



**Testimony of  
Katie Sweeney  
Executive Vice President and Chief Operating Officer  
National Mining Association**

**U.S. Senate Subcommittee on Public Lands, Forests, and Mining**

**“Hearing to Receive Testimony on the Mining Regulatory Clarity Act of  
2023 (S. 1281) and the Clean Energy Minerals Reform Act of 2023 (S.  
1742)”**

**December 12, 2023**

**Table of Contents**

Introduction.....	3
Ever-increasing Demand for Minerals .....	4
Destabilizing The Mining Law .....	7
Backdrop: Rosemont Project and Subsequent Litigation.....	7
Years of Litigation .....	7
The Mining Regulatory Clarity Act (S. 1281).....	8
What S. 1281 Does Not Affect .....	8
The Clean Energy Minerals Reform Act (S. 1742).....	10
A Punitive Gross Royalty Disincentivizes Investment .....	12
Change to the FLPMA Unnecessary or Undue Standard.....	13
Changing the Rules of the Road Impairs Investment.....	13
Conclusion.....	14



Good morning Chair Cortez-Masto and Ranking Member Lee. I am Katie Sweeney, Executive Vice President and Chief Operating Officer of the National Mining Association (NMA). I appreciate the opportunity to testify today on behalf of the hardrock mining industry on the Mining Regulatory Clarity Act of 2023 (S. 1281) and the Clean Energy Minerals Reform Act of 2023 (S. 1742). America's mining industry supplies the essential materials necessary for every sector of our economy – from technology and healthcare to energy, transportation, infrastructure and national security. The NMA is the only national trade organization that serves as the voice of the U.S. mining industry and the hundreds of thousands of American workers it employs before Congress, the federal agencies, the judiciary and the media, advocating for public policies that will help America fully and responsibly utilize its vast mineral resources.

We 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 has a membership of more than 280 companies and organizations involved in every aspect of mining, from producers and equipment manufacturers to service providers.

## Introduction

Despite being home to vast mineral reserves, the U.S. is facing unprecedented and dangerous mineral supply chain challenges. 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 supply chain challenges, and exponentially increasing mineral demands due to the rapid electrification of our economy. As documented by the U.S. Geological Survey (USGS), the U.S. reached record mineral import reliance in 2022 as imports made up more than one-half of the U.S. apparent consumption for 51 nonfuel mineral commodities – up from 2021, when only 47 commodities met that metric.<sup>1</sup>

There is recognition by some within the Biden-Harris administration of the immense challenge we now face and the importance of domestic mining to nearly every piece of the President's agenda. Several of the administration's early executive actions, including its comprehensive supply chain review, made clear the inherent vulnerabilities of our overreliance on mineral imports, the need for domestic mining support and lack of domestic processing capabilities. Despite the rhetoric from the administration about the need to address the minerals challenge, actions have not lived up to the words.<sup>2</sup> There can be no mineral and supply chain security — no

---

<sup>1</sup> U.S. Geological Survey, 2023 Commodity Summary, available at <https://pubs.er.usgs.gov/publication/mcs2023>.

<sup>2</sup> The administration recently memorialized its policy recommendations with the Sept. 12, 2023, release of the White House Interagency Working Group (IWG) on Mining Regulations, Laws, and Permitting released its report, "Recommendations to Improve Mining on Public Lands." The NMA strongly disagrees with the report's overarching conclusion that fundamental reform of the Mining Law is necessary to achieve the best outcomes. The NMA's comments to

meeting the enormous mineral demand at our doorstep — without fundamental recognition that we need more domestic mining and the policies to achieve it.

Solutions to meet anticipated mineral demand, while simultaneously rebuilding our domestic supply chains, must be comprehensive. Friend-shoring of our minerals supply, however, cannot come in place of the essential work of standing up production and these supply chains at home. Regulatory certainty must be the cornerstone of minerals policies to enable the ramping up of domestic production and processing under our rigorous environmental and safety standards.

The NMA appreciates the opportunity to discuss the importance of regulatory certainty in the context of the legislation that is the subject of this hearing. The NMA strongly supports the bipartisan Mining Regulatory Clarity Act of 2023 (S. 1281) to restore long-standing interpretations of the Mining Law upended by the U.S. Court of Appeals for the Ninth Circuit's fundamentally flawed decision in *Center for Biological Diversity v. U.S. Fish & Wildlife Service (Rosemont Decision)*. We have significant concerns, however, about the partisan Clean Energy Minerals Reform Act of 2023's (S. 1742) wholesale changes to the Mining Law including its punitive fees and a radical change to the established standard governing approval of mining projects on federal lands. These provisions will erode investor confidence in the U.S. and jeopardize the viability of a strong domestic mining industry.

## Ever-increasing Demand for Minerals

The most mineral intensive moment in human history is upon us and the U.S. is woefully unprepared. Looking solely at demand coming from the electric vehicle market: the Energy Transitions Commission estimates up to 250 new mines may be required by 2030.<sup>3</sup> Benchmark Minerals says we will need 384 new mines by 2035.<sup>4</sup> And last month, the Fraser Institute said 388 new mines must be built by 2030.<sup>5</sup> It's clearly not a question of if we must mine, but where. The "where" matters as producing minerals here at home, as opposed to countries such as Congo and Zambia being pushed by the administration, ensures mining will be conducted in accordance with the world's most stringent environmental, labor and safety regulations, while simultaneously creating high-paying American jobs.

---

the IWG are available at <https://www.regulations.gov/comment/DOI-2022-0003-26954>. A recent NMA op-ed, the Biden mining policy train wreck, outlines concerns regarding many of the key policy recommendations is available at

[https://elkodaily.com/opinion/column/commentary-the-biden-mining-policy-train-wreck/article\\_3036f00e-80c5-11ee-bc20-1bade970ae33.html](https://elkodaily.com/opinion/column/commentary-the-biden-mining-policy-train-wreck/article_3036f00e-80c5-11ee-bc20-1bade970ae33.html). These NMA concerns apply equally to provisions of S. 1742 that are similar to the IWG policy recommendations.

<sup>3</sup> Energy Transitions Commission, "Material and Resource Requirements for the Energy Transition," July 2023; [https://www.energy-transitions.org/wp-content/uploads/2023/07/ETC-Material-and-Resource-Requirements-ExecSummary\\_vF.pdf](https://www.energy-transitions.org/wp-content/uploads/2023/07/ETC-Material-and-Resource-Requirements-ExecSummary_vF.pdf)

<sup>4</sup> <https://source.benchmarkminerals.com/article/more-than-300-new-mines-required-to-meet-battery-demand-by-2035>.

<sup>5</sup> Fraser Institute, "Failure to Charge: A Critical Look at Canada's EV Policy," Nov. 2023; <https://www.fraserinstitute.org/sites/default/files/can-metal-mining-match-the-speed-of-planned-electric-vehicle-transition.pdf>.

The Biden administration has also prioritized scaling back U.S. reliance on Chinese minerals. Earlier this year, President Biden’s national security adviser, Jake Sullivan, warned that “clean-energy supply chains are at risk of being weaponized in the same way as oil in the 1970s, or natural gas in Europe in 2022.”<sup>6</sup> In his remarks, he specifically mentioned concerns about minerals that form “the backbone of the clean-energy future.”<sup>7</sup> His concerns were prescient. In July, China announced restrictions on the export of gallium and germanium, minerals integral to semiconductors, solar panels and missile systems. The U.S. is currently 100 percent reliant on China for these critical commodities. As accurately described by the Wall Street Journal, the action was “more than a trade salvo. It was a reminder of China’s dominant hold over the world’s mineral resources—and a warning of its willingness to use them in its escalating rivalry with the U.S.”<sup>8</sup> The July restrictions were followed by an October announcement by China setting export restrictions on graphite, a move Geoffrey Pyatt, Assistant Secretary of State for Energy Resources, called a “wake-up call” that reflects both the dangers and urgency the U.S. faces in ramping up critical mineral supply chains to meet its climate goals.<sup>9</sup>

China’s willingness to employ such tactics for decades, has led to skyrocketing prices for many minerals and has required a drawdown of limited stockpiles that will last two to three months at most.<sup>10</sup> As articulated by a former U.S. Trade Representative for China, China’s past retaliation patterns are the best clues for predicting what to expect next, and their most effective passive option would be an export suspension of key inputs that would “inflict direct, reciprocal pain.”<sup>11</sup>

China’s dominance in mineral production and processing will take focused and durable policies to overcome. As the primary producer and/or supplier of mineral commodities listed as essential to U.S. economic and national security,<sup>12</sup> China

---

<sup>6</sup> Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution, April 27, 2023. Available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/>.

<sup>7</sup> Id.

<sup>8</sup> Jon Emont, Wall Street Journal, China Controls Minerals That Run the World—and It Just Fired a Warning Shot at U.S., July 11, 2023. Available at <https://www.wsj.com/articles/china-controls-minerals-that-run-the-worldand-just-fired-a-warning-shot-at-u-s-5961d77b>.

<sup>9</sup> E&E Greenwire, “State Dept. official: China's graphite restriction a 'wake-up call'.” November 2, 2023. Available at <https://subscriber.politicopro.com/article/eenews/2023/11/02/state-dept-official-chinas-graphite-restriction-a-wake-up-call-00125003>.

<sup>10</sup> Reuters, “China gallium, germanium export curbs kick in; wait for permits starts.” August 1, 2023. Available at <https://www.reuters.com/markets/commodities/chinas-controls-take-effect-wait-gallium-germanium-export-permits-begins-2023-08-01/>.

<sup>11</sup> The Hill, “China’s retaliation playbook can’t meet the US export control challenge,” October 20, 2022; <https://thehill.com/opinion/international/3697077-chinas-retaliation-playbook-cant-meet-the-us-export-control-challenge/>

<sup>12</sup> Notably this reliance comes despite existing U.S. resources. In the 2022 Mineral Commodity Summaries, the USGS indicated the U.S. had an estimated 48 million metric tons (mt) of copper that can be mined and processed economically, 69 million mt of cobalt, 340 million mt

controls more than 80-90 percent of global rare earth element production, nearly 90 percent of global mineral processing capabilities, as well as the market prices for rare earth elements at each step of the process. China also refines 68 percent of the world's cobalt, 65 percent of nickel, and 60 percent of battery grade lithium needed for electric vehicle batteries and energy technologies. Goldman Sachs Research also estimates the extent of the vertically integrated nature of China's dominance, with 65 percent of battery components, 71 percent of battery cells, and 57 percent of the world's electric vehicles being made in China.<sup>13</sup>

Notably, China's strong supply chain position does not result from an inherent advantage in reserves for most materials, but rather from heavy non-market activities and government subsidization of mining, processing and manufacturing industries and excesses capacity. With its much longer planning horizon, China has pursued its "Going Global" strategy since the late 1990s, which involves deployment of significant direct investments across the globe to secure mineral supply chains.<sup>14, 15</sup>

The administration's electrification and national security objectives cannot be achieved through outsourcing our mineral supply chains to countries like China and Russia and the Democratic Republic of Congo that have far less environmental, safety and labor oversight, or in some cases none. Unfortunately, we only increase our dependence on these and other sources for our minerals needs when we stand in the way of opportunities to enact meaningful enabling policies, instead choosing policies that limit or completely block responsible domestic mineral development.

---

of nickel and 750 million mt of lithium. Regardless, in 2021, the U.S. imported 48 percent of U.S. consumption of nickel, 76 percent of cobalt, 45 percent of copper, and more than 25 percent of lithium.

<sup>13</sup> Goldman Sachs, "Resource realism: The geopolitics of critical mineral supply chains," Sept. 2023. <https://www.goldmansachs.com/intelligence/pages/resource-realism-the-geopolitics-of-critical-mineral-supply-chains.html>

<sup>14</sup> Humphries, Marc. Congressional Research Service, "China's Mineral Industry and U.S. Access to Strategic and Critical Minerals: Issues for Congress," March 20, 2015. <http://fas.org/sgp/crs/row/R43864.pdf>.

<sup>15</sup> See also, USGS 2020 Investigation of U.S. Foreign Reliance on Critical Minerals (There are instances where the mineral deposit or mining and mineral processing operation of a commodity is partially or completely owned and (or) controlled by foreign companies with strong ties to their governments. For example, Chinese firms have purchased equity stake in lithium deposits and operations in Australia and Chile, niobium operations in Brazil, a rare earth deposit in Greenland, and cobalt operations in the D.R. Congo, Papua New Guinea, and Zambia (S&P Global Market Intelligence, 2020). Investigating China's investment in cobalt assets worldwide, Gulley and others (2019) found that when taking into account Chinese companies' ownership in foreign assets on an equity-share basis, China's share of global cobalt production increases from 2 to 14 percent for cobalt mine materials and from 11 to 33 percent for cobalt intermediate materials (figure 6). Furthermore, if the Chinese companies' equity shares of the production from these assets are assumed to be as secure as its domestic production, then these acquisitions have the effect of reducing China's NIR from 97 percent to an adjusted 68 percent, thereby reducing China's exposure to supply disruptions (Gulley and others, 2019.) p. 8.

The U.S. effectively has all the ingredients necessary to counter China’s global mineral dominance. However, the wrong policies are creating substantial setbacks to attaining such dominance. Today’s legislation, the Mining Regulatory Clarity Act, is a necessary step to help ensure U.S. minerals policy provides the necessary regulatory certainty to enable responsible domestic mining.

## Destabilizing The Mining Law

### Backdrop: Rosemont Project and Subsequent Litigation

The decade-long Rosemont permitting process began in 2008 when it submitted a mining plan of operations and was subsequently followed by a draft environmental impact statement (EIS) in 2011 and a final EIS in late 2013. The Forest Service issued a final record of decision in 2017, but final approval was delayed until Rosemont received a Clean Water Act section 404 permit in 2019. The approved plan of operations included authorization to place waste rock on more than 2,000 acres of unpatented claims as a “use reasonably incident” to its operations.

### Years of Litigation

Several environmental groups challenged the approval of the Rosemont project, including the placement of waste rock on the unpatented claims. The Rosemont litigation was a strategic assault on the Mining Law in an attempt to make it wholly unworkable, knowing that the economic viability of a mine depends upon the ability to use surrounding lands for activities incidental to mining, known as ancillary use activities. In 2019, the United States District Court for the District of Arizona issued a fundamentally flawed decision vacating the Forest Service’s record of decision supporting the agency’s approval of Rosemont plan of operations.<sup>16</sup> The decision conflicted with more than a century of legal precedent, including numerous U.S. Supreme Court decisions, related to the Mining Law. The District Court’s reversal focused on the failure of the Forest Service to confirm that the mining claims underlying proposed waste rock and tailings storage facilities were valid before approving the plan.<sup>17</sup> In doing so, the court misconstrued existing legal precedent regarding rights conveyed by the Mining Law to owners of unpatented claims and the ability to use surface resources to further the development of those claims.

The district court decision was appealed and in May 2022, the United States Court of Appeals for the Ninth Circuit (9<sup>th</sup> Circuit) affirmed the underlying decision on slightly different grounds. The narrow and unprecedented reading of the Mining Law and U.S. Forest Service 36 C.F.R. §228 Subpart A regulations, severely restricts the Forest Service’s ability to approve ancillary use activities incidental to mining operations.

---

<sup>16</sup> *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 409 F. Supp. 3d 738 (D. Ariz. 2019).

<sup>17</sup> *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 33 F.3d 1202 (9<sup>th</sup> Cir. 2022).



The environmental groups involved in the Rosemont litigation have tried to further leverage the Rosemont decision to prevent other mining projects from moving forward nationwide. For example, they challenged the Lithium America's Thacker Pass project arguing the Rosemont decision rationale applied to Bureau of Land Management (BLM) authorizations as well as Forest Service. The U.S. District Court for the District of Nevada agreed but remanded the Thacker Pass permit back to the agency instead of invalidating it.<sup>18</sup> The Mount Hope molybdenum mine suffered a similar fate later in 2023. These same groups have submitted comments on numerous other projects arguing they are unlawful under the Rosemont decision.

## The Mining Regulatory Clarity Act (S. 1281)

The bipartisan legislation introduced in April 2023 by Senator's Catherine Cortez Masto (D-Nev.) and Jim Risch (R-Idaho) reinstates much needed clarity in the face of the Rosemont decision. The legislation returns us to the workable framework that existed prior to the fundamentally flawed Rosemont ruling, ensuring the fundamental ability to conduct responsible mining activities on federal lands.<sup>19</sup> The legislation is a durable solution, vastly superior to what can be achieved through the May 2023 Solicitor's Opinion<sup>20</sup> issued by the Department of the Interior, especially considering courts' increasingly reluctance to provide the appropriate deference to such opinions.

### What S. 1281 Does Not Affect

Contrary to allegations by the bill's detractors, the legislation simply codifies the prior framework that existed before the Rosemont ruling – nothing more, nothing less. It provides no additional rights or allowable actions for a claim holder than what has existed, and worked, for decades before. It ensures a claim holder shall have the right to use, occupy, and conduct operations with or without discovery of a valuable mineral deposit, which is the longstanding method utilized by BLM to evaluate proposed operations.

- **The legislation does not lock up federal lands:** The legislation does not change the requirements that a mining claim actually be used for mining purposes. A claim holder cannot simply ground a stake to mark a claim, pay a fee, and file paperwork to lock up lands for purposes unrelated to mining as this would result in immediate suspension pursuant to BLM regulations.<sup>21</sup> All existing standards for conducting mining operations under existing BLM regulations remain in effect as does the Mining Law's "good faith" doctrine.

---

<sup>18</sup> *Bartell Ranch LLC v. McCullough*, No. 321CV00080MMDCLB, 2023 WL 1782343, (D. Nev. Feb. 6, 2023)

<sup>19</sup> See, definition of operations at [36 CFR 228.3](#) which is mirrored in the legislation.

<sup>20</sup> Department of the Interior, Office of the Solicitor, [Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057](#), May 16, 2023. The NMA believes the opinion undermines regulatory certainty by raising more questions than it answers, offering unworkable solutions and undercutting well-understood and lawful interpretations of the Mining Law.

<sup>21</sup> See, use and occupancy regulations under the Mining Law at [43 CFR § 3715.0-1](#), [43 CFR § 3715.2](#), and [43 CFR § 3715.7-1](#)

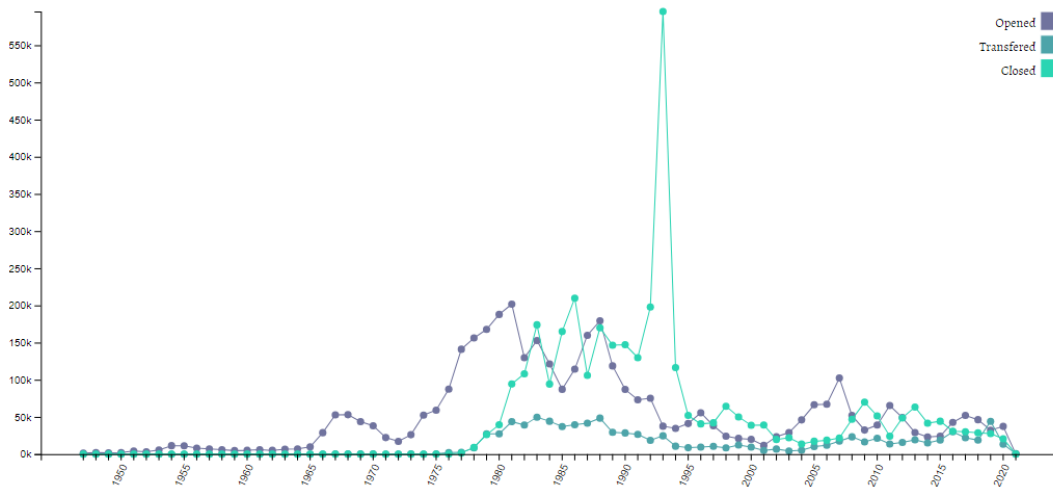


Pursuant to the doctrine, any claim located in “bad faith,” or with no intention to extract minerals is void.<sup>22</sup> Activities must be reasonably incident, constitute substantially regular work, be reasonably calculated to lead to the extraction and beneficiation of minerals, as verified by BLM official.

Further, BLM data listing the amount of mining claims opened, closed or transferred demonstrates that since 1947 a steady and proportionate number of new claims are opened and closed each year.<sup>23</sup>

### Annual The United States Mining Claim Trends

Annual breakdown of The United States mining claim records between 2021 and 1947.



- The legislation is complemented by exhaustive local, state, and federal environmental, cultural resource, reclamation, and financial assurance laws and regulations to ensure responsible operations:** Activities on BLM and Forest Service lands must meet all applicable laws and regulations. Under the Federal Land Policy and Management Act (FLPMA) section 302(b), activities must be conducted to prevent “unnecessary or undue degradation,” which requires compliance with applicable federal and state laws related to environmental protection and protection of cultural resources.<sup>24</sup> Furthermore, the standard is self-updating: the inherent nature of the standard allows for continual improvement. As federal and state laws are strengthened, so is the standard. Importantly, state environmental regulations of general applicability

<sup>22</sup> See, generally, *U.S. v. Bagwell*, 961 F.2d 1450 (9<sup>th</sup> Cir. 1992) (The department can move forward to eject a claimant acting in bad faith without first contesting the claims) and *U.S. v. Nogueira*, 403 F.2d 816 (9<sup>th</sup> Cir. 1968)(A claim made in bad faith is void even if it is supported by a discovery).

<sup>23</sup> Bureau of Land Management claim listings data. Available at <https://thediggings.com/usa/trends#table-annual-actions>. Note: a data outlier occurred in 1993 after the claims maintenance fee was implemented.

<sup>24</sup> Bureau of Land Management, “The Federal Land Policy and Management Act of 1976, as amended.” Available at [https://www.blm.gov/sites/default/files/AboutUs\\_LawsandRegs\\_FLPMA.pdf](https://www.blm.gov/sites/default/files/AboutUs_LawsandRegs_FLPMA.pdf)

apply on federal lands and are not preempted by the General Mining Law or other federal laws.<sup>25</sup>

- **The Mining Regulatory Clarity Act would not change access to public lands for recreation or conservation:** Under existing law, the public has “the conditional right to cross mining claims or sites for recreational and other purposes and to access federal lands beyond these boundaries.” Nor does the legislation reopen lands already placed off-limits to mining through congressional or administrative action, including wilderness, national parks, wildlife refuges, recreation areas and wild and scenic rivers.
- **Renewable energy projects on public lands will not be impacted:** In April 2013, the BLM published a final rule, “Segregation of Lands—Renewable Energy,” that allows the BLM to segregate public lands within a solar or wind application area from the operation of the public land laws, including the Mining Law, by publication of a Federal Register notice. The BLM uses this temporary segregation authority to preserve its ability to approve, with modifications, or deny proposed energy generation right-of-way (ROW), and to facilitate the orderly administration of the public lands, subject to valid existing rights.<sup>26</sup> Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature which would not impact lands identified in this notice of intent may be allowed with the approval of an authorized officer of the BLM during the segregation period. The BLM has exercised this authority at least 10 times in the last year.
- **The legislation does not undermine the rights of tribes:** The legislation does not speak to the rights of tribes, communities, or any stakeholders so it does not lessen any obligations under existing local, state, and federal regulations.

## The Clean Energy Minerals Reform Act (S. 1742)

International competition for minerals is becoming fierce and nearly every other Western ally – aside from the U.S. – is prioritizing ramping up domestic mining operations. In the last two years, Canada released its strategy to position itself as the “global supplier of choice for clean energy minerals;”<sup>27</sup> the United Kingdom released its critical minerals strategy;<sup>28</sup> and the European Union unveiled a

---

<sup>25</sup> *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

<sup>26</sup> Federal Register, “Segregation of Lands—Renewable Energy,” (78 Fed. Reg. 25204, Apr. 13, 2013). Available at <https://www.federalregister.gov/documents/2013/04/30/2013-10087/segregation-of-lands-renewable-energy>

<sup>27</sup> Natural Resources Canada News Release, “Countries Commit to the Sustainable Development and Sourcing of Critical Minerals,” Dec. 12, 2022. Available at <https://www.canada.ca/en/natural-resources-canada/news/2022/12/countries-commit-to-the-sustainable-development-and-sourcing-of-critical-minerals.html>

<sup>28</sup> Department for Business, Energy and Industrial Strategy, “Resilience for the future: The UK’s critical minerals strategy, 22 July 2022. Available at

comprehensive proposal including various permitting efficiency actions to ensure the EU's access to a secure, diversified, affordable and sustainable supply of critical raw materials.<sup>29</sup>

Despite significant efforts by individual agencies to secure our supply chains, the U.S.-China Economic and Security Review Commission found that:

The current ability of the U.S. to overcome the scale and scope of China's harmful policies is undermined by the lack of a coherent strategy and fragmented authorities to mobilize resources, coupled with a deficiency in new tools to address economic injury. The U.S. is also impeded by its self-imposed barriers to employing and underutilization of available tools and its difficulties in data sharing and analysis.<sup>30</sup>

Over the past three decades, legislation to amend the Mining Law has been introduced every Congress. The legislation generally is punitive in nature, containing gross retrospective royalties, taxes on the movement of materials, prescriptive, duplicative and potentially conflicting environmental standards, and greater restrictions on land access. The partisan Clean Energy Minerals Reform Act, despite the name, is no exception. Upending the Mining Law as contemplated by S. 1742 at this critical moment is counterproductive to reshoring essential supply chains, reducing our mineral import dependence on geopolitical adversaries, and building the materials industrial base needed to underpin the renewable energy and climate reduction objectives.

The perennial legislative proposal relies on an outdated view of the mining industry to legislate us into indefinite import reliance. While it is a worthy goal we all share of promoting cleanup of abandoned legacy mines that predate the modern regulatory era, it is undermined by its failure to recognize the effectiveness of existing regulations and modern mining practices. Remaking the way we conduct mining on federal lands, as is contemplated in S. 1742 undermines the regulatory certainty needed to incentivize domestic investment and development.

Proposed provisions in the Act that create the greatest uncertainty include:

- A 5-8 percent royalty on the gross income from mining for production of all locatable minerals (includes a grandfathering provision to only protect mines that have an approved plan of operations and are in production as of the date of enactment);
- A prospective annual land use fee equal to four times the claims maintenance fee on each 20 acres of federal lands;

---

<https://www.gov.uk/government/publications/uk-critical-mineral-strategy/resilience-for-the-future-the-uks-critical-minerals-strategy>

<sup>29</sup> European Union's Critical Raw Materials Act, March 16, 2023. Available at

[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/green-deal-industrial-plan/european-critical-raw-materials-act\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/green-deal-industrial-plan/european-critical-raw-materials-act_en)

<sup>30</sup> U.S.-China Economic and Security Review Commission, 2022, Executive Summary; p. 16.

Available at [https://www.uscc.gov/sites/default/files/2022-11/2022\\_Executive\\_Summary.pdf](https://www.uscc.gov/sites/default/files/2022-11/2022_Executive_Summary.pdf)

- A prospective annual abandoned mine land reclamation fee of 1-3 percent of the value of production from hardrock minerals mining operations (the reclamation fee applies to all operations, whether on federal, state or private lands);
- A radical change to the existing unnecessary or undue degradation standard;
- New authority allowing land withdrawals to be effectuated without compliance with the procedures and approvals established under FLPMA.

The existing system works as intended – as a land tenure statute and not an environmental statute – to promote mineral exploration and development on federal lands. It is complemented by exhaustive local, state and federal environmental, cultural resource, reclamation, and financial assurance laws and regulations to ensure responsible operations. Upending this system will not only slow the mine permitting process in the U.S. but will force the U.S. to double-down on our already outsized import reliance from countries with questionable labor, safety and environmental practices.

### A Punitive Gross Royalty Disincentivizes Investment

As highlighted by the NMA and mining company representatives in prior congressional hearings, the NMA and the mining industry are not opposed to all royalty proposals, just those that impair our global competitiveness.<sup>31</sup> The mining industry has long worked to engage with Congress in a bipartisan fashion to enact reasonable amendments to the Mining Law, including a royalty. However, all royalty approaches are not equal, and royalties need to be crafted carefully to avoid driving mining further abroad. The NMA supports the allocation of royalties to address physical safety and environmental hazards at abandoned hardrock mines. These monies could be supplemented with allocation of excess claims maintenance fees (fees collected by the BLM in excess of the funds needed for the Mining Law Administration Program). The NMA supports a portion of the monies collected being distributed directly to affected states where these abandoned mine lands (AMLs) are located though we do not currently have an official position on allocation percentages.

The NMA believes that the best way to address competitiveness concerns is to institute a net prospective royalty. Generally, a royalty assessed on gross income increases the economic risk of a given mining investment and acts as a disincentive to investment. A net prospective royalty is the only type of royalty that maintains incentives for private parties to invest enormous up-front capital to develop mining projects on federal lands. Because a royalty assessed on net income has a smaller effect on the variability of after-tax rates of return, it is a better basis for assessing a royalty. As commodity prices decrease, the rate of return required to justify a mining investment increases more dramatically under a gross royalty than under a net royalty. Because the other costs of the mining operation are relatively fixed, the

---

<sup>31</sup> Comments for 2009 testimony from Phil Baker and 2021 testimony from Katie Sweeney, illustrating the NMA's consistent positions on potential amendments to the Mining Law.

gross royalty takes a bigger bite out of the shrinking income pie as prices decrease. This can have a dramatic impact on whether existing mines stay open or new mines are built.

### Change to the FLPMA Unnecessary or Undue Standard

S. 1742 would subvert the FLPMA unnecessary or undue standard by redefining the term to eliminate the word “unnecessary” and provide a mine veto for mines that cannot meet the new standard. As such, the definition displaces decades of administrative and judicial interpretation of FLPMA by grafting into it the “substantial irreparable harm” standard that mining opponents have sought for decades. The new standard will lead to project delays and litigation and undermine investment.

The BLM engaged in rulemaking activities to adopt a similar change in 1999 and 2000 but ultimately concluded the harms of such an approach outweighed any benefits. The final 2000 Environmental Impact Statement associated with the rulemaking effort projected that the value of mine production originating from public lands would decrease by 10-30 percent (\$169-\$484 million) across the study area. Decreased production would cause ripple effects including losses of: 2,100 to 6,050 jobs; \$305 million to \$877 million in total industry output; \$138 million to \$396 million in total personal income (of which \$76 million to \$218 million is employee compensation); \$157 million to \$453 million in value-added. The negative impacts to Nevada alone were estimated at \$117 to \$351 million.<sup>32</sup>

### Changing the Rules of the Road Impairs Investment

S. 1742’s vast changes to the Mining Law will undermine the U.S.’ investment attractiveness. With so many variables at play within a mining project, the importance of regulatory certainty in attracting investment in mining projects cannot be overstated. Mining is a capital-intensive process that takes years of exploration, engineering, design and development before minerals can be produced. Unlike coal, and oil or gas exploration, concentrations of useful minerals that are rich enough to form ore deposits are rare with approximately 1 out of 1,000 deposits having the qualities that allow them the chance of being transformed into an operating mine. Coupled with the complex state and federal permitting process, significant time may pass – the NMA has member companies whose projects have been more than 20 years in the making and billions of dollars invested before bringing in a single dollar in return – impacting the ability of mining companies to attract investment capital.

A recent article from consulting firm McKinsey Metals & Mining highlights the importance of regulatory certainty, noting that regulatory and policy uncertainty could put the energy transition at risk. The article cautions that any ambiguity could affect domestic supply chains as potential investors lose the ability to accurately

---

<sup>32</sup> BLM Final EIS, Surface Management Regulations, Vol. 1, at p. 288 (Oct. 2000).

forecast cash flows leading to delays in urgently needed investment decisions.<sup>33</sup> McKinsey's conclusion is particularly alarming in the face of the International Energy Agency's estimates that global investment in mining will need to reach \$360–450 billion by 2030 to support the energy transition.<sup>34</sup> McKinsey also found the Inflation Reduction Act's mineral sourcing requirements would fail without simultaneously addressing the existing permitting system that has allowed persistent bottlenecks.

It should come as no surprise that investors favor projects where they are likely to get the earliest return on their investment and where they know they have the necessary security of title and tenure from the time of location through mine reclamation and closure. As a result, investment dollars for mineral exploration and development tend to flow to countries with a stable political environment, a strong economy, an efficient permitting system and predictable regulatory climate. Further, unlike other countries where mining is driven by government investment, U.S. mining is primarily a private enterprise. These unique factors taken together make the existing system, with its requisite security of tenure, the most appropriate for the U.S. to promote mineral exploration and development on federal lands.

## Conclusion

What we are seeing is an explosion in mineral demand colliding with a geopolitical arms-race for development and control of integrated mineral supply chains. Matching the speed and scale of this rising demand requires the U.S. to recognize that mineral policy is now energy, climate and national security policy. To compete, we need access to our vast mineral resources and a permitting regime that enables the mining sector to respond to market signals and meet demand. Additional improvements to the permitting process should remain a high priority given the data provided by Dr. Daniel Yergin of S & P Global in testimony before the committee this fall. He shared global data on 127 mines across the world that began production between 2002 and 2023, which demonstrated that a major new resource discovery today would not become a productive mine until 2040 at the earliest. He cautioned against overzealous attempts to source minerals primarily from allied countries while blocking domestic projects, noting that our allies are experiencing similar supply constraints, so availability is not guaranteed.

The right policies to support domestic mineral production and our supply chains must be forward-looking rather than regressive or the U.S. mineral supply chain – from mining through smelting and processing – will remain a shell of our true domestic potential. Promoting regulatory certainty doesn't mean that laws and regulations never change or that we aren't always seeking improvements. In my 33 years in this industry, I can assure you that the NMA's members are committed to

---

<sup>33</sup> McKinsey & Co. Regulatory efficiency will be essential for the energy transition, June 16, 2023 Available at <https://www.mckinsey.com/industries/metals-and-mining/our-insights/regulatory-efficiency-will-be-essential-for-the-energy-transition>.

<sup>34</sup> International Energy Agency, Energy Technology Perspectives 2023, Jan. 2023

continuous environmental improvements, and routinely review developments across the globe for potential incorporation into their own operations.

The NMA applauds the work of this committee, and the legislation pursued both by Mining Subcommittee Chairwoman Catherine Cortez Masto (D-Nev.), Senator Jim Risch (R-Idaho), Chairman Joe Manchin (D-W. Va.), and Ranking Member John Barrasso (R-Wyo.), and Mining Subcommittee Ranking Member Mike Lee (R-Utah), among many others, to reach a thoughtful, bipartisan, and durable solutions to address our nation's disjointed minerals policy and prioritize domestic mineral security. Regulatory certainty provided in the Mining Regulatory Clarity Act, permitting certainty through real time limits on reviews and judicial review of federal agency actions, getting the decisions made by Bureau of Land Management state offices to the Federal Register for public comment and out of endless review in Washington D.C., and responsible access to federal lands are important efforts to ease our nation's bureaucratic paralysis and provide for greater economic competitiveness and growth.

The NMA appreciates the opportunity to provide this testimony to the subcommittee and looks forward to working with Congress and the administration to support a robust domestic mineral supply chain for generations to come.