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Testimony of the American Exploration & Mining Association on the November 3, 2015 Presidential Memorandum: *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*

Chairman Murkowski, Ranking Member Cantwell and Members of the Committee, the American Exploration & Mining Association (AEMA) appreciates this opportunity to provide testimony on the *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.*

AEMA (*formerly Northwest Mining Association*) is a 121-year old, 2,200 member national association representing the minerals industry with members residing in 42 U.S. states, seven Canadian provinces or territories, and 10 other countries. AEMA is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. Our broad-based membership includes many small miners and exploration geologists as well as junior and large mining companies, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. More than 80% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

Our members understand the responsibility to be good stewards of the environment. Our members take great pride in producing the minerals America requires in an environmentally and socially responsible manner. Our members have developed best management practices and technologies to avoid, minimize and mitigate mining's impact on the environment and ensure proper closure and reclamation of mines at the end of their productive life as required by existing law and regulation.

As this Committee knows, mining is the beginning of the supply chain for manufacturing, energy production, national defense, technological advancements, and all of the "stuff" that makes modern civilization possible, like smart phones, computers, flat screens, medical devices, housing and transportation. Mining also is essential to job creation. An abundant and affordable supply of domestic minerals is critical to America's future. The U.S. has become increasingly dependent on foreign sources of strategic and critical minerals and this vulnerability has serious national defense and economic consequences. According to the U.S. Geological Survey, the U.S. is more than 50% import reliant for 40 critical minerals and 100% import reliant for 19 critical and strategic minerals despite having the third largest source of mineral wealth in the world.

We appreciate and applaud the Chairman's leadership on critical minerals and thank the Chairman, Ranking Member and this Committee for including critical minerals provisions (S. 883, the American Mineral Security Act of 2015) in S. 2012, the Energy Policy Modernization

Act. Like you, we are hopeful you and your colleagues will pass this important, bi-partisan legislation in this Congress.

For the reasons set forth below, we are concerned that this Presidential Memorandum will make it harder to explore for and produce the minerals America requires. While on its face, the Memorandum purports to adhere to existing statutory authority, closer examination reveals that much of the Memorandum is in direct conflict with the Mining Law and existing land management statutes. One could argue the Memorandum is another attempt by this Administration to usurp Congress' constitutional authority over the public lands. The President's authority over the public lands is limited to implementing what Congress has delegated to the executive branch, yet the Memorandum reads as though all authority over public lands and natural resources is vested in the Chief Executive. This Memorandum goes far beyond implementing the laws enacted by Congress.

At a minimum, the Memorandum contains different standards than existing law, vague and undefined terms that will result in agency confusion, delays, increased costs, potential litigation, and in some cases project abandonment for those parties exploring for and producing minerals and carrying out economic development and multiple-use activities on the public lands.

Furthermore, it appears to be another attempt to create a one-size-fits-all policy that, like all such policies, is doomed to failure because each department named in the Memorandum and the various agencies and bureaus within those departments have different missions and statutory authorities. Multiple-use management is complex and often requires a balancing of competing values. Some activities are discretionary, while others involve statutory rights. Add to that mix the variations in geology, geography, terrain and climate across the public lands with the different types of disturbances, and it becomes clear that mitigation must be a site-specific, case by case determination, using the authorities, tools and standards Congress has provided in exercising its plenary power over the public lands.

The Memorandum remains us of Secretarial Order 3310 where the Secretary of the Interior tried to change the management of public lands to favor wilderness over multiple-use and economic activities that create new wealth. Congress immediately defunded any ability to implement the Order and it was promptly withdrawn. Likewise, Congress should move to prohibit the implementation of this Memorandum.

Congress has the Constitutional Authority to Manage the Public Lands

Article IV, Section 3 of the United States Constitution states, in part, "the Congress shall have the power to dispose of and *make all needful rules and regulations* respecting the territory or other property belonging to the United States; . . . " (emphasis added). Congress has delegated some, *but not all*, of this authority to the Departments of the Interior and Agriculture, and their respective land management agencies, the Bureau of Land Management and the U.S. Forest Service, through the *Mining Law of 1872* (30 U.S.C. 21, *et seq*), the *Federal Land Policy and Management Act* (FLPMA), the Organic Act of 1897 (16 U.S.C. 473 et seq), the *National Forest Management Act* of 1976 (NFMA) (16 U.S.C. 1600, et seq), the *Multiple-Use Sustained-Yield Act* of 1960 (MUSY) (16 U.S.C. 528 *et seq),* and the *Surface Use Act* (SUA) (30 U.S.C. 612(b)).

In these statutes, Congress has clearly stated that the public lands and National Forest Lands are to be managed for multiple-use and sustained yield. Congress also retained certain authority and put sideboards or limitations on the delegation of authority. These laws also provide the tools and standards the Departments, agencies and bureaus require to meet the Nation's need for minerals, food, timber and fiber, to conserve and protect our natural resources, and to manage the public lands and balance these sometimes competing values.

Thus, the Presidential Memorandum is unnecessary and one must ask what is the real purpose or intent of the Memorandum, especially considering that many of the directives conflict with existing statutory authority.

In 1976, when Congress enacted FLPMA, it understood that managing for multiple-use would require balancing between competing policies and uses. Compare Section 102(a)(8) which states:

> 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; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; (43 U.S.C. 1701(a)(8))

with section 102(a)(12) which states:

> the public lands be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the *Mining and Minerals Policy Act of 1970* as it pertains to the public lands; (43 U.S.C. 1701(a)(12)).

In FLPMA, Congress provided the Secretary with the tools and direction for resolving these sometimes competing multiple-use values. There is a section establishing the California Desert Conservation Area (CDCA), another for Wilderness Study Areas (WSA), a process with public input for establishing areas of critical environmental concern (ACEC) and a process with public input for withdrawing lands from mineral entry and operation of various public land laws. Congress also made it clear that with the exception of the CDCA, WSA and the last sentence of section 302(b), "no provision of this section or any other section of the Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. 1732(b).

The last sentence of §302(b) is important because it not only establishes the standard for managing disturbance and degradation of the lands, it is an important tool that helps the Secretary strike a balance between sometimes competing multiple-use values. Section 302(b) states: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to *prevent unnecessary or undue degradation* [UUD]of the lands." (emphasis added). By adopting the UUD standard, Congress declared that FLPMA is a preventive statute, not an improvement or recovery statute like the Endangered Species Act (ESA), the Clean Water Act or Clean Air Act.

In adopting the UUD standard for managing the public lands, Congress understood there would be degradation of those lands. In other words, FLPMA authorizes necessary degradation and due

degradation, meaning that some degradation of the public lands will be necessary and due or reasonable under the circumstances. Congress could have, but did not require the public lands to be managed for a *net resource benefit* or to a *no net loss of resources* standard. As Justice Scalia explained in his concurrence in *Whitman v. American Trucking*, "Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouse holes." 531 U.S. 457, 468 (2001). For example, the Comprehensive Environmental Response, and Liability Act of 1980 ("CERCLA") provides for recovery of Natural Resource Damages from potentially responsible parties to baseline condition (known as "primary restoration").

While there is not a lot of guidance in FLPMA or its legislative history as to the meaning of UUD, with respect to locatable mineral activities authorized by the General Mining Law of 1872, BLM has defined UUD to mean conditions, activities, or practices that:

> (1) Fail to comply with one or more of the following: the performance standards in §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 §3715.0-5; 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.

Outside of these special management areas, BLM, under FLPMA, simply has no authority to require locatable mineral operations on the public lands provide a *net benefit*, *net conservation gain* or *no net loss of natural resources*. Furthermore, FLPMA does not authorize BLM to require compensatory mitigation that goes beyond the direct impacts from mining activities, to require offsite mitigation including advanced mitigation.

The preamble to the November 21, 2000 amendments to BLM's 43 CFR 3809 Surface Management Regulations for activities under the General Mining Laws clarifies that neither the Mining Law, FLPMA nor the 3809 regulations require compensatory mitigation (65 Federal Register 70012). The preamble goes on to state: "BLM will approach mitigation on a mandatory basis where it can be performed onsite, and *on a voluntary basis*, where mitigation (including compensation) can be performed offsite" (*Id*. Emphasis added).

On National Forest Lands, the 36 CFR 228 A regulations govern surface disturbance by locatable mineral operations pursuant to the General Mining Law of 1872. 36 CFR 228.8 **Requirements for environmental protection**, states "all operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on national forest surface resources including the following requirements:" Among the requirements are words such as "to the extent practical, harmonize;" "take all practicable measures;" "minimize so far as practicable, its impact on the environment;" and "minimize adverse impact upon the environment and forest surface resources." Clearly, these requirements recognize there will be impacts to the environment and surface resources of National Forest Lands, and some of those impacts could be "adverse." The

requirement is to minimize where practicable or feasible. There is no authority or requirement to manage for *net conservation benefit, no net loss of natural resources,* or require compensatory or advance mitigation.

The Presidential Memorandum Conflicts with Existing Land Management Law

In Section 1, the President declares:

> Policy. It shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them (agencies); to *avoid and then minimize* harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land – or water – disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall each adopt a clear and consistent approach for *avoidance and minimization* of, and *compensatory mitigation* for, the impacts of their activities and the projects they approve. That approach should also recognize that existing mission and legal authorities contain additional protections for some resources that are of such *irreplaceable character* that minimization and compensation measures, while potentially practicable, may not be adequate or appropriate, and therefore agencies should design policies to promote avoidance of impacts to these resources (emphasis added).

Section 1 also requires agency policies to encourage *advance compensation*, and sec.3.(b) states:

> Agencies' mitigation policies should establish a *net benefit goal* or, at a minimum, *a no net loss goal* for natural resources the agency manages that are *important, scarce or sensitive,* or whenever doing so is consistent with agency mission and established natural resource objectives. When a resource's value is determined to be *irreplaceable,* the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities (emphasis added).

Let's take a closer look at the italicized words and phrases in the provisions of the Memorandum quoted above. *Avoid and then minimize* are consistent with statutory authorities, and is what our members do as part of the requirement to prevent UUD. Onsite *mitigation* is clearly within the land management agencies' statutory authority and is part and parcel to preventing UUD. However, neither the BLM nor the Forest Service has the statutory authority to require *compensatory mitigation, advance mitigation,* or *offsite mitigation,* all of which is required by this Memorandum.

The Memorandum defines *irreplaceable natural resources* as "resources recognized through existing legal authorities as requiring particular protection from impacts and that because of their high value or function and unique character, cannot be restored or replaced." The Memorandum requires agencies to promote policies that avoid impacts to *irreplaceable resources*. However, FLPMA already provides for the designation of Areas of Critical Environmental Concern (ACEC) through the land use planning process subject to public input through the NEPA process to protect *irreplaceable resources.* FLPMA also provides the Secretary with limited withdrawal

authority as another means to protect *irreplaceable resources*. The FLPMA withdrawal process also provides for public input and comment. The Memorandum would replace these congressionally mandated processes with an agency directive to identify and protect these resources without public input or comment.

There is no authority in the Mining Law, FLPMA or NFMA that would allow BLM or the Forest Service to require *compensatory mitigation, advanced compensation or offsite compensation.* Our fear is that the directives in the Memorandum will be used as a form of "permit extortion." In other words, the agency suggests or with the power of a Presidential memorandum behind them, requires that providing *advanced compensation, compensatory mitigation or off-site mitigation* could speed up the permitting process. The Memorandum even hints at this by suggesting that the directives in the Memorandum will potentially reduce permitting timelines.

The directive to establish *net benefit goal* or *no net loss goal* for natural resources the agency manages that are *important, scarce or sensitive* clearly conflicts with FLPMA's UUD standard and the Forest Service's *minimize disturbance to surface resources* standard. The Memorandum's standard of *net benefit* or *no net loss* is not found in any existing land management statute. There simply is no way the Mining Law, FLPMA, the Organic Act of 1897, NFMA or the respective surface management regulations can be interpreted to authorize *net benefit* or *no net loss* goals for managing natural resources.

FLPMA's UUD standard clearly contemplates that mining and other multiple-use activities will degrade the public lands and authorizes degradation that is necessary to the activity and is due or reasonable under the circumstances, i.e., not excessive. The same is true of the Forest Services "where feasible, minimize adverse environmental impacts on national forest surface resources. Both standards contemplate a reasonable delta between existing baseline and post-project conditions.

Contrast the UUD and Forest Service standards with the *no net loss* or *net benefit* goals or standards in the Memorandum. What does this mean? Does it mean replacement above baseline conditions? How does one measure *net benefit*? And, is it 2:1; 5:1; 10:1 or 100:1? And at what scale, range wide, portion of the range, watershed, or landscape? What are the economic impacts of such a sweeping change? Requiring *no net loss* or, *net benefit* will make many projects uneconomical, adversely impacting America's ability to meet its mineral requirements and preventing BLM from carrying out one of its multiple-use mandates.

One of our many concerns with the Memorandum is that it arbitrarily raises the bar for project development on public lands that is different from and in many cases in direct conflict to the congressional direction contained in these statutes. While the Memorandum claims to have no legal effect and purports to adhere to existing legal authorities, the reality is that it constitutes marching orders from the Commanding Officer to the troops. Federal land management professionals will feel pressure to comply with the directions in this Memorandum, even when those directions conflict with other statutory authorities and requirements. This creates legal uncertainty, confusion, and will result in project delays, slower permitting times, and increased costs.

Many Terms Are Vague, Ambiguous, Undefined and not Tied to Statutory Authority

Many of the terms used in this Memorandum to describe resources requiring mitigation, including 'important,' 'scarce,' 'sensitive', and 'irreplaceable' are largely undefined. These vague terms create potential legal uncertainty relating to FLPMA and NFMA for scores of authorized multiple-use activities on federal lands.

All of these terms are capable of having different meanings to different people. This dilemma was best expressed by Humpty Dumpty and Alice in Lewis Carroll's *Through the Looking-Glass*, Chapter 6, p.205 (1934):

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."

Project proponents will face the same dilemma Alice faced. The agency is master when it comes to defining vague, ambiguous and undefined words and applying standards that are not tethered to statutory authority.

What's next? Policy Manuals? Instruction Memorandum? Continued advancement of this regulatory shift without congressional authority or public oversight and involvement?

Application of the Memorandum in the BLM Land Use Plan Amendments for Sage-Grouse

Despite the lack of statutory authority, BLM already is applying the directives in the Memorandum in their recently adopted Land Use Plan Amendments (LUPAs) for Sage Grouse Conservation. The final LUPAs inserted three last-minute requirements, one to manage the lands for a *net conservation gain or benefit* for the Greater Sage-Grouse and its habitat, another establishing Sagebrush Focal Areas (SFA) recommending the withdrawal of more than 10 million acres from mineral entry, and a 3% disturbance cap in sage-grouse habitat even though those concepts are nowhere to be found in the Draft Environmental Impact Statements (DEIS). For the purposes of this testimony, I will focus on the *net conservation gain or benefit* standard and the SFAs.

The *net conservation gain or benefit* standard, which is an ESA recovery standard, was inappropriately inserted into the land use plan amendments at the insistence of the U.S. Fish and Wildlife Service (FWS). The Sage-Grouse LUPAs state that BLM and the Forest Service are "to require and ensure" operations in sage-grouse habitat include "mitigation that provides a *net conservation gain* to the species." The LUPAs further provide that if any habitat loss or degradation remains after avoiding and minimizing impacts, then *compensatory mitigation* will be required "to provide *a net conservation gain* to the species."

Since the Greater Sage-Grouse is not a listed species, FWS has no authority to impose ESA recovery standards on the land management agencies. Furthermore, these requirements conflict with FLPMA's "prevent unnecessary or undue degradation" standard and BLM's long-standing

position that it cannot require compensatory mitigation under FLPMA or NEPA for locatable mineral activities on the public lands.

The SFAs were another last minute addition to the LUPAs at the insistence of FWS. SFAs are, according to FWS, lands of *irreplaceable character* necessary for the persistence of the species. SFAs are, in effect, ACECs without having been vetted through the required public process. Coupled with the SFAs were a recommendation for withdrawing over 10 million acres from mineral entry, prohibitions on conventional and renewable energy, and grazing restrictions. Importantly, the SFAs set the table to catapult acknowledged secondary threats like mining and grazing to the top of the list, even though FWS acknowledges that mining does not have a significant effect on sage-grouse. ". . . Overall, the extent of [mining] projects directly affects less than 0.1 percent of the sage-grouse occupied range. Although direct and indirect effects may disturb local populations, ongoing mining operations do not affect the sage-grouse range wide." 80 Fed. Reg. 59915 (October 2, 2015). The purpose of SFAs must be to prohibit economic activities important to the western sage-grouse states because this could not have been accomplished with an ESA listing.

As you may be aware, six lawsuits have been filed challenging the Records of Decisions (ROD) and various land use plan amendments. Plaintiffs include two governors, a state legislature, an attorney general, a state land board, counties in two states, grazing interests, mining interests and environmental NGOs. Two of the issues in five of the cases are 1) BLM violated FLPMA and NEPA when it adopted a *net conservation benefit or gain* standard which conflicts with FLPMA's prevent unnecessary or undue degradation standard; and 2) BLM violated FLPMA and NEPA when it inserted SFAs into the final LUPAs.

BLM has provided the administrative record in two of these lawsuits and the record demonstrates BLM's concern that the new and undisclosed *net conservation benefit or gain* standard could conflict with its existing authorities under FLPMA. Also, there is no analysis in the Final Environmental Impact Statements (FEIS) or RODs explaining *net conservation benefit or gain* and its impact on the human environment as required by NEPA. Furthermore, there is no analysis in the DEIS or FEIS of the impacts of withdrawing 10 million acres from mineral entry, no analysis of the geology mineral potential of those acres, or the cumulative impacts across the entire 10 state range. All of this was done in secret without public oversight or comment.

Although the Memorandum purports to adhere to existing statutory authorities, the Sage-grouse LUPAs demonstrate that the Administration is implementing the Memorandum in situations that clearly violate existing statutory authority. These examples also demonstrate the havoc this Memorandum will have on western rural communities.

Conclusion and Recommendation

It is clear the directives in the Memorandum circumvent the authorities and standards established by Congress for managing the public lands and is one more attempt by the current administration to usurp Congress' constitutional and legislative authority. The proper procedure would be for the administration to work with Congress and convince Congress of the need to change the standards for managing public lands, including mitigation protocols. At the very least, the

directives in the Memorandum require rulemaking with public notice and comment pursuant to the Administrative Procedure Act.

Congress stopped the Department of the Interior from changing the management of public lands from multiple-use to managing for wilderness values when it defunded Secretarial Order 3310 in 2011. Congress should do the same with this Memorandum. AEMA encourages this Committee and Congress to take whatever steps are necessary and available to assert its constitutional plenary power over the public lands and clarify that the standards for managing public lands and National Forest Lands are those set forth in statute and not in this Presidential Memorandum. It is up to Congress if there is to be a change in mitigation policies and how the public lands are managed.

Thank you for this opportunity to testify on the important issues raised by this Presidential Memorandum. I am happy to answer any questions.