate a treaty with an Indian tribe only by an Act of Congress that “clearly express[es an] intent to do so.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Congress has not abrogated the Stevens Treaties. So long as this is so, the Tribes’ rights under the fishing clause remain valid and enforceable. The United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes’ rights, but the rights belong to the Tribes.

The United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights. See, e.g., *Cramer v. United States*, 261 U.S. 219, 234, 43 S.Ct. 342, 67 L.Ed. 622 (1923) (where Indians had treaty rights to land, leasing of the land to a non-Indian defendant “by agents of the government was ... unauthorized and could not bind the government; much less could it deprive the Indians of their rights”); *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (“[L]aches or estoppel is not available to defeat Indian treaty rights.”) (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983)); and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (“No defense of laches or estoppel is available to the defendants here for the Government[,] as trustee for the Indian Tribe, is not subject to those defenses.”). The same is true for waiver. Because the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them.

*United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) (emphasis added), affirmed *Washington v. United States*, 138 S. Ct. 1832 (2018). Although that case focused on the actions of the State of Washington in violation of treaty rights, the court further confirmed that treaty rights are binding upon the United States:

[T]he United States is bound by the Treaties. Indian treaty rights were “intended to be continuing against the United States ... as well as against the state[.]” *Winans*, 198 U.S. at 381–82, 25 S.Ct. 662. Our holding that Washington has violated the Treaties in building and maintaining its barrier culverts necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts.

*United States v. Washington*, 853 F.3d at 969 (emphasis added). There is no exemption from compliance with treaty rights in federal mining or public land laws and as such Congress has not abrogated or diminished any currently in force treaty or the rights of Tribes to the resources/lands covered by a treaty.

The Mining Law itself recognizes that all “rights” under the Mining Law exist so long as such

activities are “not inconsistent with the laws of the United States.” 30 U.S.C. 22. Because Indian treaties are the supreme law of the land under Article VI of the United States Constitution, there is no question that Indian treaties ratified by the United States constitute “laws of the United States” whose provisions must be fully applied in any examination of proposed mineral activities under the Mining Law on federal public lands subject to Indian treaties.

Joint Secretarial Order No. 3403 seeks to ensure that the Department of Interior and Department of Agriculture manage federal lands and waters in a manner that is protective of treaty, religious, subsistence and cultural interests of tribes and the Native Hawaiian community.<sup>2</sup> The order states that in making management decisions for Federal lands and waters that impact treaty or religious rights of Tribes, Interior and Agriculture will ensure that tribal governments play an integral role in decisionmaking relating to the management of federal lands and waters, and that consultation at the earliest phases are required to ensure that Tribes can shape the direction of management. The Departments also are required to consider traditional ecological knowledge as part of federal decisionmaking related to Federal lands, particularly where those decisions concern management of resources subject to treaty rights and subsistence uses.

In addition, over a dozen federal agencies, including those agencies participating in the interagency working group, have entered into an MOU to affirm the commitment to protect tribal treaty rights, reserved rights, and similar tribal rights to natural and cultural resources.<sup>3</sup> The MOU states that the parties will integrate consideration of tribal treaty and reserved rights early in the decisionmaking and regulatory processes to ensure that agency actions are consistent with treaty rights.

The IWG must honor these obligations in development of regulations, recommendations, and in making policy and permitting decisions. Increasing the timeliness of permitting decisionmaking is not incompatible with the directives in the MOUs. The agencies must be open to the possibility that some proposed mining activities are not compatible with the obligation to protect tribal treaty resources, or the obligation to consider and implement traditional ecological knowledge, which may include cultural and subsistence practices. Determining early on in a proposed project or land-use planning process that impacted tribes oppose the project, and that even mitigation measures may not be sufficient to protect tribal interests, may lead to determinations that a certain area or ecosystem simply cannot sustain both tribal resources and mining activity, and determining that the mining activity should not proceed in a certain area, will increase the efficiency and timeliness of federal agency decisionmaking. Working with tribes and the Native Hawaiian community to identify areas that are incompatible with mining or other development due to the existence of treaty rights, cultural resources, or subsistence resources will also help agency decisionmakers know when a project or application should be denied at the early stages.

(4) *Land-use plans. Consistent with FLPMA and the NFMA, operations and post-mining land use must comply with the applicable BLM RMP and USFS Forest Plan.*

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<sup>2</sup> <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>

<sup>3</sup> <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>

For BLM, FLPMA requires that: “The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available.” 43 U.S.C. §1732(a). FLPMA requires that: “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.” 43 U.S.C. §1701(a)(8). FLPMA requires compliance with all applicable RMPs, regardless of whether compliance would impact mining operations. Complying with the RMP is required by both the general land use conformity requirement of FLPMA and BLM’s duty under FLPMA to “prevent unnecessary or undue degradation” (“UUD”) of the public lands. 43 U.S.C. §1732(b). To prevent UUD, BLM must ensure that all environmental protection standards will be met at all times. 43 C.F.R. § 3809.5 (definition of UUD prohibited by FLPMA includes “fail[ure] to comply with one or more of the following: ... Federal and state laws related to environmental protection.”). “All future resource management authorizations and actions ... shall conform to the approved plan.” 43 C.F.R. §1610.5-3(a).

Mining operations are not exempted from FLPMA’s requirement to comply with the RMP. For example, in Western Exploration v. U.S. Dept. of the Interior, 250 F. Supp. 3d 718, 747 (D. Nev. 2017), the court held that in the mining context, as well as for other potential uses of public land, RMP standards to protect the Greater Sage Grouse must be met to comply with BLM’s duty to “prevent unnecessary or undue degradation” under FLPMA. The court rejected a challenge from the mining industry and others and agreed with the Interior Department that meeting the RMP requirements was part of the UUD mandate. Western Exploration, at 747 (internal citations omitted). See also Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 49 (D.D.C. 2003) (“when BLM receives a proposed plan of operations under the 2001 rules, pursuant to Section 3809.420(a)(3), it assures that the proposed mining use conforms to the terms, conditions, and decisions of the applicable land use plan, in full compliance with FLPMA’s land use planning and multiple use policies.”).

BLM’s duty to comply with the RMP was also confirmed by the Solicitor’s Memorandum (M-37039, Dec. 21, 2016) which stated that:

The preamble to the 2000 final rulemaking acknowledged that sections 302 and 303 of FLPMA and the mining laws "provide BLM the authority for requiring mitigation." Id at 70,012. That rulemaking also provided that section 303 and the Mining Law at 30 U.S.C. § 22, taken together, "clearly authorize the regulation of environmental impacts of mining through measures such as mitigation." Id at 70,052. The general performance standard requiring mitigation, 43 C.F.R § 3809.420(a)(4), as discussed in the 2000 rulemaking preamble, remained unchanged in an amended rulemaking completed the following year. 66 Fed. Reg. 54,834 (Oct. 30, 2001). The BLM explained its decision to retain the general performance standards in sections 3809.420(a)(1) through (a)(5) from the 2000 rule: "because they provide an overview of how an operator should conduct operations under an approved plan of operations and clarify certain basic responsibilities, including the operator's responsibility *to comply with applicable land use plans and BLM's responsibility to specify necessary mitigation measures.*" Id at 54,840 (emphasis supplied).

M-37039, at n. 115 (reinstated by M-37075, April 15, 2022).

For the Forest Service, the NFMA requires the Forest Service to prepare a land and resource management plan, or “forest plan,” for each National Forest. 16 U.S.C. § 1604(a). Each plan must include standards and guidelines for how the forest shall be managed. 16 U.S.C. §§ 1604(c), (g)(2) & (g)(3). Once a forest plan is adopted, all resource plans, permits, contracts, and other instruments for use of the lands, such as Special Use Permits, Road Use Permits, mining plan approvals, etc., must be consistent with the plan. 16 U.S.C. § 1604(i). “It is well-settled that the Forest Service’s failure to comply with the provisions of a Forest Plan is a violation of NFMA.” Native Ecosystems Council v. Dombeck, 304 F.3d 886, 961 (9th Cir. 2002). See also Save Our Cabinets v. U.S. Dept. of Agric., 254 F.Supp.3d 1241, 1258-59 (D. Mont. 2017)(Forest Service approval of mining project that would not meet the Forest Plan’s “desired conditions” protecting water quality violated the NFMA).

Lastly, the applicable RMP or Forest Plan should not be amended to accommodate the needs of the mining applicant. This would essentially eviscerate the requirements in the RMP/Plan to protect wildlife, environmental and cultural values, etc. The applicable RMP or Forest Plan should, however, be expected to comply the requirements of Joint Secretarial Order No. 3403 to ensure that tribal interests and management practices are incorporated into federal management of public lands.

(5) *Protection of federal resources and property.*

Operators must protect public land resources such as federal water rights, segregated or withdrawn lands, and National Conservation Lands managed by the Department, from substantial direct, indirect, and cumulative adverse impacts. The agencies’ current standards fail to mention the need to protect other federal resources on federally-managed public lands. For example, regarding federal water rights, the agencies must ensure that federal water rights are not impaired or used by private interests to the detriment of the purposes for which the rights were acquired or created. Federal water rights are “superior to the rights of future appropriators.” Cappaert v. U.S., 426 U.S. 128, 138 (1976). “[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” Id. at 143. “Where reserved rights are properly implied, they arise without regard to equities that may favor competing water uses. See Cappaert v. U.S., 426 U.S. 128, 138-39.” Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985).

The agencies cannot disregard its duty to protect such federal property. “Only Congress, and not an executive branch agency, can authorize the disposition of federal property.” High Country Citizens Alliance v. Norton, 448 F.Supp.2d 1235, 1248 (D. Colo. 2006), citing Gibson v. Chouteau, 80 U.S. 92, 99 (1871). The court in High Country found that the Interior Department failed to protect federally reserved waters to the detriment of its reserved right. Id. at 1253. See also Lake Berryessa Tenants’ Council v. U.S., 588 F.2d 267, 271 (9th Cir. 1978) (federal agency “cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”). The federal government is under an obligation to protect federal water rights, despite the fact that “the State of Montana was in the process of determining water rights within the state, an undertaking expected to consume many years.” Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, 832 F.2d 1127, 1130 (9th Cir.

1987). The Circuit emphasized the agency's "duty" to protect the reserved water flows. *Id.* at 1132.

(6) *Protection of Special Places*

As part of the agencies' authorities to manage and protect federal public land resources (BLM, FLPMA; USFS Organic Act/NFMA), they should protect the following special places and areas (in addition to the other resources noted herein, such as Native American Sacred Sites), by precluding adverse impacts to these critical resources/areas: Wilderness study areas; Designated critical habitat of listed species; Areas of critical environmental concern; Units of the National Conservation System; Areas eligible for, or designated for inclusion in, the National Wild and Scenic Rivers System pursuant to the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.); for USFS lands, Inventoried Roadless Areas under the Roadless Area Conservation Rule, part 294 of title 36, Code of Federal Regulations, Colorado Roadless Areas, or Idaho Roadless Areas; areas designated, or any adjacent land, as a class I area under section 162 of the Clean Air Act (42 U.S.C. 7472); and (for BLM lands) Areas of Critical Environmental Concern (ACECs).

Executive Order 13007 directs each executive branch agency with statutory or administrative responsibility for the management of Federal lands to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.<sup>4</sup> In addition, the MOU Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites, to which IWG member agencies are signatories, agencies should take a forward-thinking approach and seek to avoid actions that are adverse to sacred sites and collaborate with Indian Tribes and Native Hawaiian organizations to ensure good stewardship of their lands and allow their rightful access and use to certain public lands through Tribal-agency and co-management agreements where possible. The MOU also recognizes the United States' affirmation of the United Nations Declarations on the Rights of Indigenous Peoples, which affirms the responsibility to recognize, respect and consider tribal interpretations of their own treaty and reserved rights.

(7) *Water Quality Protection.*

In addition to the Clean Water Act mandate that the agencies ensure compliance with all water quality standards and requirements at all times (CWA Section 313), the agencies cannot authorize operations that may result in long-term, or post-mining, pollution. This is true for waste and processing facilities such as waste rock dumps, tailings, and heap leaching, as well as pit lakes.

Long-term or perpetual pollution requiring treatment neither satisfies BLM's FLPMA's UUD requirements, the USFS' duties under the Organic Act, or both agencies' duties to ensure that operations must be fully reclaimed. In other words, a mine that will be a perpetual source of pollution is never really reclaimed, and as such, cannot be permitted in the first place.

For example, several states, including Colorado mandate that mines cannot be approved that would require such long-term/perpetual treatment. See C.R.S. § 34-32-116(7)(g) ("A Reclamation

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<sup>4</sup> <https://www.federalregister.gov/documents/1996/05/29/96-13597/indian-sacred-sites>

Plan for a new or amended permit must demonstrate, by substantial evidence, a reasonably foreseeable end date for any water quality treatment necessary to ensure compliance with applicable water quality standards.”). See also MI Comp L § 324.63209 (2019) (Michigan); NM Stat § 69-36-12 (2019) (New Mexico); Maine Administrative Rule 06 096, Ch. 200, Part 20.A.

This is particularly relevant given that the federal courts have held that the United States, through its public land management agencies, have “owner liability” under CERCLA regarding mining operations on public lands. “[U]nder the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–75, the United States is an ‘owner,’ and, therefore, a PRP, because it is strictly liable for its equitable portion of the costs necessary to remediate the contamination arising from mining activity on federal land.” Chevron Mining, Inc. v. United States, 863 F.3d 1261, 1265-66 (10th Cir. 2017).

The court noted that the United States was liable as the owner of the properties covered by unpatented mining claims and, for the purposes of this Petition, has broad regulatory authority to protect public resources to avoid contamination at mine sites that might lead to CERCLA liability. Id. at 1276-77, especially notes 11, 12, 13.

Another set of requirements, taken from the Interior Department’s policy for coal mines, should be adopted in order to meet its environmental protection mandates under FLPMA, the Organic Act, NFMA, and other applicable laws. In other words, the fact that this policy was initially applied to coal mines does not mean that it should not also apply to hardrock mines, as there is not provision in the Mining Law, FLPMA, or the Organic Act that would preclude that.

#### Objective 1

Only approve permits where the operation is designed to prevent off- site material damage to the hydrologic balance and minimize both on- and off- site disturbances to the hydrologic balance. In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining pollutorial discharge that would require continuing long-term treatment without a defined endpoint.

Strategy 1.1 - Predictive techniques should be used to identify and characterize the site-specific acid- or toxic-forming conditions posing a risk of AMD formation.

Strategy 1.2 - Each mining and reclamation plan should specifically address identified acid- and toxic- forming conditions and demonstrate how off-site material damage will be prevented and on- and off-site disturbances minimized without the use of techniques that require long- term discharge treatment without a defined endpoint.

Strategy 1.3 - Each permit should include adequate measures, such as prevention and mitigation technologies, to control and manage identified acid- or toxic-forming AMD conditions and to protect the quality and quantity of surface and ground water systems during mining and reclamation.

Interior Department, HYDROLOGIC BALANCE PROTECTION, POLICY GOALS AND OBJECTIVES on CORRECTING, PREVENTING AND CONTROLLING

ACID/TOXIC MINE DRAINAGE, March 31, 1997, at 5. [amdpolicy033197.pdf \(osmre.gov\)](#)

(8) *Protection of the Hydrologic Balance.*

Under both BLM's duties under FLPMA to prevent UUD, as well as the USFS' duty to protect favorable conditions of water flows under the Organic Act, operations should not be permitted unless they can ensure they will prevent impacts to the hydrologic balance that may impair beneficial uses of surface and ground water, including cultural values and designated uses of such waters for aquatic life, riparian habitats, domestic, agricultural and industrial uses, and recreation. This is also required to make sure that operations do not cause a violation of state and federal water quality standards protecting beneficial uses of water. This is primarily related to the prevention of dewatering, diversions, and the creation of pit lakes (and the resulting long-term/perpetual loss of waters). *See also* Interior Department, HYDROLOGIC BALANCE PROTECTION, POLICY GOALS AND OBJECTIVES on CORRECTING, PREVENTING AND CONTROLLING ACID/TOXIC MINE DRAINAGE, March 31, 1997, at 5. [amdpolicy033197.pdf \(osmre.gov\)](#)

(9) *Fisheries, wildlife and plant habitat.*

Both agencies should require that operations do not result in adverse impacts to threatened, endangered, candidate, sensitive, and special status species, and their habitat which may be affected by operations. Although this is required by the ESA for listed species, this needs to be expanded to include proposed/candidate, sensitive, and special status species.

(10) *Cultural, Religious, or Historic Sites or Properties.*

36 CFR § 800.6, Resolution of adverse effects, often involves development and implementation of a Memorandum of Agreement (MOA) to address adverse effect to tribal resources. There is room for improvement in this process. For example, tribes frequently are considered to be a consulting party instead of actual party to the MOA. This often results in a lack of enforcement of the MOA provisions and a lack of accountability. Often, there is no oversight with regard to mitigation of the adverse effects to the resources at issue, and better or actual enforcement of the MOA needs to take place. Tribes and Native Hawaiian organizations should, when possible, be encouraged to be a signatory and full partner to an MOA with authority to change or terminate the agreement. Enforcement mechanisms need to be implemented to ensure accountability if and when parties fail to carry out MOA provisions for mitigation.

Similarly, Programmatic Agreements under 36 CFR § 800.14 for the development of alternate procedures or delegation of federal responsibilities under NHPA section 106 must provide for tribal participation. Under 800.14(f), tribes and Native Hawaiian organizations are afforded consultation, but should instead be afforded the opportunity to participate as full partners to the Programmatic Agreement, with authority to change, terminate and enforce the Programmatic Agreement. Delegating responsibility for oversight and implementation of the federal trust responsibility to states is inappropriate and has caused ongoing issues for tribes, resulting in loss of tribal rights to protect and preserve areas with cultural, historical and subsistence importance. Section 800.14

should include a provision for tribal participation as an equal partner in any Programmatic Agreement.

The agencies should: (1) avoid adverse effects to Traditional Cultural Properties identified under the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq. and cultural or historic resources eligible for listing under the National Register of Historic Places that occur on Department-managed land; (2) ensure access to and ceremonial use of Indian sacred sites on Department-managed lands by Indian religious practitioners and avoid adversely affecting the physical integrity of identified sacred sites pursuant to Executive Order 13007, “Indian Sacred Sites” (May 24, 1996), 61 Fed. Reg. 26771; and (3) ensure the continuation of Native American subsistence uses of public land.

This implements the agencies’ duties to protect resources under Executive Order 13007, the NHPA and related laws. See Exec. Order 13007, “Indian Sacred Sites” (May 24, 1996), 61 Fed. Reg. 26771 (agencies are to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”).

In 1978, Congress passed the American Indian Religious Freedom Act (“AIRFA”), extending religious freedom, including the use of sacred sites, to all American Indians. Reflecting the aims of the self-determination era, AIRFA provides:

[I]t shall be the federal policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1994). In the sacred sites context, AIRFA has been implemented largely through amendments to the National Historic Preservation Act and Executive Order 13007.

Under the National Historic Preservation Act Amendments of 1992, “properties of traditional religious and cultural importance to an Indian tribe ... may be determined to be eligible for inclusion on the National Register.” The protections of the NHPA are generally procedural. The 1992 amendments direct federal agencies “to consult ... with any tribe ... that attaches religious and cultural significance” to a site regarding federal “undertakings” that may affect it. 16 U.S.C. § 470a(d)(6)(A)-(B) (2012).

In contrast to the primarily procedural requirements of the NHPA, Executive Order (“EO”)13007 is substantive; the agencies are directed to take action, not merely to consult. Executive Order 13007 directs federal agencies to: “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” Executive Order 13007, Sec. 1(a).

Executive Order 13007 defines a “sacred site” as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the

tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.” Id. at Sec. 1(b).

The federal court’s have held that Executive Order 13007 is implemented via, and is a part of, BLM’s responsibilities to protect such resources under federal public land law and FLPMA’s UUD requirement.

Executive Order No. 13007 ... imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them. See 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order. *South Fork Band*, 2009 WL 24911, at \*16 n. 9.

*South Fork Band Council v. U.S. Dept. of the Interior*, 588 F.3d 718, 724 (9th Cir. 2009).

In *South Fork Band*, the Ninth Circuit held that compliance with EO 13007 was required in order for the agency to meet its duties to protect public land under FLPMA, as the case concerned BLM’s approval of a large mine in Nevada. Yet, in that first round of the case, while holding that EO 13007 applied to BLM’s review of the mine, the court determined that the mine would not actually adversely affect a nearby sacred site and thus BLM did not violate EO 13007.

The Ninth Circuit remanded the BLM decision on other grounds, and in its decision on the second appeal, again affirmed that the federal agency had to comply with EO 13007 as part of its to duties to prevent UUD: “Although E.O. 13007 has no force and effect on its own, see id. [quoting EO 13007], its requirements are incorporated into FLPMA by virtue of FLPMA’s prohibition on unnecessary or undue degradation of the lands.” *Te-Moak Tribe of Western Shoshone Indians of Nevada v. U.S. Dept. of the Interior*, 565 Fed. Appx. 665, 667 (9th Cir. 2014).

Thus, the law is clear – the commands of EO 13007 apply to BLM under FLPMA, and to the Forest Service under the Organic Act, that the agencies must “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”

Although not in the hardrock mining context, numerous other decisions have recognized the federal government’s mandate to protect meaningful cultural resources and sacred sites on public land under EO 13007. “Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004). Federal courts have expressly recognized the need to protect sacred sites under the EO as part of the government’s public land management authorities: “Executive Order no. 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.” *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241, 1245 (10th Cir. 2004).

Some agencies have taken seriously the dictates of Executive Order 13007 and, as required by the EO, developed internal policy to comply with it. For example, after learning of tribal

concerns about logging in the Bighorn National Forest in Wyoming, the Forest Service consulted with American Indian religious practitioners and issued an Accommodation Plan “to ensure the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property.” USDA Forest Service, Bighorn National Forest, Medicine Wheel/Medicine Mountain Historic Preservation Plan, § I (1996). The accommodation plan withdrew the Medicine Wheel and Medicine Mountain and surrounding areas from the logging bid process and was upheld on appeal. See Wyo. Sawmills, Inc. v. U.S. Forest Service, 383 F.2d 1241 (10th Cir. 2004).

Other examples applying EO 13007 include the Devils Tower National Monument (Wyoming) climbing ban in June of each year, see Bear Lodge Multiple Use Ass’n v. Babbitt, 175 F.3d 814, 815, 818 (10th Cir. 1999) (citing Executive Order 13007) and the Rainbow Bridge National Monument (Arizona) interpretative signage and public access limitations for American Indian sacred ceremonies. See Natural Arch and Bridge Soc’y v. Alston, 209 F.Supp.2d 1207, n. 11 (D. Utah 2002), *aff’d* 98 Fed. Appx. 711 (10th Cir. 2004) (upholding the accommodation plan against challenges by tourists and citing Executive Order 13007). See also Access Fund v. U.S. Dept. Agric., 499 F.3d 1036, 1039-40 (9th Cir. 2007) (Forest Service closure of Cave Rock, a sacred site of the Washoe, to rock climbing) and Fortune v. Thompson, 2011 WL 206164 (D. Mont., Jan. 20, 2011) (prohibiting “motorized use” in most of the Badger-Two Medicine area of Lewis and Clark National Forest, a sacred area to the Blackfeet).

*(11) Tailings and Waste Storage Facility Dam and Management:*

For waste and tailings storage design and management, the agencies must prioritize safety and utilize best available technology, undergo review by an independent panel of experts, and be subject to annual and periodic reviews. An increase in the rate and severity of tailings dam failures presents a significant public health and safety risk. Subsequent to the Mount Polley tailings dam failure, a group of experts released a set of recommendations to reduce the risk of catastrophic failures. These tailings design experts emphasize the need to prioritize safety and utilize best available technology (e.g., filtered tailings), and that these considerations must be incorporated into the earliest stages of mine design. Montana has subsequently incorporated some of the recommendations into state law. See Report on Mount Polley Tailings Storage Facility Breach (Jan. 30, 2015) (attached to the DOI/BLM Rulemaking Petition); *see also* MCA §§ 82-4-376-82-4-381; and attachments to the Rulemaking Petition, detailing tailings design standards and requirements that the agencies should implement.

As part of revised regulations for waste, tailings, and processing facilities, the agencies need to require that proposed operations fully account for future conditions that may result from climate change. Mitigating mining’s climate risks is necessary to protect global and local impacted communities. Climate change exacerbates the risks and uncertainties associated with hardrock mining. The increasing frequency of extreme weather events, changing temperatures, and precipitation patterns affect the safety and stability of mining operations and infrastructure. As detailed in the Rulemaking Petition, mine-specific examples of these types of impacts include major spills resulting from large storm events and damage to mine waste cover systems from unexpected wildfires. These climate risks pose particularly acute problems in Alaska, where disruptions to mining operations have occurred from permafrost thaws caused by temperatures

warming much faster than the national rate. Climate changing temperatures and precipitation patterns also affect the structural integrity of tailings dams. Disastrous waste containment failures are a tragic and continuous problem around the world, as shown at Brazil's Brumadinho, British Columbia's Mount Polley, and Florida's Piney Point. Tailings dams on public lands could also fail. A 2019 report identified an increasing trend in the number of catastrophic tailings failures globally, including in the United States. The report attributes this, in part, to more mining of lower grade ore deposits facilitated by new technology.

9. A Plan of Operations Must Not Remain Valid in Perpetuity; Unanticipated Events or Conditions Must Require a Plan of Operations to be Modified in a Transparent and Public Process with Government-to-Government Consultation.

A recurring problem that must be fixed is when mine operations have not produced valuable minerals for many years, but BLM and USFS allows the company to escape its reclamation obligations. Under the current regulations, an approved plan of operation can remain in place for years and even decades despite the mine being inoperative or even never becoming operative. These "zombie mines" can then be re-opened after long periods of non-operation. During these nonoperational periods, environmental conditions change, often profoundly, and new information about the ways that a mine may adversely affect ecosystems, human health, and sensitive cultural and historic resources can come to light but is never considered much less incorporated to avoid, minimize, or mitigate such impacts. Moreover, these inoperative mines are inadequately regulated, which can lead to pollution of surface and groundwater; contamination of soils and vegetation being killed; adverse effects to sensitive species and their habitat; and the potential to profoundly affect human health.

By amending the hardrock regulations limiting the duration of time (5 years) that a plan of operations can remain valid when a mine is not producing valuable minerals would guard against the current deficiencies to better ensure protection of ecosystems, human health, and cultural and historic resource values (among others). These revisions are also needed to prevent an operator from avoiding reclamation obligations by keeping a minimal presence on site but producing no minerals.

Two mines, one on BLM land, the Arizona 1 Mine, and one on Forest Service land, Pinyon Plain Mine, formerly called the Canyon Mine, are quintessential examples of the problem zombie mines present. Although these two examples involve uranium mines, uranium mines are not alone in presenting this problem, as this has been an issue with other types of mines, such as gold mines. The incorporated Rulemaking Petition to DOI details the environmental and cultural resources impacts from these mines resulting from the shortcomings of the current USFS and BLM policies and regulations.

10. Minerals Used for Common Variety Purposes/Uses Are Not Locatable Minerals

Instances have occurred in recent years where operations that may have been initially approved for the mining of minerals that originally qualified as locatable minerals now mine and remove minerals that should be treated as common variety minerals under the Common Varieties Act of 1955, 30 U.S.C. § 611, not authorized under the 1872 Mining Law.

A prime example is limestone. Although high-quality, chemical grade limestone used for and possessing a distinct and special value under the McClarty test is considered a locatable mineral, limestone used for common purposes such as rip-rap, road base, and structural fill should not qualify as a locatable mineral. These materials qualify as locatable minerals under the 1872 Mining Law, 30 U.S.C. §§ 22 et seq., the 1947 Materials Act, 30 U.S.C. §§ 601-604, or the 1955 Common Varieties Act, 30 U.S.C. § 611. “The Department has consistently held that materials suitable only for fill purposes, for road base or for comparable purposes are not locatable under the mining laws.” United States v. Bienick, 14 IBLA 290, 293 (1974), 1974 WL 12889, \*\*WL2.

While valuable deposits of such minerals as gold and silver are clearly locatable under the mining law, not all material that could be removed from the earth and sold at a profit was considered by the Department to be locatable under the General Mining Law. See id. 14 IBLA at 297, \*\*WL5 (Judge Stuebing concurring). “There are numerous cases involving specific examples of materials which have been held to be not locatable under the general mining law. Among these are ... common or inferior limestone ‘for building of levees or railroad embankments or filling [sic] up low places,’ Holman v. Utah, 41 L.D. 314 (1912); Gray Trust Co. (On rehearing) 47 L.D. 18 (1919), ... common rock for ‘filling purposes’ Solicitor’s Opinion M-36295, *supra*; Holman v. Utah, *supra*.” Id.

In 1947, Congress passed the Materials Act, as amended, 30 U.S.C. §§ 601-604, authorizing the disposition of, inter alia, sand, stone, and gravel “‘not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.’” United States v. Matthey, 67 I.D. 63, 65-66 (1960), quoting comments of the Under Secretary of the Interior found in S. Rept. No. 204, 80th Cong., 1st Sess. (1947).

Eight years later, Congress passed the Multiple Use Mining Act of 1955, also known as the Surface Resources Act or Common Varieties Act, 30 U.S.C. § 611, which declared that no deposit of common varieties of, inter alia, sand, stone, or gravel would be considered “a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws.” Thus, Congress removed common varieties of those materials from the purview of the mining law and made them subject to the provisions of the Materials Act. United States v. Pitkin Iron Corp., 170 IBLA 352, 354 (2006); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991).

Accordingly, minerals used for road base, fill, rock, and boulders are not locatable minerals under the 1872 Mining Law, regardless of whether the minerals could be used for a locatable mineral purpose. The production of these minerals, then, falls under the Common Varieties Act and 1947 Materials Act, not the 1872 Mining Law.

Specific regulatory language is proposed in the Rulemaking Petition to the Interior Department (see Attachment 9), and should likewise be adopted by the Forest Service.

#### 11. Underground Access to Federal Minerals

Also as noted in the Rulemaking Petition to the Interior Department, in recent years mining

companies have proposed drilling and removal of the federal mineral estate, and the federal agencies have done little in response, assuming that if there are no impacts to the federal surface estate, the agencies are powerless to regulate these operations. But that ignores the fact that the federal mineral estate is considered federal public lands and property. As such, the agencies should adopt rules that require federal approval, with full public review, before any entity may access and remove federal minerals, whether through exploration drilling or production extraction.

## II. Specific BLM and Forest Service Regulatory Reform

In addition to the above needed reform applicable to both USFS and BLM, due to the different governing statutes, e.g. FLPMA vs. Organic Act/NFMA, agency-specific regulatory reform language is provided. More specific regulatory language revisions are included in the 2021 Rulemaking Petition to the Interior Department, and the 2018 Comments to the Forest Service.

### 1. BLM Regulations

#### *The Definition of UUD Must Be Strengthened to Meet the Intent of FLPMA*

Congress mandated the Interior Secretary in FLPMA to, “by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b) (“UUD”). In the preceding sentence in that section, Congress made it explicit (albeit by negative phrasing) that this mandate “amend[ed] the Mining Law of 1872 [and] impair[ed] the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.” Id.

The duty to prevent UUD “supplements requirements imposed by other federal laws and by state law,” Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010), and is the “heart of FLPMA” that “amends and supersedes the Mining Law.” Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003). “FLPMA, by its plain terms, vests the Secretary of the Interior [and the BLM] with the authority—indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” Id. DOI, of which BLM is a part of, has argued “that it will protect public lands from any UUD by exercising case-by-case discretion to protect the environment, including by approving or rejecting individual mining plans of operation.” Center for Biological Diversity, 623 F.3d at 645, quoting Mineral Policy Center, 292 F.Supp.2d at 44. BLM cannot approve mineral operations that would cause UUD. 43 C.F.R. § 3809.411(d)(3)(iii). “Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is clearly unnecessary.” 65 Fed. Reg. 69998, 70052 (Nov. 21, 2000) (preamble to BLM’s 43 C.F.R. Part 3809 mining regulations) (emphasis added). See also Kendall’s Concerned Area Residents, 129 IBLA 130, 138 (1994) (“If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.”).

However, as shown in these comments and the Rulemaking Petition, BLM and DOI repeatedly fail to ensure such protection on a case-by-case basis. BLM and DOI routinely assert —albeit wrongly and to the contrary of representations made to the court in Mineral Policy Center—that despite the unequivocal UUD mandate of FLPMA that BLM and DOI

have limited to no discretion to protect public lands from exploration or mine development.

Currently, the 3809 regulations implement FLPMA's mandate to prevent UUD through two primary provisions: (1) the definition of UUD at 3809.5; and (2) the Performance Standards at 3809.420. But these are inadequate in meeting the UUD mandate and protecting public resources. The proposed revisions not only cure the shortfalls of the current language for both sections, but will also ensure that BLM and DOI no longer abdicate their duties to safeguard against UUD when reviewing, approving, and otherwise regulating hardrock mining.

The present UUD definition fails to include an overriding substantive resource protection standard. Currently, Unnecessary or undue degradation means conditions, activities, or practices that:

- (1) Fail to comply with one or more of the following: the performance standards in Sec. 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;
- (2) Are not "reasonably incident" to prospecting, mining, or processing operations as defined in Sec.3715. 0-5 of this chapter; or
- (3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM- administered portions of the National Wilderness System, and BLM- administered National Monuments and National Conservation Areas.

But, as detailed in the Rulemaking Petition, the damage to public land resources under this definition has been immense and fails to comply with congressional intent under FLPMA.

The proposed definition in these comments, and in the Petition, corrects this severe deficiency and sets a substantive standard by supplementing existing criteria with new provisions, as discussed herein. The revision starts with the definition in 3809.5:

Unnecessary or undue degradation means conditions, activities, or practices that:

- (1) May cause substantial irreparable harm to important environmental, scientific, historical, cultural, or other public resources.

This proposed addition is similar, but more protective than, the definition promulgated in 2000 (since rescinded), which prevented operations that would "result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." 65 Fed. Reg. 69,998, 70,115 (Nov. 21, 2000) (known then as the "SIH" definition). Based on a Solicitor's Opinion issued on March 23, 2001, the Bush Administration eliminated the SIH provision, so that it is not currently part of the BLM Part 3809 regulations. While the court in Mineral Policy Center decided not to vacate the Bush Administration's deletion of SIH from the regulations, it ruled that the 2001 Solicitor's Opinion had based its rejection of the SIH definition on a crabbed and legally wrong view of BLM's duties to prevent UUD under FLPMA that ignored the "undue degradation" language: "The court finds that the Solicitor misconstrued the clear mandate of FLPMA. FLPMA, by its plain terms, vests the Secretary of the Interior with the authority--

and indeed the obligation--to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” Mineral Policy Center, 292 F.Supp.2d at 41-42.

The court’s refusal to overturn the 2001 regulations that eliminated SIH was based on the Interior Department’s lawyers’ commitment to the court that the agency would nevertheless fully protect all of the resources covered by the previous SIH standard:

Interior, on the other hand, maintains that, despite the elimination of the 2000 Regulations’ SIH standard, and the Solicitor’s understanding that the terms “undue” and “unnecessary” “overlap in many ways,” the 2001 Regulations nevertheless prevent UUD, as properly defined by this court. Defs.’ Mot. for Summ. J. at 22, 29 (arguing that the 2001 Regulations “will prevent all UUD, including UUD occasioning ‘irreparable harm to scientific, cultural, or environmental resource values’”); Defs.’ Reply at 5 (arguing that “both types of degradation are prevented”); see also 66 Fed.Reg. 54,834, 54,838 (Oct. 30, 2001) (“BLM does not need an SIH standard in its rules either to protect against unnecessary degradation or to protect against undue degradation BLM has other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values.”); *id* at 54,841 (“We understand it is our responsibility to implement FLPMA and prevent unnecessary or undue degradation.”).

Mineral Policy Center, at 44. Although the court noted that that “the question is indeed extremely close,” based on that commitment, and the notion that the agency has some discretion to decide how to implement UUD through regulations, it refused to set those regulation aside and reinstate the SIH standard. Id. at 45, n. 18.

As shown by this Petition, and the facts on the ground in the West over the last 20 years, BLM has failed to abide by its commitment, by failing to “prevent all UUD, including UUD occasioning ‘irreparable harm to scientific, cultural, or environmental resource values.’” Id.

These comments and the Petition provide BLM the opportunity to rectify that problem and fulfill its FLPMA duty. The proposed UUD definition removes the “cannot be effectively mitigated” provision (from the 2000 SIH definition) to prevent operators from asserting that based on a company’s approved reclamation plan, all substantial and irreparable adverse impacts were “mitigated.” This is necessary because under the current definition of “mitigation,” at 3809.5, mitigation could simply mean “minimizing impacts by limiting the degree or magnitude of the action and its implementation.” But “minimizing” or “limiting” impacts does not protect the affected resources from permanent harm, it merely somewhat lessens the severity of the damage.

Such assertions of “reclaiming” and “mitigation” are often a fallacy, as many—if not most—of the most resource-damaging operations at a large mine, even if covered by a reclamation financial guarantee or bond, permanently affect the landscape. The Petition also adds a provision to the definition of “reclamation” at 3809.5, stating that “The potential for post-operational reclamation, does not mean that the Operations do not cause irreparable or substantial harm to public land resources. ” This is needed to ensure that operators cannot assert that if the site is eventually “reclaimed” (sometimes decades in the future) that the

initial damage is not irreparable or substantial. For example, open pits are never truly “reclaimed” as they remain a permanent impact, often leaving a massive hole in the landscape that can or does fill with water and become a toxic pit lake. The same is true for “reclamation” of large-scale waste rock dumps, tailings waste and chemical leaching facilities, as they are never removed from the site.

Thus, the focus should be on whether there will be “substantial and irreparable” adverse impacts from the outset of the operations, not on assertions that impacts might be lessened far in the future at the end of the mine life. If an impact is not substantial and irreparable, it is not considered UUD, and can be approved (assuming compliance with the other provisions of subpart 3809 and other applicable laws and regulations).

As stated by the Interior Department to the court in Mineral Policy Center, the agency implements its authority under its UUD mandate “by exercising case-by-case discretion to protect the environment through the process of: (1) approving or rejecting individual mining plans of operations....” Mineral Policy Center, 292 F.Supp. 2d at 44 (citing Interior’s briefs to the court).

Thus, this new definition allows mineral operations to occur on public lands, but only in instances where the damage is not “substantial and irreparable,” or the affected non- mineral resources are not “important.” If either the harm is not substantial/irreparable or the affected resources are not deemed to be important, then the operation does not cause UUD. As discussed herein, to determine what resources are “important,” the agency could look to the list of resources in the “Performance Standards” in subpart 3809.420.

## 2. Forest Service Regulations

### *Elimination of the Categorical Exclusion for “Short-Term” Mineral Exploration*

One of the most recurring problems for Tribal and public review of mineral operations regards the USFS’ NEPA regulation categorically excluding “[s]hort-term (*1 year or less*) mineral, energy, or geophysical investigations and their incidental support activities,” 36 § 220.6(e)(8). Notably, the BLM does not have a similar NEPA regulation, and subjects all PoO-level operations to at least an Environmental Assessment (EA)(and see above discussion detailing why the NOI allowance should be eliminated and that all operations above casual-use should require a PoO). In the past, the Forest Service has inappropriately relied upon CE-8 to avoid reviewing the true impacts from the project, especially related to the cumulative impacts to wildlife and other public resources. *See Defenders of Wildlife v. U.S. Forest Service, No. 4:14-cv-02446-RM (D. Ariz. Sept. 15, 2015)*(USFS CE for mineral exploration project failed to consider impacts and, due to multi-year reclamation requirements, did not qualify under CE-8).

Instead, all activities/operations should require review under an Environmental Assessment (“EA”), or Environmental Impact Statement (“EIS”), depending on whether the activities/operation pose a risk of significant impacts.

Categorical exclusions by their definition are not appropriate for mining related activities. Categorical exclusions are defined as “a category of actions which do not individually or

cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency. . . . and . . . therefore, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. As shown through various examples in these comments, attachments, and in the 2021 and 2018 submittals, environmental and human health risks and harms are unfortunately inherent in mining related activities. This makes it inappropriate for the existing CE to remain on the books, much less for USFS to contemplate adding more as part of this proposed rulemaking.

### *Strengthen the Regulatory Standard To More Properly Meet the Organic Act Requirements*

The Forest Service’s Part 228A mining regulations inappropriately constrain the agency’s authority over mining operation, limiting the agency to just “minimi[zing] adverse environmental impacts on National Forest System resources.” 36 C.F.R. §228.1. But this standard was based on the now-invalidated view that the USFS could not “materially interfere” with operations and that the agency could not “prohibit” operations under Section 612 of the Surface Resources Act of 1955. *See* above discussion.

Thus, the agency should implement a regulatory standard that matches the direction given in the Organic Act, that the “Secretary of Agriculture . . . protect national forests from ‘depredations’ and ‘destruction,’ 16 U.S.C. §551.” Bohmker v. Oregon, 903 F.3d 1029, 1038 (9th Cir. 2018).

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<sup>i</sup> <https://www.achp.gov/sites/default/files/guidance/2018-07/ACHPPlanttoSupporttheUnitedNationsDeclarationontheRightsofIndigenousPeoples.pdf>.