

August 30, 2022

The Honorable Deb Haaland
U.S. Secretary of the Interior
Office of the Secretary, Department of the Interior
1849 C Street NW
Washington, D.C., 20240

Dear Secretary Haaland,

RE – COMMENT TO INFORM INTERAGENCY WORKING GROUP ON MINING REGULATIONS, LAWS, AND PERMITTING (DOC. NUMBER 2022-06750)

We write to you from 86 Indigenous, climate, environmental, racial justice, and human rights organizations (see full list below).

We write to provide written comments to the Interagency Working Group (IWG) that is gathering information and developing recommendations to improve Federal hard rock mining regulations, laws, and permitting processes.

The United States has a crucial role to play in ensuring a just and equitable energy transition away from fossil fuel dependence, and that includes ensuring the highest human rights and environmental standards are upheld when extracting minerals critical to the renewable energy economy. It also means exploring all avenues for recycling and utilizing the materials we already have.

The Biden-Harris Administration’s EO 14017 on America’s Supply Chains and subsequent 100-day reviews commit all Federal Departments and Agencies to undertake a systematic effort to tackle this challenge. This means finding and funding solutions to minimize the need to mine critical minerals, and then ensure that what mining is still needed be conducted in a sustainable, just, and equitable way, with companies accountable to human rights and environmental standards, and always operating with the support and full consent of the communities they impact.

This comment letter addresses the question put forward in the Federal Register notice with respect to what “international mining best practices or standards that the United States should consider adopting, or encouraging the U.S. mining industry to adopt? If so, which practices or standards and what improvements or benefits would they provide?”

PART ONE: SUMMARY OF OUR RECOMMENDATIONS

Below is a list of international best practices in mineral supply governance that the IWG should adopt to meet the goals laid out in the recommendations in EO 14017 and the subsequent 100-

day reviews. Please note these recommendations are consistent with recommendations provided as part of the proposed revision to U.S. National Action Plan on Responsible Business Conduct.¹

- 1) Align federal mining reform recommendations with international law and emerging norms around responsible business conduct, including the requirement for conducting gender-responsive human rights and environmental due diligence, respect for the rights of Indigenous and customary land rights holders, worker rights, and transparency and anti-corruption.
- 2) Make anti-corruption a priority and ensure that the corruption risks posed by critical minerals are recognized and addressed across government and law enforcement agencies, including in engagement with the private sector.
- 3) Require applicants of all federal grants, loans, loan guarantees and procurement related to critical minerals to provide evidence of their human rights and environmental due diligence in alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), past performance on human rights and anti-corruption, support of collective bargaining, and beneficial ownership information prior to issuing of any award.
- 4) Ensure U.S. international partnerships and trade agreements operate under the highest international standards for human rights and environmental due diligence and traceability.
- 5) Require U.S. mining companies operating in the U.S. or abroad to undertake intersectional gender-based risk analysis to understand the specific challenges in their operations that disproportionately impact women, gender diverse people, especially those who are also Indigenous.
- 6) Require companies supplying (or sourcing) critical minerals to have committed to respect and uphold Indigenous Peoples and customary land rights holders right to Free, Prior and Informed Consent (FPIC).
- 7) Require companies supplying (or sourcing) critical minerals to have a clear statement of policy on human rights defenders and be willing to use their leverage to speak out in defence of human rights defenders as well as against legal reforms that are aimed at restricting civil society space, including the work of journalists.

In the following part we expand on these recommendations and include specific actions that relevant Federal agencies can take to operationalize these.

PART TWO: DETAILED RECOMMENDATIONS

- 1) **Align federal mining reform recommendations with international law and emerging norms around responsible business conduct, including the requirement for conducting gender-responsive human rights and environmental due diligence, respect for the rights of Indigenous and customary land rights holders, for worker rights, and transparency and anti-corruption.**

Despite the need and rapidly expanding demand for clean energy minerals and renewable energy technologies, due diligence by governments and companies are not keeping pace, leaving gaps in

¹ For example, see the submission by the International Corporate Accountability Roundtable (ICAR) dated 31 May 2022 available here <https://www.regulations.gov/comment/DOS-2022-0002-0039>, and the submission by Oxfam America dated 31 May 2022 available here <https://www.regulations.gov/comment/DOS-2022-0002-0045>

policies, regulations, and operations across these supply chains that risk violating human rights, polluting the environment, and, ultimately, delaying the energy transition. Voluntary approaches to human rights due diligence have proven limited in their effectiveness, and despite some good practices by a few leading companies, human rights due diligence remains anemic, where implemented at all.

This means a whole of government approach to protecting human rights in the extraction of critical minerals is necessary to ensure the strong environmental and social protections called for by President Biden in EO 14017 on America's Supply Chains² and fulfill the recommendations in the subsequent 100-day reviews.³ Preventing human rights violations by U.S. companies involved in clean energy supply chains at home and abroad is a necessary condition if we are to accelerate the transition to low carbon economy, and must be a priority focus for the IWG.

There is a growing global movement to legally require companies to undertake human rights due diligence across their supply chains. Mandatory due diligence schemes are being proposed by civil society and/or at various levels of the legislative process in Mexico,⁴ Canada,⁵ the European Union,⁶ and in the legislatures of more than a dozen European countries.⁷ The U.S. risks falling further behind if it does not adopt its own legally binding human rights due diligence schemes for companies to abide by.

The UNGPs, the OECD Due Diligence Guidance for Responsible Business Conduct guidelines and supporting guidance on mineral supply chains provide the starting framework for responsible business conduct. These guidelines are internationally recognized, critical tools to advance responsible business conduct and address inequality.⁸ Many governments and extractive

² Executive Order on America's Supply Chains EO 14017. (The White House, Washington, D.C., 24 February 2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/>

³ "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-based Growth, 100-day review under Executive Order 14017" (The White House, Washington, D.C., June 2021, page 202). <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>

⁴ ECIJA, "Corporate 'due diligence' in the field of human rights: the new challenge for companies." (ECIJA Press Release, Mexico City, 25 March 2021) <https://ecija.com/en/sala-de-prensa/mexico-corporate-due-diligence-in-the-field-of-human-rights-the-new-challenge-for-companies/#:~:text=Due%20diligence%20implies%20that%20States,to%20ensure%20the%20companies'%20behavior.>

⁵ BHRRC, "Canadian Network on Corporate Accountability letter calls for Canada to develop comprehensive mandatory human rights due diligence legislation." (Business and Human Rights Resource Center, London, 6 March 2019) <https://www.business-humanrights.org/en/latest-news/canadian-network-on-corporate-accountability-letter-calls-for-canada-to-develop-comprehensive-mandatory-human-rights-due-diligence-legislation/>

⁶ European Commission, "Just and Sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains." (European Commission Press Release, Brussels, 23 February 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145

⁷ BHRRC, "National and regional movements for mandatory human rights and environmental due diligence in Europe," (Business & Human Rights Resource Center, London, 22 May 2019). <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>

⁸ The OECD Guidelines are not perfect and have important limitations that need to be recognized upfront. They are limited in relation to how to protect the land rights of Indigenous peoples; how to address gender discrimination and

industries companies have adopted the framework of the UNGPs into their own policies and plans.

Taken together, the UNGPs and OECD Due Diligence guidelines and supporting guidance create an ongoing obligation of companies to implement robust human rights and environmental due diligence (HREDD) to identify and address—through prevention or mitigation—the severe impacts these businesses cause the planet and people—women and girls in particular—in due consultation with affected rights-holders. Company directors should have oversight and responsibility for performing due diligence and report to their Boards on performance.

HREDD involves assessing actual or potential adverse impacts on rights-holders, including Indigenous peoples', integrating findings into management plans; taking action; providing remedy and gender-responsive grievance mechanisms when violations occur; and tracking and communicating externally on performance. It is an ongoing process, requiring periodic review and revisions as project operations and operating contexts change.

In the mining context, HREDD processes should include, but not be limited to:

- A commitment to conduct intersectional human rights impact assessments when assessing project risks. Traditional environmental and social impact assessments (ESIAs) do not typically adequately assess the human rights risks and as a result management plans often fail to anticipate and mitigate these risks.⁹ Applicants and suppliers should align their assessments with the Guidance on Gender Dimensions of the UNGP,¹⁰ developed by the UN Working Group on Business and Human Rights, when prescribing the due diligence strategy and outline examples to ensure a gender-responsive approach.
- A commitment to transparency, including project-level payment, contract, and beneficial ownership disclosures in line with global standards such as the Extractive Industries Transparency Initiative (EITI),¹¹ and other anti-corruption good practices including rigorous third-party due diligence, policies and risk-mitigation measures regarding agents and politically exposed persons, and whistleblower mechanisms.
- Clear and unambiguous policy commitment to respect FPIC when their projects affect Indigenous peoples or customary land rights holders and demonstrate evidence of effective implementation (e.g., through providing evidence of good quality agreements reached).¹²

promote gender equality; how to guard against corruption; and are limited in their ability to provide remedy/access to justice. All of these are some of the most salient human rights risks in mineral supply chains globally.

⁹ Götzmann, Nora. 2019. Introduction to the handbook on human rights impact assessment: principles, methods and approaches. In: Götzmann N, editor. Handbook on human rights impact assessment. Cheltenham (UK): Edward Elgar Publishing; p. 2–31.

¹⁰ [OHCHR | Gender lens to the UNGPs](#)

¹¹ <https://eiti.org/>

¹² Good quality agreements between mining companies and Indigenous peoples have been found to address, at minimum, to: protect for cultural heritage; create opportunities for Indigenous participation in environmental management; address revenue sharing/royalties; facilitate local employment and training; create Indigenous business development opportunities; recognize and protect Indigenous land rights; and, be enforceable. Indigenous control is essential to achieve this enforcement. State agencies and mining companies cannot be relied upon to do so, as the historical record demonstrates. For more information, see C. O'Fair-cheallaigh, Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada (USA: Routledge, 2016)

- Plans for gender-responsive rightsholder engagement, with particular focus on Indigenous peoples, women and other marginalized groups who face increased risks and disproportionate impacts. Engagement should include adequate risk-mitigation, and a commitment to ongoing dialogue throughout the project lifecycle and operation with all rights-holders, leading to robust impact-benefit agreements with them.
- A comprehensive corporate gender policy, including flow-down requirements for subcontractors.
- Clear commitment to provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships, including providing for remedy and grievance mechanisms when violations occur (consistent with the effectiveness criteria ...

The IWG should recommend that the Administration should work with Congress to adopt legislation that will address these elements and make gender responsive HREDD mandatory across all sectors of the clean energy economy, including the mining sector. The adoption of such piece of legislation would level the playing field for all businesses and decrease the negative human rights impact of businesses while increasing their positive footprint. It would also help accelerate the energy transition—by limiting the operational risks and project stoppages that are inevitable when companies fail to respect the rights of local communities. In fact, failing to obtain a social license to operate was recognized as one of the biggest risks for mining companies in 2020.¹³ Such U.S. legislation should be comprehensive, intersectional, gender-responsive and explicitly require the key elements outlined above. Where such transformational measures are not possible, the Administration should support positive movement where it is feasible, including around related legislation such as a Foreign Corrupt Practices Act for Human Rights.

In the absence of federal legislation to accomplish this vital need, the IWG should ensure its recommendations align with these international norms around responsible business conduct. This means Departments and Agencies should:

- Articulate clear support for the highest social and environmental protections, circular economy solutions, and the need to reduce demand for new mining as a whole of government priority, shaping how the USG invests its financial, technical, and diplomatic resources.
- Enforce policies to hold U.S. companies accountable to these standards in the extraction of critical minerals. This should include promoting access to remedy through judicial and non-judicial mechanisms.
- All Federal agencies administering USG policies, programs, and funding related to critical minerals should commit to:
 - o Set measurable goals and performance metrics, as required under the GPRA Modernization Act.¹⁴ These goals should include, but not be limited to, time-bound targets for the development of strong human rights and environmental due diligence standards, national recycling and reuse programs, and staff training on

¹³ Paul Mitchell, “Top mining and metals risks and opportunities in 2022,” (EY Global Mining and Metals, Sydney, 7 October 2021). https://www.ey.com/en_gl/mining-metals/top-10-business-risks-and-opportunities-for-mining-and-metals-in-2022

¹⁴ <https://www.congress.gov/111/plaws/publ352/PLAW-111publ352.pdf>

- compliance with standards. Progress should be reported to the public and to the Office of Management and Budget (OMB) on a quarterly basis.
- o Institute robust human rights and environmental due diligence in their dealings with companies and businesses in the clean energy supply chain. These standards must be used to guide agency actions and prioritize funding to actors upholding the highest human rights and environmental standards in their operations and should be retroactively applied.
 - o Integrate community feedback into decision-making processes for such Federal investments. Applications for federal funding, supplier contracts, and supporting documentation should be disclosed on a public website with sufficient time for rightsholders to provide public comments on the application prior to a decision being made. Agencies should commit to take into consideration such comments when making their determinations.

Finally, hard rock mining reform offers a clear opportunity to continue to build on and reinforce the Administration’s worker-centered agenda, including setting a firm expectation that American mining companies, whether operating at home or abroad, support freedom of association and collective bargaining and strengthen transparency and monitoring in adherence with ILO core labor standards and the UNGPs.

Box 1: Specific agency recommendations

DOS/BER: Ensure the mining principles promoted by the Energy Resources Governance Initiative (ERGI) align with international law and global norms around responsible business conduct.¹⁵

DOS, USAID, DOE, EPA, and DOI: Commit to creating a fund that would allow communities affected by proposed critical minerals projects to secure their own independent, third-party specialists, such as technical and legal advisors, who can help them understand key technical and legal issues; provide support with negotiations, compensation, and resettlement; document FPIC processes; and assist with dispute resolution.

DPC, NSC, OMB, FAR Council, DOE, DoS, DOT, DOI: Develop and implement due diligence standards in alignment with the UNGPs that protect human rights and the environment for all Federal programs and financing opportunities to bolster domestic supply chains of advanced batteries and renewable energy technologies. These standards would apply to all agreements with private sector partners, and to applicants and recipients of Federal funding, including grants, sub-grants, loans, investments, research and development funding, and money for pilots and projects. Sustainability standards developed for sourcing critical minerals need to be developed in collaboration with the Department of State, the Department of Transportation,

¹⁵ For example, in the ERGI document titled “Mineral Sector Governance for a Responsible Energy Transformation” available at https://ergi.tools/assets/pdfs/2-28-20%20ERGI%20PDF%20Report_DGB_AN.pdf there is no mention of the UNGPs, the OECD Due Diligence Guidance for Responsible Business Conduct guidelines and supporting guidance on mineral supply chains, nor any mention of the core human rights instruments that govern States’ responsibilities to protect and respect human rights. These guidelines are internationally recognized, critical tools to advance responsible business conduct and address inequality.

the Department of Interior, and the Department of Agriculture, and need to align with international law and emerging best practices, specifically around gender-responsive human rights and environmental due diligence; respect for the rights of Indigenous and customary land rights holders; and, transparency and anti-corruption.

DOI: Mandate and guarantee FPIC of indigenous peoples in policymaking and decisions that affect them, their lands (including ancestral and traditional lands), territories, and/or natural resources.¹⁶

Treasury: Mandate and guarantee FPIC of indigenous peoples and customary land rights holders in the EXIM Bank, DFC, and development finance institutions where the USG is a lead shareholder.¹⁷

2) Make anti-corruption a priority and ensure that the corruption risks posed by critical minerals are recognized and addressed across government and law enforcement agencies, including in engagement with the private sector

The extractives industry is notorious for high levels of corruption and corruption remains a major environmental, social, and governance risk in mineral supply chains globally. For example, approximately 1 in 5 global bribery cases involves the extractives sector, according to the OECD.¹⁸ This contributes to the approximately \$1 trillion lost every year in tax revenue from corruption in countries, including in the United States.¹⁹

Corruption poses a major threat to the security of minerals supply for the energy transition. As demand continues to grow, exploration will continue to expand, and investment deals will be made at an increasingly fast pace. Under these conditions, mining companies may prove willing to take on more risks to reap rewards, such as operating in high-risk jurisdictions or seeking to exert undue influence on political decision-makers, all while regulators struggle to keep pace.²⁰

For this reason, good governance and anti-corruption measures need to be a priority concern for the IWG and for all U.S. Agencies involved in securing America's clean energy supply chains. The U.S. must take seriously the lessons learned from past commodity booms – and act now. Doing so will help mitigate future threats to America's supply of key minerals, its reputation, and taxpayer dollars. This means:

¹⁶ ICAR, submission to the revision of the U.S. National Action Plan on Responsible Business Conduct, pp.29—30. Available at https://downloads.regulations.gov/DOS-2022-0002-0039/attachment_2.pdf

¹⁷ Ibid.

¹⁸ OECD, "OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials." (OECD Publishing, Paris, 2 December 2014) <https://doi.org/10.1787/9789264226616-en>.

¹⁹ Rodrigo Campos, "Corruption costs \$1 trillion in tax revenue globally: IMF," (Reuters, New York, 4 April 2019) <https://www.reuters.com/article/U.S.-imf-corruption-idUSKCN1RG1R2>

²⁰ Tim Grice, "Through the Looking Glass: corruption risk in mining licensing and permitting in the pandemic era," (Transparency International Australia, Melbourne, 2021), https://transparency.org.au/wp-content/uploads/2021/04/TIA_COVID_Report_web.pdf

- Making anti-corruption a priority and ensuring that the corruption risk posed by critical minerals is recognized and addressed across government and law enforcement agencies, including in engagement with the private sector.
- Reducing the opportunities for wrongdoing through robust transparency measures like:
 - Adopting the measures required in the widely adopted EITI Standard, including the disclosures of project level payment data; contracts; and beneficial ownership information.
 - Extending beneficial ownership transparency across critical minerals supply chains, not only among mining companies but also suppliers, traders, and other players who can be prone to corruption risks like agents and politically exposed persons.
 - Promoting Open Contracting²¹ in the critical mineral sector, both in how the U.S. selects recipients of public funding and more widely as a good practice for governments and companies active in these supply chains.
- Expanding U.S. technical assistance to low- and medium-income mineral-producing countries that a) prioritizes integrity and anti-corruption measures, and b) includes support to civil society, media, and other oversight actors.
- Ensuring there are consequences for bad actors through effective enforcement and accountability measures.
- Continuing to use the tools at the disposal of the U.S. government, including the use of target sanctions under Global Magnitsky Act and fully implementing the beneficial ownership registry under the Corporate Transparency Act.

Further, the IWG should recommend all federal agencies involved in critical minerals—in particular, DOI, DOE, and DOD—should develop and disclose their plans for preventing corruption and enforcing anticorruption rules and standards in the mining sector, including measures to ensure that companies follow these practices. These measures should reflect a full conception of corruption, rather than focusing exclusively on bribery, and should include expectations that companies across the supply chain adopt and promote transparency measures, including project-level payment, contract and beneficial ownership disclosures in line with global standards such as the EITI, and other anticorruption good practices including rigorous third-party due diligence systems, policies and risk-mitigation measures regarding agents and politically exposed persons, and other practices such as those laid out in the OECD FAQ on How to Prevent Bribery and Corruption Risks in Mineral Supply Chains.²²

Box 5: Agency Specific asks

SEC: Expeditiously conclude new SEC rulemaking to revise the implementing rule (2020) for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The

²¹ Open contracting is about opening public procurement processes by promoting transparency, participation, and public oversight. It is an emerging global norm endorsed by the G7, G20, OECD, the European Commission, World Bank, and European Bank of Reconstruction and Development. For more information, see <https://www.open-contracting.org/what-is-open-contracting/>

²² OECD, “Frequently Asked Questions: how to address bribery and corruption risks in mineral supply chains,” (OECD Center for Responsible Business Conduct, Paris, 23 March 2021). <https://mneguidelines.oecd.org/faq-how-to-address-bribery-and-corruption-risks-in-mineral-supply-chains.htm>

rulemaking should result in the adoption of a strong, well-aligned, project-level payments-to-governments disclosure rule for mining, oil, and gas companies without broad exemptions. Such a rule would be consistent with sister provisions in the European Union, Canada, Norway, UK, Ukraine, and Switzerland, and with the EITI Standard, and it would be in line with the underlying statutory mandate and the overwhelming evidence in the SEC's comment file on the rule.

DOS/Bureau of Energy Resources, DOI (including ONRR) and Treasury: A strong, well-aligned 1504 rule is a prerequisite for U.S. implementation of the EITI. Only after the SEC finalizes a strong section 1504 rule that aligns with the global standard for project-level payments-to-governments disclosure, can the U.S. government seriously consider rejoining the EITI as an implementing country and thus demonstrate leadership in transparency and anticorruption in the extractive industries.

SEC: Adopt a rule mandating the publication of country-by-country reports of key financial information by multinational corporations.

DOS/DRL: Commit to including a new section in annual Country Reports on Human Rights (or as a standalone report) for relevant countries that are key producers of critical minerals. This section should focus specifically on documenting the salient human rights and corruption risks (and progress in mitigating those risks) in the exploration, extraction, processing, refining, and export of critical minerals, including evaluating country-by-country compliance with anticorruption norms and standards.

DOS/DRL: Update the U.S. Open Government Partnership action plan and ensure it includes strong anti-corruption measures, especially in relation to the disclosure of extractive industry resource contracts as required by the EITI Standard. This should be done with active participation of all stakeholders, including frontline communities.

DOD: Articulate a clear policy stating that, as the lead authority for acquisition and sustainment of critical minerals, as well as a leading agency in starting and funding related public-private partnerships, the DOD will ensure that its activities and partnerships adhere to the highest standards human rights, environmental protection, and sustainability.

Treasury: Reference and reinforce the recommendation in the 100-day supply chain report for Treasury to (a) fully-resource and staff their activities to trace strategic and critical material supply chains, investigate money laundering, corruption, links to organized crime, and human rights abuses; and (2) implement the appropriate mix of civil, criminal, and administrative enforcement actions.

Treasury, OFAC, OMB: Articulate a commitment in future budget requests and budget allocations to prioritize additional resources for the Office of Foreign Assets Control (OFAC) in order to better support their efforts to pursue and ensure implementation of Global Magnitsky and corruption sanctions related to critical minerals, and to ensure geographic balance in investigations into acts of corruption in this area.

Treasury/FinCEN: Conclude and strengthen rulemaking implementing the 2021 National Defense Authorization Act²³ to ensure implementation of the intent of the law around beneficial ownership reporting requirements, maximizing its positive impact and utility for the protection of human rights. In particular, the rulemaking should implement the key recommendations included in public comments to the rulemaking process by the FACT Coalition.²⁴

3) **Impose human rights and anti-corruption requirements on all federal grants, loans, loan guarantees and procurement related to critical minerals**

Evidence has shown that relying solely on non-binding corporate accountability measures is insufficient to deliver effective solutions to environmental, social, and governance issues.²⁵ For these reasons, recipients of U.S. federal assistance should be required to:

- Respect the sovereignty of Indigenous peoples and other rightsholders, specifically their right to FPIC with regard to any funded program. International sustainability standards like the IFC Performance Standards require this.²⁶ The IFC Performance Standards represent an important set of project safeguards that many large companies, including mining companies, industry associations, and investors have adopted these standards. They have gained normative weight as a benchmark for sustainability, notwithstanding they do not expressly adopt human rights standards and do not, in and of themselves, satisfy the requirements for human rights and environmental due diligence.
- Provide for and cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships.
- Conduct gender-responsive human rights due diligence, in alignment with the UNGP's including a commitment to conduct intersectional human rights impact assessments when assessing project risks. This additional guidance is required because the level of attention given to gender and the analysis of gender impacts within standards like the IFC Performance Standards is low.²⁷ Without this additional guidance, companies and regulators will continue to underestimate the gendered impacts of mining projects.
- Disclose evidence of their human rights and environmental due-diligence activities, past performance on human rights and anti-corruption, and beneficial ownership information.
- There should also be evidence of an established effective grievance mechanism that is accessible, predictable, equitable, transparent, rights compatible, and that is developed

²³ In particular, the legislative text incorporated from the Corporate Transparency Act (CTA).

²⁴ https://thefactcoalition.org/wp-content/uploads/2022/02/FINCEN-2021-0005-0421_attachment_1.pdf

²⁵ For example, an EU study found only 37% of companies were undertaking due diligence and only 16% doing so across their entire supply chains. <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea->

²⁶ IFC Performance Standard one (PS1) focuses on the assessment of social and environmental impacts, emphasizing the importance of transparency of all project information to ensure effective participation of affected communities. Performance Standards two (PS2) through eight (PS8) address common risks and impacts that are features of large-scale private infrastructure projects and that require special safeguards, including the requirement of FPIC when projects impact the rights of Indigenous peoples.

²⁷ Christina Hill et al., "Position Paper on Gender Justice and the Extractive Industries," (Oxfam, Washington D.C., 2017). <https://www.oxfamamerica.org/explore/research-publications/position-paper-on-gender-justice-and-the-extractive-industries/>

based on engagement and dialogue with rights-holders.²⁸ Grievance mechanisms require Board oversight.

These requirements should be cross-sectional, covering all businesses in the clean energy supply chain, including but not limited to, original equipment manufacturers (OEMs), mining companies, automakers, refineries, development finance, and renewable energy companies.

Doing so will bring the U.S. into alignment with international best practice, with efforts by trusted partners like the EU, and will level the playing field for U.S. businesses, while providing certainty for them and rights-holders all over the world.

We urge the IWG to avoid adopting industry led, voluntary ESG standards. Many of these are governed by industry alone and cannot be relied upon as satisfying international norms around responsible business conduct. For example, one of the most widely cited industry standards are those developed by the International Council on Mining and Metals (ICMM), a CEO-led industry association aiming to promote sustainable development in the mining sector. ICMM members are required to implement ten Mining Principles,²⁹ alongside the position statements that have been developed around industry specific challenges, like climate, water, and the rights of Indigenous peoples.³⁰ Members are required to publicly report against the Global Reporting Initiative (GRI) Standard and conduct an independent third-party assurance on an annual basis.

ICMM has raised the bar in terms of expectations on mining companies. However, they are still industry led, non-binding, do not necessarily align with international law, and therefore cannot be relied upon to satisfy corporate responsibilities under international norms on business and human rights.³¹ A recent assessment by the Responsible Mining Foundation found evidence of compliance with the Mining Principles and position statements was weak and performances are highly variable across individual member companies.³²

What about certification schemes like IRMA? The Initiative for Responsible Mining Assurance (IRMA) represents the current gold-standard in terms of voluntary certification of large-scale mining projects. It offers independent third-party verification and certification against a comprehensive Standard for Responsible Mining.³³ The Standard was developed from the outset by a multi-stakeholder coalition representing industry, end users, organized labor, investors, and representatives of affected communities, including Indigenous leaders.

Voluntary certification schemes like IRMA are important and we endorse many of the detailed mine-site level standards they have developed. However, we recognize that there is more work to

²⁸ See also UNGP principle 31: Effectiveness criteria for non-judicial grievance mechanisms

²⁹ <https://www.icmm.com/en-gb/about-U.S./member-requirements/mining-principles>

³⁰ <https://www.icmm.com/position-statements>

³¹ The ICMM position statement on Indigenous Peoples', for instance, falls short of international standard of FPIC, as it only requires members to "work to obtain the consent of Indigenous Peoples...".

³² Responsible Mining Foundation, "Assessment of ICMM member companies in RMI Report 2022 with respect to ICMM Performance Expectations," (Responsible Mining Foundation, Switzerland, 2022).

https://www.responsibleminingfoundation.org/app/uploads/RMF_ICMM_Member-companies-performance-in-RMI-Report-2022.pdf

³³ See <https://responsiblemining.net/what-we-do/standard/>

be done to strengthen certain standards to reflect best practice. And, like all voluntary certification schemes or “contractual assurances”, they cannot replace the need for mining companies, and companies all along clean energy supply chains, to satisfy their responsibilities to respect human rights and the environment throughout their entire value chains.³⁴ Information disclosed under an IRMA audit would form part of a human rights and due diligence process.

Box 3: Specific Agency recommendations

OMB, NSC, DPC: Require all federal agencies administering U.S. government policies, programs, and funding related to critical minerals to set measurable goals and performance metrics, as required under the GPRM Modernization Act. These goals should include but not be limited to time-bound targets for the development of strong human rights and environmental due diligence standards, national recycling and reuse programs, and staff training on compliance with standards. Progress should be reported to the public and to the Office of Management and Budget (OMB) on a quarterly basis.

OMB: Require any company receiving federal funding, or involved in any kind of federal public-private partnership to show:

- Evidence of strong past performance in terms of respecting human rights, labor, environmental protection, transparency, and anti-corruption. Any company, operator, or other supply chain actor with any known outstanding violations should not be eligible for new contracts or other forms of Federal funding.
- A commitment to conduct gender-responsive human rights due diligence, in alignment with the UNGP’s. Human rights due diligence involves assessing actual or potential adverse impacts on rights-holders, including indigenous peoples’, integrating findings into management plans; taking action; and tracking and communicating externally on performance. Applicants and suppliers should be encouraged to use the Guidance on Gender Dimensions of the UNGP, developed by the UN Working Group on Business and Human Rights, when prescribing the due diligence strategy and outline examples to ensure a gender-responsive approach.
- A commitment to transparency, including project-level payment, contract, and beneficial ownership disclosures in line with global standards such as the EITI, and other anticorruption good practices including rigorous third-party due diligence, policies and risk-mitigation measures regarding agents and politically exposed persons, and whistleblower mechanisms.
- Clear and unambiguous policy commitment to respect FPIC when their projects affect Indigenous peoples, provide remedy and grievance mechanisms when violations occur, and demonstrate evidence of effective implementation (e.g., through providing evidence of good quality agreements reached).
- Plans for stakeholder engagement, including a commitment to ongoing dialogue throughout the project lifecycle and operation with all project-affected communities leading to robust impact-benefit agreements with them.

³⁴ See ECCJ, “European Commission’s proposal for a directive on Corporate Sustainability Due Diligence: a comprehensive analysis,” (European Coalition for Corporate Justice, Legal Brief, April 5, 2022). <https://corporatejustice.org/publications/analysis-of-eu-proposal-for-a-directive-on-due-diligence/>

- Clear commitment to provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships, including, at minimum, a commitment to companies to participate in the OECD U.S. National Contact Point (NCP) process and work to resolve any allegations of human rights violations that are brought there.

4) Ensure U.S. international partnerships and trade agreements operate under the highest international standards for mandatory human rights and environmental due diligence and traceability.

Even with Federal investments and initiatives to increase domestic production and refining capacity of transition minerals, the United States will still, to some extent, continue to rely on foreign partners for its supply for years to come. This is for multiple reasons. Therefore, it is vital that international partnerships and agreements related to transition minerals are updated to operate under the highest international standards for mandatory human rights and environmental due diligence and traceability.

All Departments and Agencies working with international partners must:

- Impose requirements on all funding, trade and procurement related to critical minerals. These requirements should be cross-sectional, covering all businesses in the clean energy supply chain, including but not limited to, original equipment manufacturers (OEMs), mining companies, automakers, refineries, development finance, and renewable energy companies. They should be critical components of decision making with regard to all funding streams. These requirements should reflect the requirements we recommend be conditions for domestic financial support (see above, p.12).
- Implement consistent and internationally aligned policy on environmental and social risk management in USG engagement with international Financial Institutions (IFIs) and across its own development financing institutions, in particular the U.S. International Development Finance Corporation (DFC) and the U.S. Export Import (EXIM) Bank. Such Policy should include:
 - Disclosure of project-level payments, contracts, and beneficial ownership for contractors and subcontractors, in line with the EITI. All disclosure information should be made available on a public website.
 - Rigorous third-party due diligence.
 - Policies and risk-mitigation measures regarding agents and politically exposed persons, together with robust whistleblower mechanisms.
 - Independent accountability mechanisms (IAM) at EXIM and DFC that meet international best practice, including UNGPs, that include compliance review, dispute resolution, and advisory functions.
 - “Remedy frameworks” to be adopted by EXIM, DFC, and IFC that adhere to UNGPs and incorporate strong principles for “responsible exit” that incorporate regular and meaningful stakeholder engagement and address ongoing IAM complaints prior to losing leverage by divesting from problematic projects.

- Disclosure of subproject information for higher risk subprojects and activities should be required for financial intermediary investments.
- Agencies must commit to not entering a partnership or contract with international institutions, businesses, and other entities who fail to meet these standards.

Box 4: Agency specific recommendations

Treasury, DFC, EXIM Bank: As part of a consistent policy on environmental and social risk management, all extractives' projects funded by Exim and DFC should require contract and revenue disclosure, consistent with IFC's Policy on Environmental and Social Sustainability. Currently, EXIM and DFC apply the IFC's Performance Standards, which are obligations for the borrower, but are not required to implement that sustainability policy, which includes IFC's extractives transparency commitments on revenue and contract disclosure.

Treasury, DFC, EXIM Bank: Establish Independent Accountability Mechanisms (IAM) at EXIM Bank and DFC that meet international best practice, including UNGPs, that include compliance review, dispute resolution, and advisory functions.

Treasury, DFC, EXIM Bank: "Remedy frameworks" to be adopted by EXIM, DFC and IFC that adhere to UNGPs, and incorporate strong principles for "responsible exit" that incorporate regular and meaningful stakeholder engagement and address ongoing IAM complaints prior to losing leverage by divesting from problematic projects.

DOS, Bureau of Energy Resource: Enhance the mining good governance principles being promoted by the Energy Resources Governance Initiative (ERGI) to align with international law and global norms around responsible business conduct. In particular, the ERGI principles³⁵ must:

- Include a clear and unambiguous commitment for States and companies to respect the sovereignty of Indigenous peoples, specifically their right to FPIC.
- Align with the emerging global norms around gender-responsive human right due diligence,³⁶ including requiring companies to conduct intersectional human rights impact assessments when assessing project risks and engaging with all affected rights-holders on an ongoing basis.
- Advance transparency, access to information, and strong and effective anti-corruption mechanisms, including aligning with the EITI Standard.
- Establish an effective grievance mechanism that is accessible, predictable, equitable, transparent, rights compatible, and that is developed based on engagement and dialogue with rights-holders. Grievance mechanisms require Board oversight.

³⁵ For example, in the ERGI document titled "Mineral Sector Governance for a Responsible Energy Transformation" available at https://ergi.tools/assets/pdfs/2-28-20%20ERGI%20PDF%20Report_DGB_AN.pdf there is no mention of the UNGPs, the OECD Due Diligence Guidance for Responsible Business Conduct guidelines and supporting guidance on mineral supply chains, nor any mention of the core human rights instruments that govern States' responsibilities to protect and respect human rights. These guidelines are internationally recognized, critical tools to advance responsible business conduct and address inequality.

³⁶ Companies should be encouraged to use the [Guidance on Gender Dimensions of the UNGP](#), developed by the UN Working Group on Business and Human Rights, when prescribing the due diligence strategy and outline examples to ensure a gender-responsive approach

- Call for a clear commitment for extractive industry companies to provide for or cooperate in the remediation of adverse impacts in their global value chains and within their operations and business relationships, including at minimum a commitment to participate in the OECD U.S. National Contact Point (NCP) process and work to resolve any allegations of human rights violations that are brought there.

DOS with USTR, DOE, and EPA: Work with international partners and counterparts to ensure mining good governance standards (as detailed above) are integrated into international agreements and partnerships.

NSC, DPC, DOJ, Treasury, OMB: Include a recommendation that the USG will take robust action to hold U.S. companies accountable for remediating human rights abuses and environmental impacts linked to their global supply chains, through a commitment to fully staff and resource their investigative and enforcement teams at the Department of Justice (DOJ) and Department of Treasury (Treasury).

NSC, USTR, USAID, DOS, Treasury: Address the fact that many U.S. trade and development agencies do not have non-judicial grievance mechanisms through which victims can seek remedy for business-related human rights harm. Such mechanisms should be consistent with the UNGP criteria and include monitoring of remediation.

USTR: Refuse to agree to include investor-State dispute settlement agreements in bilateral investment agreements (BITs) and other trade and investment agreements, as such agreements undermine the ability of foreign governments to regulate corporate activities that could harm the environment and human rights.³⁷

5) Require U.S. mining companies operating in the U.S. or abroad to undertake intersectional gender-based risk analysis to understand the specific challenges in their operations that disproportionately impact women, gender diverse people, especially those who are also Indigenous.

There is strong evidence that extractive industries projects disproportionately undermine women’s rights and interests.³⁸ Women and gender-diverse people are too often disproportionately affected by mining activities due to their roles and responsibilities within their communities and families, but also due to existing gender-based discrimination in the enjoyment of their rights. Harmful gender norms, discriminatory and abusive practices, and stereotyping confine women to lower paid, informal, and precarious jobs with limited labor rights or social protection and benefits that are socially undervalued. They also lead to women, girls, and gender diverse people experiencing more threats and acts of sexual and physical violence. For example, when compared to the general population, those identifying as LGBTQIA+ report about 7% higher rate higher rate of sexual harassment per year.³⁹

³⁷ ICAR, submission to the revision of the U.S. National Action Plan on Responsible Business Conduct, pp.18—20. Available at https://downloads.regulations.gov/DOS-2022-0002-0039/attachment_2.pdf

³⁸ Caroline Sweetman and Maria Ezpeleta, “Natural Resource Justice,” Gender and Development 25, no. 3 (2017).

³⁹ <https://www.stancounty.com/personnel/pdf/workplace-sexual-harassment.pdf>

Yet few extractive industries companies have developed policy and practice on gender equality and women's rights related to host communities. Widespread corporate commitments to principles of anti-discrimination, anti-harassment, and workforce diversity have not translated into similar policy commitments in community consultation and engagement processes.

The IWG should recommend that all Federal Agencies take actions to require or incentivize U.S. mining companies to commit to gender equality by adopting comprehensive gender policies and undertaking intersectional gender-based risk analysis to understand the specific challenges that disproportionately impact women, gender diverse people, and Indigenous women and gender diverse people in their operations. It is key that companies explicitly evaluate overlapping forms of discrimination that make some people more likely to suffer the negative impacts of business operations than others. This requires seeking out different perspectives based on varying characteristics such as sex and gender-orientation, age (youth / elderly), (dis)ability, race and ethnicity, socio-economic status, religion, and other relevant factors.

Key actions, based on international best practices, that Federal Agencies must require mining companies take include:

- Implementing an intersectional gender-based analysis to understand the specific challenges that disproportionately impact women and gender-diverse people impacted by their business conduct and mining operations.⁴⁰
- Require companies to use the Guidance on Gender Dimensions of the UNGP, developed by the UN Working Group on Business and Human Rights, when prescribing the due diligence strategy and outline examples to ensure a gender-responsive approach.⁴¹
- Companies' risk analyses and policy development processes should also be informed by and developed in collaboration with the DOI's Missing and Murdered Indigenous Peoples Unit, the Gender Policy Council, the Secretary's Office of Global Women's Issues, the Department of Labor Women's Bureau, and other Federal agencies and councils with gender-focused mandates. Resources should be allocated as needed to support their participation and active engagement.
- Require mining companies to submit periodic reports to the USG regarding how they address actual and potential human rights risks and impacts with a gender lens, with clear penalties for failure to comply. These should include tracking and publish gender-disaggregated data from the contractor's own operations and across their value chains and detail progress in closing their gender pay gap, beginning with three high-risk supply chains.
- Ensure access to a gender-sensitive grievance mechanism to be informed by a robust gender analysis process, with clarity and transparency around its efficacy and proactive engagement with local gender justice organizations.

⁴⁰ This is also consistent with OECD Guidelines: <http://mneguidelines.oecd.org/mneguidelines/Responsible-Business-Conduct-and-Gender.pdf> and the European Commission's Gender Equality Strategy 2020-2025 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN> and the EU Gender Action Plan III: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2184

⁴¹ UN Working Group on Business and Human Rights, "Gender Dimensions of the Guiding Principles on Business and Human Rights," (United Nations Development Program, New York, 2019).

- Federal Agencies should implement an intersectional gender-based analysis as well as gender-responsive stakeholder engagement with adequate risk mitigation before implementation of any federal contract, to ensure the funded activity is gender-informed.⁴²
- Appointing a senior-level gender focal point to ensure effective gender mainstreaming.
- Promoting and ensuring effective access to gender-informed judicial and non-judicial mechanisms in the U.S., responsive to human rights impacts of U.S. companies abroad.
- Including key commitments to require, persuade and incentivize companies to commit to gender equality by adopting and publishing comprehensive gender policies and undertaking gender sensitive human rights due diligence.

Box 5: Agency Specific Asks

DOI, DOE, DOD, DOS: Ensure that the IWG recommendations are informed by and developed in collaboration with the Gender Policy Council, the Secretary’s Office of Global Women’s Issues, the DOL Women’s Bureau, and other federal agencies and councils with gender-focused mandates that may touch on promoting responsible business conduct. Resources should be allocated as needed to support their participation and active engagement.

OMB, DPC, NSC, FAR Council: Building on the National Strategy on Gender Equity and Equality,⁴³ commitment to encouraging intersectional gender impact assessments for U.S. funded projects and develop and promulgate an Executive Order mandating comprehensive gender justice in federal contracting and grant-making.

6) Require companies supplying (or sourcing) critical minerals to have committed to respect and uphold Indigenous Peoples’ Rights to Free, Prior and Informed Consent (FPIC).

One of the most important safeguards for Indigenous and environmental rights is the right to FPIC. For Indigenous peoples, the power to give or withhold consent to extractive industries or other large-scale infrastructure projects is a right protected by international law, one that has become a crucial safeguard for the protection and realization of their collective autonomies, resilience, and self-determination. While FPIC processes vary depending on the distinct decision-making customs of each Indigenous nation, there are common elements:

- Free—from coercion and manipulation.
- prior—to each phase of project development.
- informed—meaning full and timely access to all relevant project information in formats that ensure understanding of project risks and impacts and promote engagement.

<https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights>

⁴² Key components for such an analysis can be found here, Krista Bywater et al., “Gender and Power Analysis: a child-centered and intersectional approach,” (Save the Children, London, 2021).

<https://resourcecentre.savethechildren.net/document/gender-power-gap-analysis/>

⁴³ “National Strategy on Gender Equity and Equality” (The White House, Washington, D.C., October 2021).

<https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>

- consent—requires that communities have the power to give or withhold their consent to a project. Consent is a collective decision made by the community or communities, based on their own decision-making processes.

A 2021 study from MSCI found that key transition minerals in the US, including 97% of nickel reserves, 89% of copper, 79% of lithium and 68% of cobalt, are located within 35 miles of Tribal reservations and are in or near areas of Tribal cultural and environmental importance.⁴⁴

FPIC is also recognized around the world as a best practice standard for affected local communities who do not fit the international law definitions of rights-holding Indigenous entities. This is especially the case across the African continent, where regional bodies like the African Commission on Human and Peoples’ Rights, Pan African Parliament, and Economic Community of West African States have applied FPIC to non-Indigenous local communities⁴⁵ and courts are finding the right to give or withhold consent exists in many customary law systems.⁴⁶ In this way, FPIC represents a principle of best practice for sustainable development generally, a crucial project safeguard that can increase the legitimacy of a project in the eyes of all rights holders.

Yet, current U.S. practices and laws, including those explicit to mining and those that are used in mining processes, do not uphold Tribal rights regarding FPIC. The U.S. has not ratified principal international standards recognizing and protecting the rights of Indigenous Peoples rights to FPIC nor has it passed domestic legislation codifying these rights. In fact, there are numerous examples of U.S. government institutions failing to properly uphold Tribal consultation rights guaranteed under Federal legislation, like the National Historical Preservation Act. This includes emerging transition minerals mining projects, like Lithium Nevada’s Thacker Pass lithium mine, which Tribes are pursuing legal action against for failure to consult them.⁴⁷ Companies spanning the extractive industries⁴⁸ and agribusiness sectors,⁴⁹ as well as international financial institutions and global banks,⁵⁰ have already committed to upholding FPIC in their corporate policies and lending conditions, recognizing that respecting Indigenous

⁴⁴ Samuel Block, “Mining Energy-Transition Metals: National Aims, Local Conflicts.” (MSCI, New York, 3 June 2021). <https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947>

⁴⁵ Emily Greenspan, “Free, Prior and Informed Consent in Africa: An emerging standard for extractive industry projects”, (Oxfam America, Washington, DC, 2014). <https://www.oxfamamerica.org/explore/research-publications/fpic-in-africa/>

⁴⁶ Legal Resources Centre, “Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An Analysis of Legislation and Their Implementation in Malawi, Mozambique, South Africa, Zambia and Zimbabwe” (Oxfam, Washington, D.C., 2018), <https://www.oxfamamerica.org/explore/research-publications/free-prior-and-informed-consent-in-the-extractive-industries-in-southern-africa/>

⁴⁷ Jennifer Solis, “Tribes seek pause on development of lithium mine.” (Nevada Current, 28 August 2021). <https://www.nevadacurrent.com/2021/08/28/tribes-seek-pause-on-development-of-lithium-mine/>

⁴⁸ Emily Greenspan et al., “Community Consent Index: Oil, Gas, and Mining Company Public Positions on Free, Prior and Informed Consent” (Oxfam briefing paper, Oxfam, Washington, D.C, 2015), <https://www.oxfam.org/communityconsent>

⁴⁹ Chloe Christman-Cole, “Companies Spoke. Did their Suppliers Listen? Tracking Behind the Brands Sustainability Commitments through the Supply Chain with the ‘Agribusiness Scorecard’” (Oxfam briefing paper, Oxfam, Washington, D.C, 2019), <https://www.oxfam.org/en/research/companies-spoke-did-their-suppliers-listen>

⁵⁰ Shona Hawkes, “Consent is Everybody’s Business—Why Banks Need to Act on Free, Prior and Informed Consent” (Oxfam briefing paper, Oxfam, Oxford, 2020), <https://policy-practice.oxfam.org/resources/consent-is-everybodys-business-why-banks-need-to-act-on-free-prior-and-informed-620854/>

sovereignty is both a legal requirement and makes good business sense.

Commitments to uphold FPIC rights should also be required for other supply chain actors, including but not limited to, original equipment manufacturers (OEMs), automakers, and renewable energy companies. Companies should have clear and unambiguous policy commitments to respect FPIC when their projects affect Indigenous peoples, provide remedy and grievance mechanisms when violations occur, and should demonstrate evidence of effective implementation (e.g., through providing evidence of good quality agreements reached). These companies can also add value in influencing the behavior of other market players across the supply chain through leading by example and using their influence to ensure effective FPIC implementation.

Box 6: Agency specific asks

DOI/BLM/FS: Commit to updating Bureau of Land Management and Forest Service mining regulations to strengthen protections for Indigenous peoples, communities, and the environment. Updates should further require that any pilot or other project for mining, “remining,” or other extraction for materials must go through a full National Environmental Policy Act review process.

OMB, DPC: Require all agencies to publish their reports on progress in implementing agency action plans on Tribal consultation and strengthening the Nation-to-Nation relationship with Tribal governments. These reports are currently only mandated, by Presidential memorandum, to be submitted to the Director of the Office of Management and Budget.

OMB, DPC, NSC, FAR Council: Require clear and unambiguous policy commitment from all USG agencies to respect FPIC when USG-Funded projects affect Indigenous peoples or customary land rights holders, provide remedy and grievance mechanisms when violations occur, and demonstrate evidence of effective implementation (e.g., through providing evidence of good quality agreements reached).

OMB, NSC, DPC, FAR Council: Local communities, Indigenous communities and other interested rightsholders should be allowed an opportunity to review and provide public comments on Federal investments in critical minerals. All such applications for federal funding, (including grants, contracts, loans, and loan guarantees) as well as all supplier contracts, along with their relevant supporting documentation, should be disclosed on a public website with sufficient time for rightsholders to provide public comments prior to a decision being made. Agencies should be required to take into consideration such comments when making their determinations. All contractors and subcontractors should also publish their beneficial ownership information, with this information also made available on the public website.

7) Require companies supplying (or sourcing) critical minerals to have a clear statement of policy on human rights defenders and be willing to use their leverage to speak out in defence of human rights defenders as well as against legal reforms that are aimed at restricting civil society space.

Mining reform presents an important and urgent opportunity to strengthen the role of businesses and the U.S. government to protect civic space and human right and environmental defenders (HRDs). Protecting human rights and environmental defenders and ensuring the existence of a vibrant civil society where businesses operate is in the best interest of everyone including the private sector. Operating in risky areas where freedom of expression and assembly is limited can put at risk the business activities and greatly affect the reputation of the companies operating in such context.

Globally, the mining sector is consistently reported as a top perpetrator of rights violations and violence against human rights and environmental defenders.⁵¹ In fact, in 2019, Global Witness reported mining as the deadliest sector for defenders.⁵²

In the United States, environmental defenders and protesters against extractive projects face increasingly levels of violence and criminalization. According to the Center for Not-for-Profit Law's U.S. Protest Law Tracker, since 2017, nearly every U.S. state—45—have considered over 200 bills that would restrict the right to assembly and protest.⁵³ Of these, 39 have been enacted, nearly half of which (18) impose criminal penalties for protests near “critical infrastructure,” including extractives projects.⁵⁴ To date, most of these bills are focused on oil and gas facilities and pipelines, but in February this year, Alabama passed SB 17/ HB 21 which expands the “critical infrastructure” definition to include mining operations.⁵⁵ Laws like these violate First Amendment rights to freedom of assembly, effectively shrinking the civic space key to a thriving democracy and the protection of civic rights and the environment.

Furthermore, attacks against defenders are closely linked to racial, ethnic, and gender discrimination, therefore disproportionately impact LGBTQI defenders, defenders who identify as women, and others who represent groups facing discrimination and marginalization.⁵⁶ They also disproportionately impact Indigenous defenders, a major concern for increasing mining exploration and production operations in the United States.

It is critical that the U.S. government intervenes and takes an intersectional approach to

⁵¹ Front Line Defenders, Global Analysis 2021,

https://www.frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf

⁵² Global Witness, “Global Witness records the highest number of land and environmental activists murdered in one year—with the link to accelerating climate change of increasing concern.” (Global Witness, London, 29 July 2020)

<https://www.globalwitness.org/en/press-releases/global-witness-records-the-highest-number-of-land-and-environmental-activists-murdered-in-one-year-with-the-link-to-accelerating-climate-change-of-increasing-concern/>

⁵³ ICNL, “U.S. Protest Law Tracker.” (The International Center for Not-for-Profit Law, Washington, D.C., 2 June 2022). <https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=6&date=&type=legislative>.

⁵⁴ ICNL, “Exploring Trends in Anti-Protest Bills: Infrastructure.” (The International Center for Not-for-Profit Law, Washington, D.C., 12 January 2022) <https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=6&date=>

⁵⁵ ICNL, “U.S. Protest Law Tracker: Alabama.” (The International Center for Not-for-Profit Law, Washington, D.C., 2 June 2022). <https://www.icnl.org/usprotestlawtracker/?location=&status=&issue=6&date=&type=legislative>

⁵⁶ The United Nations defines women human rights defenders as “all women and girls working on any human rights issue, and people of all genders who work to promote women’s rights and rights related to gender equality.” See The United Nations Human Rights Office of the High Commissioner, “Who are women human rights defenders?” available at: <https://www.ohchr.org/en/women/women-human-rights-defenders>

guarantee the rights and the protection of Indigenous and other defenders, especially those who are disproportionately impacted due to other existing oppression.⁵⁷

IWG should recommend all agencies involved in critical minerals to issue clear public statements that⁵⁸:

- Extractives companies, including mining companies, have a baseline responsibility to “do no harm” to HRDs and to civic freedoms by not participating in or contributing to reprisals against HRDs or to actions that constrain civic space.
- Mining and extractives companies must have a “zero tolerance” policy on harms to HRDs that guides their own actions, as well as their relationships across their value chains.
- Mining and extractives companies must identify risks to civic freedoms and HRDs through their due diligence as part of their responsibility under the UNGPs.
- Mining and extractives companies must ensure their policies, commitments, risk assessments, and other actions take an intersectional approach and address the specific risks of violence faced by Indigenous and women’s rights and environmental defenders.
- Recognize and commit to protecting the rights and legitimacy of HRDs by adopting and disclosing a policy to protect their rights.
- Commitments to speak out in defense of HRDs as well as against legal reforms that are aimed at restricting civil society space.
- Commitments not to use or support Strategic Lawsuits Against Public Participation (SLAPP) or other legal strategies that diminish established legal protections for HRDs or silence their voices.

Further, the IWG should recommend support for the passage of the Alien Tort Statute Clarification Act (ATSCA)⁵⁹ to enhance accountability for human rights violations in U.S. courts and the Global Voices of Freedom Act of 2022 to protect HRDs and enhance the U.S. government’s ability to prevent, mitigate and respond in these cases.⁶⁰

Box 7: Agency-Specific Recommendations

DOS: Require U.S. Embassies to collect information as needed and publish regular reports notifying national civil society about new major contracts in the public record, significant investments, or operational changes among U.S.-based multinationals that might impact the human rights of local communities.

⁵⁷ Amnesty International, Challenging Power, Fighting Discrimination: A call to action to recognize and protect women human rights defenders (Amnesty International, London, October 2019).

<https://www.amnesty.org/en/documents/act30/1139/2019/en/>

⁵⁸ Adapted from ICAR, submission to the revision of the U.S. National Action Plan on Responsible Business Conduct, pp.30—33. Available at https://downloads.regulations.gov/DOS-2022-0002-0039/attachment_2.pdf

⁵⁹ <https://www.congress.gov/bill/117th-congress/senate-bill/4155>

⁶⁰ See Oxfam America, submission to the revision of the U.S. National Action Plan on Responsible Business Conduct,

DOS: Commit U.S. Embassies in conflict-affected areas to encourage and incentivize companies to prioritize in decision-making behavior and practices that support peace processes and avoid contributing to the armed conflict.

DoS, USAID: Commit to taking the following steps to ensure human rights and environmental defenders involved in disputes relating to extractive industry projects are protected:

- Require every U.S. Embassy to have a publicly designated point of contact for human rights and environmental defenders facing threats or attacks.
- Engagement in support of specific defenders must be linked to advocacy in support of broader civic space and human rights issues and must be sustained over time.
- In coordination with USAID, DOS should consult with civil society partners and HRDs regarding implementation of new Guidelines for U.S. Diplomatic Support to Civil Society and Human Rights Defenders, including on implementing strategies to prevent and sanction the use of SLAPP.
- Establish guardrails for flexible and responsive funding to counter potential attacks against CSOs and specific advocates.
- Create mechanisms for civil society to continue its work in closing spaces, including collaboration across U.S. government agencies and with international partners.
- Commit to new programming to build human rights defenders' capacity to engage with businesses and financial institutions on human rights and environmental issues in high-risk settings, including through accountability measures. These programs should also provide unrestricted funds to support HRDs as needed in taking measures to ensure their safety, at their own discretion.

CONCLUSION

The clean energy era we know is needed must avoid repeating the mistakes and exploitation that have long characterized U.S. mining. This can be achieved through instituting strong policies that embed circular economy principles and practices, and mandate respect for Indigenous sovereignty and binding gender-responsive human rights and environmental due diligence standards across the sector.

Secretary Haaland, we thank you for your time and consideration of our comment. We applaud your efforts in asking for public input and incorporating elements from our input into the proposal. Please do not hesitate to reach out to Blaine-Miller McFeeley, Senior Legislative Representative, Earthjustice (bmcfeeley@earthjustice.org) to follow up on anything in this submission.

Sincerely,
Havasupai Tribe
Hualapai Tribe
Norton Bay Inter-Tribal Watershed Council
San Carlos Apache
Tohono O'odham Nation
Alaska Soles, Great Old Broads for Wilderness

Alaska Trollers Association
Alaska Wilderness League
Arizona Faith Network
Arizona Mining Reform Coalition
Arizona Trail Association
Bank Information Center
Basin and Range Watch
Black Hills Clean Water Alliance
Borderlands Restoration Network, 501c3
California Environmental Voters
Californians for Western Wilderness
Center for Biological Diversity
Citizens to Protect Smith Valley
Coalition to SAVE the Menominee River, Inc.
Common Defense
Conservation Northwest
Conservation Voters New Mexico
Cook Inletkeeper
Cultural Survival
Dakota Rural Action
Dawson Ranch HOA, Arkansas Valley Conservation Coalition
Deer Tail Scientific
Earthjustice
Earthworks
Endangered Species Coalition
Environmental Protection Information Center- EPIC
First Peoples Worldwide
Fishhawk River Company
Friends of Santa Cruz River
Friends of Sonoita Creek
Friends of the Earth U.S.
Friends of the Kalmiopsis
Gila Resources Information Project
Grand Riverkeeper Labrador
Great Basin Resource Watch
Great Old Broads for Wilderness, Bozeman Broadband
GreenLatinos
High Country Conservation Advocates
Idaho Conservation League
Idaho Rivers United
Information Network for Responsible Mining
Inland Ocean Coalition
International Campaign for Responsible Technology
Kalmiopsis Audubon Society
Klamath-Siskiyou Wildlands Center
Los Padres ForestWatch

Lynn Canal Conservation
Malach Consulting
Montana Environmental Information Center
Multicultural Alliance for a Safe Environment
Native Movement
Northeastern Minnesotans for Wilderness
Northern Alaska Environmental Center
Observatoire d'etudes et d'appui a la responsabilite sociale et environnementale (OEARSE)
Okanogan Highlands Alliance
Oregon Wild
Oxfam America
Patagonia Area Resource Alliance
Progressive Leadership Alliance of Nevada
Project HEARD
Publish What You Pay US
Rock Creek Alliance
Royal Gorge Preservation Project (501(c)(3)) non-profit
San Luis Valley Ecosystem Council
Save Our Cabinets
Save The Scenic Santa Ritas
Save the South Fork Salmon, Inc.
Sheep Mountain Alliance
Sierra Club
Soda Mountain Wilderness Council
Southeast Alaska Conservation Council
Southern Utah Wilderness Alliance
The Wilderness Society
Trustees for Alaska
Tucson Audubon Society
Upper Peninsula Environmental Coalition
Western Environmental Law Center
Western Leaders Network
WildEarth Guardians
Wildsight