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Comments: Please find attached the National Mining Association's comments.

September 20, 2024

U.S. Department of Agriculture Ecosystem Management Coordination 201 14th Street SW

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Submitted electronically via <https://cara.fs2c.usda.gov/Public/CommentInput?Project=65356>

Re: Draft Environmental Impact Statement, U.S. Forest Service Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System, 89 Fed. Reg. 52,040 (June 21, 2024).

Dear Sir/Madam:

The National Mining Association (NMA) appreciates the opportunity to submit comments on the U.S. Forest Service's (Service) Draft Environmental Impact Statement (DEIS) for its Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System.¹ As written, the Service would 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 NMA is the official voice of U.S. mining. Our membership includes more than 250 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. 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.

Background

The Service's DEIS was informed through a series of public engagement opportunities including an advance notice of proposed rulemaking (ANPR) in April 2024 regarding how the Service should adapt its policies to protect, conserve and manage the national forests for climate resilience.² The NMA commented on the ANPR

and hereby incorporates those comments by reference.³

The Service subsequently published a notice of intent (NOI) to prepare the DEIS.⁴ The NMA commented on the NOI and hereby incorporates those comments by reference.⁵ NMA's comments to the NOI outlined the potential conflicts of prioritizing conservation with the Service's multiple use mandates under both the Multiple Use Sustained Yield Act (MUSYA) and the Federal Land Policy and Management Act (FLPMA). The NMA urged the Service to exercise caution in its execution of the management plan amendments so not to ignore the plenary power of Congress to legislate the use of federal lands. The comments also encouraged the Service to account for the increased demand for domestically mined minerals and materials in its 128 land management plan amendments.

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 amendments to the land management plans would provide a framework for strategic conservation, proactive stewardship and management, and mitigate risks across old-growth forest conditions. While the NMA broadly supports these goals, we urge the Service to be mindful of Congress' intent that forest lands are open to myriad of uses, including mining activities.

As stated in our comments on the ANPR and NOI, 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. Given the DEIS'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 (BLM) on its proposed Conservation and Landscape Health rule.⁶

The Forest Service's Multiple Use Mandate

Congress established the National Forest System through the Organic Administration Act of 1897 (Organic Act).⁷ From the outset, Congress made clear that national forests "are not parks set aside for nonuse, but have been established for economic reasons."⁸ 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."⁹

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 MUSYA,¹⁰ the Forest and Rangeland Renewable Resources Planning Act of 1974,¹¹ and the National Forest Management Act of 1976 (NFMA).¹²

"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 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.¹³

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.¹⁴

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.¹⁵

Similarly, FLPMA requires the Service to manage the National Forests in a manner which is consistent with a multiple use philosophy derived from the MUSYA.¹⁶ FLPMA defines "multiple use" as:

[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.¹⁷

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 1872¹⁸ and the Mineral Leasing Act of 1920 (MLA).¹⁹

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."²⁰

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."²¹ 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 . . ."²²

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.²³ 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 demand 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[mdash]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 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

The Service must consider the impact on mineral availability, including possible impacts to national security, energy needs, and the balance of trade as it moves forward with amendments to all 128 land management plans.

Importantly, the Service must continue to recognize that as a matter of federal mineral policy, domestic production is encouraged by statute and should not be prevented with the amendment of these plans.

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 . . .
.24

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 1953.²⁵

As further evidence of Congress' recognition of the need for domestic mining, the National Materials and Minerals Policy, Research and 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.²⁶ When Congress speaks so clearly, in multiple statutes, the Executive Branch must listen.

As the Service finalizes these plans, 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.²⁷

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.²⁸ 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.

Specific Comments on the DEIS

The NMA appreciates the Service's recognition in the DEIS of the federal government's policy for mineral and energy resource management. The Service correctly acknowledges Congress' direction in the Minerals Policy Act of 1970, which states that the government is to "foster and encourage private enterprise in the development of economically sound and stable industries, and in the orderly and economic development of domestic resources to help assure satisfaction of industrial, security, and environmental needs." The DEIS further addresses the essential role of national forests and grasslands in contributing to an adequate and stable supply of mineral and energy resources, while continuing to sustain the lands productivity for other uses and support biodiversity goals.²⁹ As stated earlier, NMA's members frequently engage in conservation activities to support the conservation and resilience of federal lands, like national forests.

Additionally, and as stated in the DEIS, the rights to explore and develop mineral and energy resources on national forest lands is explicitly authorized by Congress through laws dating back to 1872 with the Mining Law.³⁰ The NMA appreciates the Service's consideration of the effects of the amendments on mineral and energy resource management and development, in addition to the effects of the management of the four mineral disposal groups could have on the amendments. The Service's exceptions to the standards under the amendments if the responsible official determines that actions are necessary "to comply with other statutes or regulations, valid existing rights for mineral and energy resources, or authorizations of occupancy and use made prior to the amendment decision" correctly recognize Congress' intent in the prioritization of mineral and energy development. The Service notes that for mineral and energy resources, the exceptions would apply often due to the numerous laws, regulations, valid existing rights, and other existing authorizations that provide legal deference to allow the activities to occur where otherwise they would be restricted or prohibited. While the NMA welcomes these important acknowledgements regarding mining operations by the Service, we remain concerned about certain provisions of the mineral disposal groups outlined in the DEIS analysis of the Socio Economic and Cultural Impacts Analysis.

For locatable minerals, the Service acknowledges that all forest service lands are classified as reserved public domain lands that are open to prospecting, exploration, and development of locatable minerals unless they have been appropriated, withdrawn, or segregated from mineral location and entry subject to valid existing rights under the Mining Law of 1872. Therefore, the Service states existing locatable mineral operations could still occur under the proposed action alternatives, as the land or mineral status would not change. However, any new locatable mineral operations adjacent to an old-growth forest would likely experience prolonged timelines for approval, and proponents could be subject to additional mitigation measures resulting in increased costs that may inhibit the development of locatable mineral resources. The Service notes that potential future mineral plan modifications or expansions of existing operations could experience similar effects. The NMA urges the Service to clarify its existing authority only extends to national forest service lands, and the Service has no control over adjacent lands. The Service should also not penalize mining operations undergoing mine plan modifications or expansions with punitive mitigation measures that will ultimately cost project proponents time and resources and is in direct contravention of Congress' intent in the multiple federal laws recognizing the importance of mining.

The Service also acknowledges the importance of the Mineral Leasing Act of 1920 in the form of monetary returns to the federal treasury and state and local governments from rents, bonus bids, and royalties on mineral and energy production. Therefore, under the action alternatives, existing leases and operations are not expected to be affected by the proposed action due to a proposed exception for when the responsible official determines that actions are "necessary to comply with other statutes or regulations, valid existing rights for mineral and energy resources, or authorizations of occupancy and use made prior to the amendment decision." The Service states that existing leases with future project modifications or expansions could experience indirect effects similar to new leasing operations. New proposals for leasable operations would be managed in accordance with the plan components in the amendments where the Service has discretion on whether to recommend leasing and/or could

add stipulations to mitigate or avoid impacts to those resources. The NMA encourages the Service to not penalize mining operations undergoing leasing modifications or expansions with punitive measures that will threaten mining projects with costly mitigation and additional resources. The DEIS amendments could allow the Service to completely stymie mining on federal lands. For example, the BLM, in updating its resource management plans (RMPs) recently, has taken the position of severely limiting leasing operations on federal lands with little justification and in contravention to Congress' intent in multiple federal statutes. The NMA filed protests on these egregious RMPs and they are hereby incorporated by reference.³¹

The Service's DEIS notes that on lands containing both old-growth forests and non-federal mineral estates, owners of the non-federal mineral estates could be asked to comply with the proposed plan components of the amendments. However, the Service concedes that it likely does not have authority to require compliance. The NMA agrees that the Service does not have authority to require compliance, and therefore the Service should not attempt to force adherence to the new amendments. Doing so would likely be considered a "taking" by the federal government, setting up the Service for litigation for its unlawful conduct.

As noted above, the Service's current approach could impede mining activities on public land, including development of coal that continues to play an outsized role in providing affordable and reliable 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. The NMA urges the Service to adhere to its multiple use mandate while striving toward its sustainability concepts.

Conclusion

The NMA appreciates the opportunity to provide these comments. The importance of forest service lands for mineral and energy development cannot be understated. The Service's 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."³² 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,

¹ 89 Fed. Reg. 52,040 (June 21, 2024).

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 Sept. 20, 2024).

4 88 Fed. Reg. 88,043.

5 See National Mining Association Comments (Feb. 2, 2024).

6 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 Sept. 20, 2024).

7 30 Stat. 11 (June 4, 1987).

8 30 Cong. Rec. 966 (1897) (Cong. McRae).

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

10 16 U.S.C. [sect][sect]528-31.

11 16 U.S.C. [sect][sect]1600-14.

12 16 U.S.C. [sect]1600 et seq.

13 16 U.S.C. [sect] 531(a).

14 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. [sect][sect] 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).

15 16 U.S.C. 1604(e).

16 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").

17 43 U.S.C. [sect] 1702(c).

18 30 U.S.C. [sect][sect]21 et seq.

19 30 U.S.C. [sect][sect]181 et seq.

20 16 U.S.C. [sect] 478 (emphasis added).

21 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).

22 16 U.S.C. [sect]528.

23 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 Sept. 20, 2024).

24 84 Stat. 1876, 30 U.S.C. [sect] 21a.

25 50 U.S.C. [sect] 4502.

26 30 U.S.C. [sect] 1601.

27 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 Sept. 20, 2024).

28 Forest Service Manual 2800: Minerals and Geology, available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd533980.pdf (last visited Sept. 20, 2024).

29 DEIS Social, Economic and Cultural Impact Analysis Report, p. 40.

30 Id.

31 See National Mining Association Protests on the Miles City Field Office RMP, Buffalo Field Office RMP, North Dakota Field Office RMP, and Rock Springs Field Office RMP.

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

ATTACHMENT: NMA_Final Comments-FS DEIS on Old Growth Forests.pdf - this is the same content that is coded in text box; it was originally included as an attachment