



February 2, 2024

U.S. Department of Agriculture
Ecosystem Management Coordination
201 14th Street SW
Mailstop 1108
Washington, DC 20250-1124

Submitted electronically via www.regulations.gov

Re: Notice of Intent to Prepare an Environmental Impact Statement; Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System, 88 Fed. Reg. 88,042 (Dec. 20, 2023).

Dear Sir/Madam:

The National Mining Association (NMA) appreciates the opportunity to submit comments on the U.S. Forest Service's (Service) Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) on its Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System.¹ The Service intends to amend all 128 of its land management plans for units in the National Forest System to include directions to conserve and steward existing old-growth forest conditions.

The Service's NOI was informed by public feedback received on an advanced notice of proposed rulemaking (ANPR) last April 2023 regarding how the Service should adapt its policies to protect, conserve and manage the

¹ 88 Fed. Reg. 88,042 (Dec. 20, 2023).

national forests for climate resilience.² The NMA commented on the ANPR and hereby incorporates those comments by reference.³

The NMA is the official voice of U.S. mining. Our membership includes more than 280 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers. We represent all facets of the domestic mining industry and the hundreds of thousands of American workers it employs before Congress, federal agencies, the courts, and the public. The NMA advocates for public policies that will help America fully and responsibly utilize its vast natural resources. Our members work to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security, and economic security, all delivered under world-leading environmental, safety, and labor standards.

The NMA noted in our previous comments that much of the ANPR was framed in reference to wildfires or mature and old-growth forests, but several of the specific requests for comment broadly address how the Service should manage national forest lands. Several of these similar themes are discussed throughout the NOI and may impact mining operations throughout the U.S. NMA's members frequently conduct mining activities on national forest lands and therefore, have a significant interest in rules that impact the management of those lands.

Our comments should not be read as opposition to conservation activities. In fact, NMA's members have a longstanding commitment to addressing and maintaining healthy landscapes and old-growth forest management. NMA's members routinely engage in the conservation and recovery of threatened and endangered species and their habitats. These values are reflected in the sustainable land management practices used in their business models. Additionally, NMA members have reclaimed millions of acres of land, much of which is restored to serve as prime species habitat previously unsuitable for these species prior to operations.

Among other things, the proposed amendments to the land management plans would provide a framework for strategic conservation, proactive stewardship and management, and mitigate risks across old-growth forest

² 88 Fed. Reg. 24,497 (Apr. 21, 2023).

³ See July 20, 2023 NMA comments, *available at* <https://www.regulations.gov/comment/FS-2023-0006-91499> (Last visited Feb. 2, 2024).

conditions.⁴ A primary focus of the proposal is the risks related to climate amplified stressors. While the NMA broadly supports these goals, we urge the Service to exercise caution in its execution of the plan amendments so not to ignore the plenary power of Congress to legislate the use of federal lands, including national forest lands.

Congress' power is derived from the Property Clause of the U.S. Constitution, which provides broad authority over lands owned by the federal government.⁵ As such, the scope of the Service's authority is limited to that delegated by Congress. It is an appropriate inquiry to assess how the agency's land management policies are developed and how they align with existing congressional mandates.⁶

The NMA is concerned that the overarching multiple use mandate guiding national forest land management may get overlooked as the Service amends its land management plans. This concern is heightened by the multiple mentions of prioritizing strategic conservation as a part of this effort⁷ and minimal mentions of the Service's congressionally-directed multiple use mandate. Given the NOI's focus on conservation and other non-uses of old-growth forests, the NMA incorporates by reference its recent comments to the Department of the Interior's Bureau of Land Management on its proposed Conservation and Landscape Health rule.⁸

As noted in our comments on the ANPR, the Service's current focus could impede mining activities on public land, including development of coal that continues to play an outsized role in providing affordable and reliable

⁴ *Id.* at 88,043.

⁵ U.S. Constitution, Article IV, Section 3, Clause 2. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

⁶ Statement of Honorable Raul Grijalva, House Natural Resources Oversight Hearing on Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special Use Permits and Travel Management, Nov. 15, 2011 (transcript available at <https://www.congress.gov/event/112th-congress/house-event/LC3410/text?q=%7B%22search%22%3A%5B%22%5C%22forest+service%5C%22%22%2C%22%5C%22forest%22%2C%22service%5C%22%22%5D%7D&s=1&r=56> (last visited Feb. 2, 2024)).

⁷ For example, each plan will include consistent direction to conserve and steward existing and future old-growth forest conditions. 88 Fed. Reg. at 88,042.

⁸ 88 Fed. Reg. 19,583 (Apr. 3, 2023). The NMA comments are available at <https://www.regulations.gov/comment/BLM-2023-0001-154284> (last visited Feb. 2, 2024).

energy. Additionally, it could create further permitting inefficiencies for hardrock mineral projects, and in turn will delay the administration's goal to reduce reliance on foreign sources of minerals. As outlined below, the NMA urges the Service to adhere to its multiple use mandate while striving toward its sustainability concepts.

The Forest Service's Multiple Use Mandate

Congress established the National Forest System through the Organic Administration Act of 1897 (Organic Act).⁹ From the outset, Congress made clear that national forests "are not parks set aside for nonuse, but have been established for economic reasons."¹⁰ Similarly, the U.S. Supreme Court has confirmed:

[T]he Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for two purposes "[t]o conserve water flows and to furnish a continuous supply of timber for the people . . . *National forests were not reserved for aesthetic, environmental, recreational or wildlife preservation purposes.*"¹¹

Over the next several decades, Congress consistently and clearly specified through a number of enactments that stewardship over the national forests would be guided by the principles of multiple use and sustained yield. These statutes, all of which endorse multiple use and sustained yield, include the Multiple Use Sustained Yield Act of 1960 (MUSYA),¹² the Forest and Rangeland Renewable Resources Planning Act of 1974,¹³ and the National Forest Management Act of 1976 (NFMA).¹⁴

"Multiple use" is defined in Section 4 of the MUSYA as:

[T]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination

⁹ 30 Stat. 11 (June 4, 1987).

¹⁰ 30 Cong. Rec. 966 (1897) (Cong. McRae).

¹¹ *United States v. New Mexico*, 438 U.S. 696, 707-08 (1978) (emphasis added).

¹² 16 U.S.C. §§528-31.

¹³ 16 U.S.C. §§1600-14.

¹⁴ 16 U.S.C. §1600 *et seq.*

that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.¹⁵

In explaining MUSYA's multiple use directive, the House of Representatives report prepared in conjunction with consideration of the legislation discusses the "relative values" analysis as follows:

One of the basic concepts of multiple use is that all of these resources in general are entitled to equal consideration, but in particular or localized areas relative values of the various resources will be recognized ... no resource would be given a statutory priority over the others. The bill would neither upgrade nor downgrade any resource.¹⁶

Congress did not alter the MUSYA concepts in enacting NFMA, but rather made the multiple use, sustained-yield mandate the cornerstone of land and resource management plan development, maintenance, and revision.¹⁷

Similarly, the Federal Land Policy and Management Act (FLPMA) requires the Service to manage the National Forests in a manner which is consistent with a multiple use philosophy derived from the MUSYA.¹⁸ FLPMA defines "multiple use" as:

¹⁵ 16 U.S.C. § 531(a).

¹⁶ See H.R. Rep. No. 1551, 86th Cong., 2d Sess. --- (1960), *reprinted in* 1960 U.S.C.C.A.N. 2377, 2379. See 43 U.S.C. §§ 1701(a)(3) and *National Wildlife Federation v. Buford*, 835 F.2d 305, 308-09 (9th Cir. 1987) (finding that classifications must be reviewed consistent with the principles of multiple use and sustained yield).

¹⁷ 16 U.S.C. 1604(e).

¹⁸ See Senate Report No. 95-583 ("this [multiple use] definition is very similar to that . . . which presently appears at section 4 of the Multiple-Use Sustained-Yield Act of 1960 . . ."); See also House Report No. 94-1163 ("the definition of multiple use preserves essentially its same meaning as used in the Forest Service Multiple Use Act of 1960").

[T]he harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the combination of uses that will give the greatest economic return or greatest unit output.¹⁹

In addition to consistently endorsing the principles of multiple use and sustained yield, Congress has also clearly indicated that the Service has limited authority regarding the exploration for and the extraction of mineral resources on forest lands. Such activities are governed by statutes including the Mining Law of 1872²⁰ and the Mineral Leasing Act of 1920 (MLA).²¹

The Organic Act itself acknowledges mining as an important use of forest lands. Specifically, section 478 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."²²

Courts have upheld the Service's authority to issue "reasonable rules and regulations," but cautioned that "prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition."²³ Similarly, MUSYA explicitly provides that "nothing" in the Act "shall be construed so as to affect the use or administration of the mineral resources of national forest lands . . ."²⁴

¹⁹ 43 U.S.C. § 1702(c).

²⁰ 30 U.S.C. §§21 *et seq.*

²¹ 30 U.S.C. §§181 *et seq.*

²² 16 U.S.C. § 478 (emphasis added).

²³ See *e.g.*, *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981); *United States v. Shumway*, 199 F.3d 1093, 1106-07 (9th Cir.1999); *Clouser v. Espy*, 42 F.3d 1522, 1529-30 (9th Cir.1994).

²⁴ 16 U.S.C. §528.

Likewise, the disposition of solid minerals subject to the leasing laws cannot be impaired by unilateral action by the Service under the guise of its general authority to manage surface resources within the national forest system. For example, the MLA provides for the disposition and development of federal coal on national forest lands and establishes specific land use planning considerations for the availability of federal coal resources.

Importance of Forest Lands for Mineral Development

National forest lands are an important source of mineral and energy resources that are integral to our economic and national security. In fact, mineral production from national forests and grasslands contributes approximately \$5 billion annually to the Gross Domestic Product and supports approximately 32,000 jobs.²⁵ In revising its land management plans, the Service needs to ensure it does not impede access to these critical resources especially as the United States is facing grave mineral supply chain challenges and increasing energy reliability issues. Our import reliance has been a well-documented and increasingly problematic issue for decades and has now become a crisis, exacerbated by pandemic- and war-related challenges, and the electrification of our economy.

With mineral demands poised to grow between 500 and 1,000 percent in the coming decades – and even higher for some key minerals like lithium – the U.S. must act quickly to align our need to source more minerals domestically with the right policies to unlock those resources. We are now in the most mineral and metal intensive era in human history. Every new electric vehicle (EV), solar array, wind turbine and transmission line is driving demand higher and faster than ever before.

Russia's actions have similarly raised alarm bells on energy affordability and reliability and highlighted the importance of coal to the global energy mix. Coal is America's most reliable and abundant energy resource—making up nearly 90 percent of U.S. fossil energy reserves on a Btu basis. At current consumption rates, the U.S. has more than 250 years of remaining coal

²⁵ Statement of Christopher French, Acting Deputy Chief, National Forest System USDA Forest Service Before The House Natural Resources Committee, Subcommittee on Energy and Minerals On "Examining the Policies and Priorities of the Bureau of Land Management, the U. S. Forest Service, and the Power Marketing Administrations" March 12, 2019, available at <https://www.congress.gov/116/meeting/house/109054/witnesses/HHRG-116-II06-Wstate-FrenchC-20190312.pdf> (last visited Feb. 2, 2024).

reserves. The demand for coal is only going to rise, especially for coal exports. Russia's invasion of Ukraine triggered U.S. thermal coal exports to spike due to Europe's tight energy supply and low natural gas reserves. Contrary to the advocacy of activists, responsible coal development is not in conflict without expanded deployment of renewables. The Nation's energy grid cannot function without reliable, weather-independent baseload power of the type provided by coal, and a firm base actually facilitates greater practical use of renewables.

The Forest Service's Recognition and Implementation of Federal Minerals Policy

As the Service moves forward with amendments to all 128 land management plans, it must consider the impact on mineral availability, including possible impacts to national security, energy needs, and the balance of trade. Importantly, the Service must recognize that as a matter of federal mineral policy, domestic production is encouraged by statute and should not be prevented by this rulemaking effort.

The Mining and Minerals Policy Act of 1970, states:

[T]hat it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial security and environmental needs . . .²⁶

Congress also made abundantly clear in other statutes the need for domestic mining, which largely occurs on federal lands, including national forests. For example, Congress expressed the need for the U.S. to develop a robust domestic mineral supply, and charged the federal government with responsibilities concerning the development, production, and acquisition of strategic or critical minerals in the Domestic Minerals Program Extension Act of 1953.²⁷

As further evidence of Congress' recognition of the need for domestic mining, the National Materials and Minerals Policy, Research and

²⁶ 84 Stat. 1876, 30 U.S.C. § 21a.

²⁷ 50 U.S.C. § 4502.

Development Act of 1980 underscored the policy of the U.S. to promote an adequate and stable supply of materials for national security, economic well-being and industrial production.²⁸ When Congress speaks so clearly, in multiple statutes, the Executive Branch must listen.

As the Service develops a draft EIS, it cannot ignore the specific minerals policies articulated in the agency's manuals and handbooks. For example, Service Manual (FSM) 2800 on Minerals and Geology contains an overarching statement of the Service's mission related to minerals:

The availability of mineral and energy resources within the national forests and grasslands significantly affects the development, economic growth, and defense of the Nation. The mission of the Forest Service in minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation.²⁹

FSM 2800 outlines specific objectives for the agency including the need to: encourage and facilitate the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to maintain a viable, healthy minerals industry and to promote self-sufficiency in mineral and energy resources essential for economic growth and the national defense.³⁰ The manual also articulates policies to achieve the specific outlined objectives. One important policy in the context of the land management plan amendment efforts is the integration of mineral resource programs and activities with the planning and management of renewable resources through forest land and resource management plans, recognizing mineral development may occur concurrently or sequentially with other resource uses.

Conclusion

²⁸ 30 U.S.C. § 1601.

²⁹ See FSM 2800 Minerals and Geology, Chapter Zero Code, Amendment 2800-2012-1, available at https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsm?2800 (last visited Feb. 2, 2024).

³⁰ Forest Service Manual 2800: Minerals and Geology, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd533980.pdf (last visited Feb. 2, 2024).

The NMA appreciates the opportunity to provide these comments. The multiple use mandate is a viable and credible blueprint for managing forest lands. This concept is recognized and endorsed on the signs seen at the entrance of every national forest that declare the forest a 'Land of Many Uses.' While the Service must ensure multiple use remains on par with sustainability concepts, the agency may not, in its search for climate resilience, seek to establish a protection-oriented management regime more akin to the National Park Service than an agency statutorily obligated to promote multiple use and sustained yield. As the Service moves forward amendments to all 128 of its land management plans, it must keep in mind the conclusion of the U.S. Court of Appeals for the Seventh Circuit: "the national forests, unlike national parks, are not wholly dedicated to recreational and environmental values."³¹ The Service simply does not have the discretion to ignore the multiple use mandate to focus solely on environmental considerations, even ones as potentially impactful as climate resilience.

If you have any questions regarding these comments, please contact me at kmills@nma.org.

Sincerely,

Katie Mills

Katie Mills
Associate General Counsel

³¹ *Cronin v. United States Department of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990).