



**IRMA**

Initiative for Responsible  
Mining Assurance

The IRMA *Standard for Responsible Mining*  
**A Tool for U.S. Mining Law Reform**

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**Examples of Gaps in Good Practice in the U.S. Legal Framework**

August 2022

# Introduction

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In February 2022, the United States (U.S.) Department of the Interior (DOI) launched an Interagency Working Group (IWG) to reform hardrock mining laws, regulations and permitting policies to inform potential rulemaking efforts and to promote “the sustainable and responsible domestic production of critical minerals”<sup>1</sup> in line with Executive Order 14017 on America’s Supply Chains.<sup>2</sup> The focus on responsible production of non-renewable resources is increasingly important as the energy transition relies on vast amounts of mined materials.<sup>3</sup> These materials must be produced, processed, managed, and sourced in a manner that prioritizes prevention of harm to communities and their environments and in alignment with strategies that move toward a circular economy with durable goods and effective pathways for reuse and recycling of mined materials.<sup>4</sup>

The history of mining in the U.S. is one that has resulted in benefits to some and negative environmental and social impacts for many. Some negative impacts persist and must be addressed, including through improvements to the U.S. legal framework for the mining sector. This is essential to uphold the Biden Administration’s commitment to

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<sup>1</sup> U.S. Department of the Interior, *Interior Department Launches Interagency Working Group on Mining Reform*, February 22, 2022, <https://www.doi.gov/pressreleases/interior-department-launches-interagency-working-group-mining-reform>.

<sup>2</sup> The White House, *Executive Order on America’s Supply Chains*, February 24, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/>.

<sup>3</sup> International Energy Agency, *World Energy Outlook Special Report: The Role of Critical Minerals in Clean Energy Transitions*, 2021, <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions>, noting that the world is currently on track for a doubling of overall mineral requirements for clean energy technologies by 2040 and a “concerted effort” to reach the Paris Agreement goal of stabilizing the climate at “well below 2°C global temperature rise” would require quadrupling minerals needed for clean energy technologies by 2040—hitting net zero globally by 2050 would require six times more mineral inputs in 2040 than today; World Bank, *Minerals for Climate Action – The Mineral Intensity of the Clean Energy Transition*, 2020, <https://pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition>, finding that the production of minerals such as graphite, lithium, and cobalt will increase by nearly 500% by 2050 to meet demands for low-carbon energy technologies.

<sup>4</sup> See Elsa Dominish, Sven Teske, and Nick Florin, *Responsible Minerals Sourcing for Renewable Energy*, Institute for Sustainable Futures, 2019, <https://earthworks.org/publications/responsible-minerals-sourcing-for-renewable-energy/>, stating “[r]ecycling can significantly reduce primary demand, especially for batteries, however it cannot meet all demand” thus new mining is likely to meet demand in the short term until recycled metals are more widely available.

environmental justice as a core component of strengthening U.S. supply chains for the energy transition.<sup>5</sup>

The U.S. Government Accountability Office and others estimate that mining has left hundreds of thousands of abandoned mines that will cost billions of dollars to reclaim.<sup>6</sup> Perhaps most damaging is mining's impacts on Indigenous Peoples; pursuit of mineral wealth in violation of legally binding treaties with sovereign tribes has caused harms that persist and are likely to impact future generations.<sup>7 8 9</sup>

The legal framework that allowed those harms is still in place. The 1872 Mining Law, supplemented by a patchwork of laws and regulations that has developed around it, governs hardrock mineral extraction on federally managed public lands to this day.

Expectations have changed, however, in the U.S. and around the world. The Initiative for Responsible Mining Assurance (IRMA) is a multi-stakeholder coalition formed in 2006 in response to global demand for more social and environmental responsibility in the mining sector. IRMA led a series of deep cross-sector discussions and broad engagement over the span of more than 10 years, leading to the publication of the IRMA *Standard for Responsible Mining* (Mining Standard) in June 2018. The IRMA Standard is used for independent audits of environmental and social performance at the mine-site level, bringing market recognition to mines demonstrating commitment to improving practices. IRMA's standards and system are governed by a multi-stakeholder board that gives equal voting power to NGOs, affected communities, organized labor, mining companies, purchasing companies, and the investor and finance sector.

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<sup>5</sup> The White House stated "[t]he United States must ... invest in sustainable production, refining, and recycling capacity domestically, while ensuring strong environmental, environmental justice, and labor standards and meaningful community consultation, including with Tribal Nations through government-to-government collaboration." The White House, *Fact Sheet: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities: 100 Day Review Outlines Steps to Strengthen Critical Supply Chains*, June 8, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/>.

<sup>6</sup> U.S. Government Accountability Office, *Abandoned Hardrock Mines: Information on Number of Mines, Expenditures, and Factors That Limit Efforts to Address Hazards*. Accessed on August 17, 2022 at <https://www.gao.gov/assets/gao-20-238.pdf>.

<sup>7</sup> Jonathan Windy Boy, Missoula Current, *Viewpoint: BLM Should Protect Fort Belknap Indian Community from Further Pollution*. Accessed on August 25, 2022 at <https://missoulacurrent.com/viewpoint-fort-belknap/>.

<sup>8</sup> Johnnye Lewis, Joseph Hoover, and Debra MacKenzie, *Mining and Environmental Health Disparities in Native American Communities*, *Current Environmental Health Reports*, 2017 Jun;4(2):130-141. doi: 10.1007/s40572-017-0140-5. PMID: 28447316; PMCID: PMC5429369. Accessed August 25, 2022 at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5429369/>.

<sup>9</sup> U.S. National Archives, *Treaty of Fort Laramie (1868)*. Accessed on Aug 25, 2022 at <https://www.archives.gov/milestone-documents/fort-laramie-treaty>.

As an independent voluntary initiative IRMA will never replace the role of government and rule of law but is a useful tool to complement government efforts. As a comprehensive set of good practices for the mining sector, the IRMA Standard can be used as a benchmark to assess and improve legal frameworks.

The purpose of this brief document is to highlight examples of areas where the U.S. legal framework for the mining sector could be more closely aligned with the IRMA Standard. This review is not comprehensive but presents representative areas where the good practices in the IRMA Standard are not yet reflected in the U.S. mining law and policy framework.

While the U.S. has stronger mining laws than many countries, there are multiple areas where improvements are needed to conform to international good practices in the IRMA Standard. By undertaking this work and reform through a process that engages mine-affected communities, Indigenous Peoples, and other sectors, the U.S. can demonstrate leadership in governance of its mining sector that can serve as a reference for U.S. partnerships. These partnerships include, but are not limited to, the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF),<sup>10</sup> the Energy Resource Governance Initiative (ERGI),<sup>11</sup> and the recently formed Minerals Security Partnership (MSP).<sup>12</sup> Notably, the U.S. also joined the Extractive Industries Transparency Initiative (EITI) in 2014, when it became the first G8 country to join the initiative,<sup>13</sup> but withdrew from EITI implementation in 2017.<sup>14</sup> While the U.S. continues to support the EITI internationally through USAID,<sup>15</sup> the country's withdrawal from implementation meant discontinuing the valuable efforts of the U.S. EITI multi-stakeholder group (MSG) that served as a platform for dialogue, including state and Tribal participation.<sup>16</sup>

IRMA has been recognized by multiple governments, including the U.S. Government, as a tool to advance more responsible mine management and sourcing. In 2021, the White House referenced IRMA in its 100-Day Review on Building Resilient Supply Chains, noting that IRMA is a possible “method for U.S. companies and the Federal Government to ensure that minerals are being sourced from mines with robust environmental, social,

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<sup>10</sup> IGF, *Members*, <https://www.igfmining.org/member/>.

<sup>11</sup> ERGI, <https://erqi.tools/>.

<sup>12</sup> U.S. Department of State, *Minerals Security Partnership*, <https://www.state.gov/minerals-security-partnership/>.

<sup>13</sup> The World Bank, *United States Joins EITI to Further Transparency in the Extractive Industries*, May 7, 2014, <https://www.worldbank.org/en/news/feature/2014/05/07/united-states-joins-eiti-to-further-transparency-in-extractive-industries>.

<sup>14</sup> EITI, *EITI Chair Statement on United States Withdrawal from the EITI*, November 2, 2017, <https://eiti.org/news/eiti-chair-statement-united-states-withdrawal-eiti>.

<sup>15</sup> EITI, *Supporting Countries*, <https://eiti.org/supporting-countries>.

<sup>16</sup> EITI, *EITI Chair Statement on United States Withdrawal from the EITI*, November 2, 2017, <https://eiti.org/news/eiti-chair-statement-united-states-withdrawal-eiti>.

and financial responsibility policies.”<sup>17</sup> The Government of Australia called IRMA a “no regrets approach” in its 2020 study of certifications and strategies to increase competitiveness of Australian battery materials for use in the EV sector in Europe.<sup>18</sup> The European Parliament referenced the IRMA Standard in its recent strategy for critical raw materials.<sup>19</sup> IRMA is also referenced as a globally recognized framework for responsible mining in the United Kingdom’s 2022 Critical Mineral Strategy.<sup>20</sup>

These and other governments are responding to decades of demands from civil society, organized labor, and purchasing companies for responsibly sourced materials. Such demands from civil society were demonstrated in 2021 when over 170 NGOs signed the “Declaration on Mining and the Energy Transition for the United Nations Framework Convention on Climate Change (UNFCCC) 26<sup>th</sup> Conference of the Parties (COP26).”<sup>21</sup> The Declaration called for “a just and rapid transition away from fossil fuels and towards a renewable energy system” expressing concern for “the impacts of extracting materials such as lithium, cobalt, nickel and copper for renewable energy technologies on communities, workers and ecosystems around the world.”<sup>22</sup> It called for ensuring responsible minerals sourcing through legally binding regulations and stringent international environmental and human rights standards with independent, third-party verification of compliance, like IRMA.<sup>23</sup>

Incorporation of the good practice guidance in the IRMA Standard can help build trust between industry, affected communities, and government. The market advantage IRMA is creating provides an impetus for improving mining sector management in the U.S. and around the world.

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<sup>17</sup> The White House, *Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews Under Executive Order 14017*, June 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

<sup>18</sup> UTS Institute for Sustainable Futures and the University of Melbourne, *Certification and LCA of Australian Batter Materials – Drivers and Options: Scene Setting Project Prepared for Future Battery Industries CRC*, Future Battery Industries CRC, Australian Government Department of Industry, Innovation and Science Business Cooperative Research Centres Program, August 2020, <https://fbicrc.com.au/wp-content/uploads/2020/10/Certification-of-Au-Battery-Materials-WEB-INTERACTIVE-SEPT-2020.pdf>.

<sup>19</sup> European Parliament, *A European Strategy for Critical Raw Materials*, November 24, 2021, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0468\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0468_EN.html).

<sup>20</sup> United Kingdom Department for Business, Energy & Industrial Strategy, *Resilience for the Future: The UK’s Critical Minerals Strategy*, July 22, 2022, <https://www.gov.uk/government/publications/uk-critical-mineral-strategy/resilience-for-the-future-the-uks-critical-minerals-strategy>.

<sup>21</sup> Earthworks. *Declaration on Mining and the Energy Transition for COP26*. 2021, <https://earthworks.org/campaigns/making-clean-energy-clean/declaration-on-mining-and-the-energy-transition-for-cop26/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

# Examples of Gaps Between the U.S. Legal Framework and IRMA

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The White House 100-Day Supply Chain Review<sup>24</sup> under Executive Order 14017 called for establishing an interagency team “to identify gaps in statutes and regulations that may need to be updated to ensure new production meets *strong environmental standards* throughout the lifecycle of the project” and “to ensure *meaningful community consultation* and *consultation with tribal nations*, respecting the government-to-government relationship, at all stages of the mining process.”<sup>25</sup>

This assessment supports the work of the IWG formed under this mandate and responds to its prompt:

“Are there international mining best practices or standards that the U.S. 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?”<sup>26</sup>

The remainder of this section provides examples of areas where there are gaps between the good practices in the IRMA Mining Standard and the U.S. legal framework governing the mining sector. This assessment is not comprehensive in its coverage of U.S. federal law and policy, and it does not extend to U.S. state and other subnational frameworks that are important for good governance of the mining sector but exceed the limited timeline and resources available for this assessment. Within these limitations, the examples presented identify areas of the U.S. legal framework where gaps can be addressed to ensure conformity with good international practice.

## Community and Stakeholder Engagement

### IRMA

Requirements of the IRMA Standard are written from the perspective that the potential for optimal outcomes for both affected communities and mining companies is maximized through meaningful stakeholder engagement that is proactive, inclusive, accountable, and transparent.<sup>27</sup>

In order to create meaningful engagement, the IRMA Standard requires mining companies to identify representative community members and other stakeholders and

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<sup>24</sup> The White House, *Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews Under Executive Order 14017*, June 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>.

<sup>25</sup> *Id.* at pp. 14-15, *emphasis added*.

<sup>26</sup> Federal Register, Vol. 87, No. 62, March 21, 2022, <https://www.govinfo.gov/content/pkg/FR-2022-03-31/pdf/2022-06750.pdf>.

<sup>27</sup> IRMA *Standard for Responsible Mining, 2018* at 1.2. Community and Stakeholder Engagement.

rights holders affected by their mining operations. Following this process, the company must work with those stakeholders and rights holders to design a public, accessible, inclusive, and culturally appropriate engagement plan to prevent or mitigate community conflict.<sup>28</sup>

This engagement plan is crucial because it guides stakeholder engagement processes<sup>29</sup> that begin prior to or during mine planning and continue throughout the life of the mine. The processes must include stakeholder engagement mechanism(s) (e.g., an advisory committee) that provide stakeholder oversight of the mining project's environmental and social performance or other issues of concern.

As part of its stakeholder engagement, the mining company must ensure that the affected communities have the capacity to effectively engage with the company. Where capacity gaps exist, the company must make assistance available to close those gaps (e.g., training, independent experts, etc.).<sup>30</sup>

## U.S. Legal Framework

Community engagement requirements in U.S. mining law are largely defined by the National Environmental Policy Act (NEPA). When a mine operator wants to do something that requires a federal agency decision, NEPA requires that—assuming the regulatory agency doesn't exclude the decision from full NEPA review—the public be notified and have the opportunity to provide comments on the proposed action in the draft decision. This process is sometimes repeated before a final decision is made.

Implicit in the NEPA process are a number of unsupported assumptions regarding those who provide comment:<sup>31</sup>

- That commenters include all affected stakeholders
- That stakeholders are relatively equal participants: equal in their power and ability to comment, equal in their knowledge of whether they would be affected by the

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<sup>28</sup> IRMA *Standard for Responsible Mining*, 2018 at 1.2.1. Planning and Designing Stakeholder Engagement Processes, [https://responsiblemining.net/wp-content/uploads/2018/07/IRMA\\_STANDARD\\_v.1.0\\_FINAL\\_2018-1.pdf](https://responsiblemining.net/wp-content/uploads/2018/07/IRMA_STANDARD_v.1.0_FINAL_2018-1.pdf).

<sup>29</sup> IRMA *Standard for Responsible Mining*, 2018 at 1.2.2. Engagement Processes.

<sup>30</sup> IRMA *Standard for Responsible Mining*, 2018 at 1.2.3. Strengthening Capacity.

<sup>31</sup> U.S. Council on Environmental Quality, *A Citizen's Guide to NEPA - Having your voice heard*, January 2021. Accessed August 25, 2022 at <https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf>. The Council on Environmental Quality guidebook to citizen participation in the NEPA commenting process does not identify factors (apart from internet access) that might affect a stakeholder's ability to comment. Much of the guidebook is about the citizen's responsibility/burden if they want to comment, rather than the government's or mining company's obligation to ensure that all affected stakeholders are engaged. Additionally, the guide makes clear that how the public is engaged varies by agency.

proposal, equal in their knowledge of the opportunity to comment, and equal in their ability to provide informed comment.

Under federal law, once the decision is made by the permitting agency,<sup>32</sup> the legally required window for public engagement is over. There is no ongoing stakeholder engagement plan or process and there is no ongoing opportunity for affected stakeholders to provide feedback regarding how the mine is operating relative to the permit or regarding any other matter.

## **Grievance Mechanism and Access to Remedy**

### **IRMA**

Industrial-scale mining inevitably raises concerns and complaints from affected community members and stakeholders. The IRMA Standard requires mining companies to have in place operational-level grievance mechanisms for systematically receiving, tracking, resolving, and communicating with local communities and stakeholders about their complaints or grievances. These mechanisms provide opportunities to quickly resolve individual problems and to identify problematic trends. One grievance mechanism may or may not be suitable to address all types of grievances related to a mining project (e.g., labor grievances are typically dealt with through a separate mechanism). Operational-level grievance mechanisms do not preclude access to other remedy mechanisms, including administrative, judicial, or other non-judicial mechanisms.

### **U.S. Legal Framework**

Federal mining law provides no non-judicial mechanisms for addressing stakeholder complaints with mining operations.

## **Free, Prior and Informed Consent (FPIC)**

### **IRMA**

In addition to the other IRMA Standard requirements regarding community and stakeholder consultation, the IRMA Standard requires the Free, Prior and Informed

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<sup>32</sup> The federal government interprets the 1872 Mining Law to mean the President has little or no discretion to deny a mine. So, rarely does any consultation or review process affect the outcome for Tribal nations or other communities who choose to withhold consent. See e.g., *Record of Decision Rosemont Copper Project and Amendment of the Coronado Land and Resource Management Plan* at p. 31 “Pursuant to Federal law, the Forest Service may reasonably regulate the use of the surface estate to minimize impacts to Forest Service surface resources, but cannot endanger or materially interfere with mining and processing operations and reasonably incidental uses. Thus, I cannot reject outright the proposed project.” Accessed August 25, 2022 at <https://www.rosemonteis.us/documents/rosemont-feis-final-rod>.



Consent (FPIC)<sup>33</sup> of potentially affected Indigenous Peoples before new mining activities can begin at either new or existing mines. The FPIC requirement is not limited to Tribal nations recognized by the federal government.<sup>34</sup>

Potential impacts that would require FPIC include situations where mining-related activities may affect Indigenous Peoples' rights or interests, including those that may impact on lands, territories, and resources; require the physical relocation of people; cause disruption to traditional livelihoods; impact on critical cultural heritage; or involve the use of cultural heritage for commercial purposes.

IRMA FPIC requires the proactive identification and consultation of Indigenous Peoples that may be affected by the mining operations. It incorporates the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization Indigenous and Tribal Peoples Convention (ILO 169).

### **U.S. Legal Framework**

The U.S. recognizes American Indian and Alaska Native Tribal Nations as sovereign governments under the Constitution of the U.S., treaties, statutes, Executive Orders, and court decisions.<sup>35</sup> The Biden Administration has promised “to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.”<sup>36</sup> These commitments, however, are not yet reflected in U.S. mining law.

Federal laws and regulations governing mining do not require FPIC for Indigenous Peoples in the U.S. Tribal nation consultation statutes—the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA)—do not allow Indigenous Peoples in the U.S. to withhold consent and thereby block mineral development, although they do require government-to-government discussions about mining operations that affect Tribal nations formally recognized by

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<sup>33</sup> IRMA defines FPIC as “consent based on: engagement that is free from external manipulation, coercion and intimidation; notification, sufficiently in advance of commencement of any activities, that consent will be sought; full disclosure of information regarding all aspects of a proposed project or activity in a manner that is accessible and understandable to the people whose consent is being sought; acknowledgment that the people whose consent is being sought can approve or reject a project or activity, and that the entities seeking consent will abide by the decision.” IRMA *Standard for Responsible Mining*, 2018 at p. 189, Glossary of Terms.

<sup>34</sup> See IRMA *Standard for Responsible Mining - Guidance Document*, April 2020 at p. 142: Explanatory Note for 2.2.3.1., [https://responsiblemining.net/wp-content/uploads/2022/06/IRMA\\_Standard\\_Guidance\\_Updated-April2020-correctedcritical.pdf](https://responsiblemining.net/wp-content/uploads/2022/06/IRMA_Standard_Guidance_Updated-April2020-correctedcritical.pdf).

<sup>35</sup> The White House, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

<sup>36</sup> *Id.*

the federal government. Tribes are often relegated to a status of consulted party, rather than an actual party to NHPA Memoranda of Agreement and Programmatic Agreements. For smaller-scale mining operations (land disturbances fewer than five acres), the Bureau of Land Management and U.S. Forest Service can avoid consultation altogether. Similarly, U.S. Forest Service NEPA rules categorically exclude consultation related to exploratory mining activities that last less than one year. Neither agency is required to consult with tribes when setting bonding levels before a project is approved.

In 2007 a majority of the UN General Assembly voted in favor of UNDRIP, with only Australia, Canada, New Zealand and the U.S. voting against this historic declaration.<sup>37</sup> The U.S. has since reversed its position and agreed to support UNDRIP<sup>38</sup> but has not reflected support for this nonbinding declaration in its domestic legal framework, as has been modeled by British Columbia in its 2019 Declaration on the Rights of Indigenous Peoples Act.<sup>39</sup> Furthermore, the U.S. has not ratified ILO 169, a convention that entered into force in 1991 and was recently ratified by Germany.<sup>40</sup>

## Community Support and Benefit Sharing

### IRMA

For non-Indigenous communities, the IRMA Standard requires an operating company to demonstrate that it obtained broad community support from communities affected by its mining project. IRMA only considers that demonstration credible if it occurred after the operating company carried out consultations with relevant stakeholders regarding potential impacts and benefits of the proposed mining project; was transparent and free from coercion or manipulation; and included the opportunity for meaningful input by all potentially affected community members, including women, vulnerable groups, and marginalized community members.<sup>41</sup>

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<sup>37</sup> United Nations Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>38</sup> *Id.* See also USAID, *Indigenous Peoples*, <https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples#:~:text=Adopted%20in%202007%2C%20the%20UNDRIP,specific%20situation%20of%20indigenous%20peoples>.

<sup>39</sup> British Columbia, *Declaration on the Rights of Indigenous Peoples Act*, 2019, <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

<sup>40</sup> International Labour Organization, *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989* (No. 169), noting that the convention entered into force in 1991 and entered into force for Germany on June 23, 2021, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO).

<sup>41</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.3.2. Commitments to Affected Communities.

The IRMA Standard requires that mining companies work in collaboration with affected communities and other relevant stakeholders and rights holders to jointly and transparently develop a process through which the company contributes to community development and benefits.<sup>42</sup>

### **U.S. Legal Framework**

U.S. Federal laws and regulations governing mining do not require broad community support, nor any mechanism for ensuring that the affected community benefits from the mine.

## **Environmental and Social Impact Assessment and Management**

### **IRMA**

A broad range of environmental, social, and economic impacts are explicitly included in the IRMA Standard impact assessment requirements. The IRMA Standard requires the collection of baseline data describing the prevailing environmental, social, economic, and political environment before mining operations begin to allow the assessment of the potential impacts of the proposed mining project.<sup>43</sup> The IRMA Standard also requires the assessment of potential impacts of “extreme events” (e.g., weather events intensified by climate change).<sup>44</sup>

### **U.S. Legal Framework**

Although NEPA requires thorough consideration of the environmental impacts of a proposal, neither it nor 43 CFR Part 3809 explicitly require the collection of baseline data<sup>45</sup> nor do they require assessment of social, economic, and political impacts. Neither NEPA nor other U.S. statutes and regulations for the mining sector require the company or permitting agency to consider “extreme events.” The U.S. Environmental Protection Agency (EPA) has, however, published Climate Change Guidance for National EPA Reviews to help federal agencies incorporate climate change considerations into the NEPA process.<sup>46</sup>

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<sup>42</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.3.8. Planning and Delivering Community Benefits.

<sup>43</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.1.4. ESIA Data Collection.

<sup>44</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.1.3. Scoping.

<sup>45</sup> 43 CFR 3809.401(c) allows the Bureau of Land Management to require baseline data at its discretion.

<sup>46</sup> U.S. EPA, *Climate Change Guidance for National Environmental Policy Act Reviews*, 2021, <https://www.epa.gov/nepa/climate-change-guidance-national-environmental-policy-act-reviews>.

## Emergency Preparedness

### IRMA

The IRMA Standard requires operators to create an emergency response plan<sup>47</sup> in consultation with workers and the potentially affected community<sup>48</sup> and to regularly test the plan. The IRMA Standard also requires the company to get public liability accident insurance that remains in effect for so long as the company has legal responsibility for the site, covering emergencies and accidents such as flooding and mine waste impoundment failures.<sup>49</sup>

### U.S. Legal Framework

Federal laws and regulations governing mining do not require emergency preparedness plans.

## Planning and Financing Reclamation and Closure

### IRMA

The IRMA Standard specifies requirements for reclamation planning to minimize pollution through reclamation, mine closure, and post-closure. Notably this includes agreement with affected communities on post-mining land and facility use.<sup>50</sup> The IRMA Standard's approach to reclamation also specifies process and outcomes. For example, the IRMA Standard requires plant selection, prioritizing native species as appropriate to achieve agreed upon post-mine land use, quantitative standards, and a timeline for revegetation.<sup>51</sup>

IRMA requires post-closure planning and monitoring, including a separate financial surety to cover the costs associated with the post-closure plan.<sup>52</sup> The financial surety guaranteeing reclamation may not be released until reclamation has shown to be effective and stable, and the public has had opportunity to comment on the release.

### U.S. Legal Framework

U.S. regulations requires reclamation planning to identify categories of issues to be addressed, but not what the outcomes should be. Revegetation provides a representative example of this approach. The BLM rule requires "a description of the equipment, devices, or practices you propose to use including, where applicable, plans

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<sup>47</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.5.1. Emergency Response Plan.

<sup>48</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.5.2. Community and Worker Consultation.

<sup>49</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.5.3. Public Liability Accident Insurance.

<sup>50</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.6.2.2.e.

<sup>51</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.6.2.2.k.

<sup>52</sup> IRMA *Standard for Responsible Mining*, 2018 at 2.6.5.-2.6.7.

for revegetation.”<sup>53</sup> This categorical approach results in many reclamation gaps compared to the detailed requirements of the IRMA Standard.

U.S. regulations allow the release of financial surety at the discretion of the regulator without specifically requiring that the reclamation plan be met as a prerequisite of its release.<sup>54</sup>

U.S. mining law doesn’t require post-closure planning and monitoring, although it does allow for post-mining effluent capture and treatment and explicitly assigns liability for their costs.<sup>55</sup>

## **Community Health & Safety**

### **IRMA**

The IRMA Standard includes a chapter on community health and safety, detailing related requirements for mine operators. Environmental impacts are considered here, including impacts on essential ecosystem services upon which the community relies, e.g., clean groundwater. The IRMA Standard requires examination of the operation’s potential impacts on the social fabric of a community—its essential services, demographics, and exposure to disease and other health risks.<sup>56</sup> Informed by this scoping, the IRMA Standard requires a risk and impact assessment that “evaluates the significance of each impact, to determine whether it is acceptable, requires mitigation, or is unacceptable.”<sup>57</sup> The IRMA Standard also requires development of a community health and safety risk management plan to prevent or mitigate risks and impacts. The scoping, assessment, and management of risk all must involve affected stakeholders.

IRMA’s FPIC and Community Support requirements align with this assessment of Community Health and Safety impacts and related management plans.

### **U.S. Legal Framework**

U.S. federal mining law includes one statute specifically written to address hardrock mining on federally managed lands: the 1872 Mining Law. Its primary goal is to facilitate the extraction of minerals from those lands. The network of other laws and regulations that address community and environmental concerns affected by mining has developed around the Mining Law since the late 1960s. The majority of those more recent laws and regulations, e.g., NEPA, were not designed specifically to address the unique impacts of the mining sector. One example of a mining-specific regulation is 43 CFR Part 3809 on

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<sup>53</sup> 43 CFR 3809.401(b)(3)(vii).

<sup>54</sup> 43 CFR 3809.590.

<sup>55</sup> 43 CFR 3809.420(b)(11)(iii).

<sup>56</sup> IRMA *Standard for Responsible Mining*, 2018 at 3.3.1. Health and Safety Risk and Impact Scoping.

<sup>57</sup> IRMA *Standard for Responsible Mining*, 2018 at 3.3.2. Risk and Impact Assessment.

surface management, created within the context of the 1872 Mining Law and relegating community concerns as less important than the Mining Law's primary goal.

U.S. federal mining law allows for consideration of community health and safety, should stakeholders raise related issues. Requirements are largely limited to maintenance of infrastructure in a safe and orderly manner and marking hazardous areas.<sup>58</sup>

## **Greenhouse Gas Emissions Requirements**

### **IRMA**

The IRMA Standard requires the development, maintenance, and implementation of a public Greenhouse Gas (GHG) Emissions policy that commits the company to identifying GHG emissions from the mining project, identifying opportunities for GHG emissions reductions, and reviewing the policy at least every 5 years.<sup>59</sup> The operating company or corporate owner must, on at least an annual basis, publicly report on GHG emissions, progress toward GHG reduction targets, and efforts taken to reduce emissions.

### **U.S. Legal Framework**

Neither U.S. federal mining law nor the U.S. EPA's Greenhouse Gas Reporting Program<sup>60</sup> require reduction or monitoring of greenhouse gas emissions by mining operations. The U.S. EPA Climate Change Guidance for National EPA Reviews includes guidance to help federal agencies incorporate climate change considerations into the NEPA process, including assessing and mitigating GHG emissions.<sup>61</sup>

## **Waste and Materials Management**

### **IRMA**

The IRMA Standard requires mine operators to develop a policy that eliminates or otherwise minimizes risks to human health, safety, the environment, and communities. This requirement is applicable for all mine waste materials and facilities and includes mine director level approval of the policy and sufficient budget to execute the policy.

Mine waste facility design and mitigation of identified risks must be consistent with best available technologies and best available and applicable practices. The siting and design or redesign of tailings storage facilities and other relevant mine waste facilities, and the selection and modification of strategies to manage chemical and physical risks

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<sup>58</sup> 43 CFR 3809.420(b)(13).

<sup>59</sup> *IRMA Standard for Responsible Mining*, 2018 at 4.5 Greenhouse Gas Emissions.

<sup>60</sup> U.S. Environmental Protection Agency, *Greenhouse Gas Reporting Program, Resources by Subpart for GHG Reporting*. Accessed August 25, 2022 at <https://www.epa.gov/ghgreporting/resources-subpart-ghg-reporting>.

<sup>61</sup> U.S. Environmental Protection Agency, *Climate Change Guidance for National Environmental Policy Act Reviews*, 2021, <https://www.epa.gov/nepa/climate-change-guidance-national-environmental-policy-act-reviews>.

associated with those facilities, must be informed by independent reviews throughout the mine life cycle.

The IRMA Standard requires the identification of potential physical risks related to tailings storage facilities and all other mine waste facilities where the potential exists for catastrophic failure resulting in impacts on human health, safety, the environment, or communities. Where such potential exists, the IRMA Standard requires an annual management review of those facilities.

Emergency preparedness plans or emergency action plans related to catastrophic failure of mine waste facilities must be discussed and prepared in consultation with potentially affected communities and workers and/or workers' representatives, and in collaboration with first responders and relevant government agencies. Emergency and evacuation drills related to catastrophic failure of mine waste facilities must be held on a regular basis.

The IRMA Standard cannot be used to assess mining sites using riverine, submarine, or lake disposal of mining waste.<sup>62</sup>

### **U.S. Legal Framework**

Federal mining regulation treatment of waste requires the identification of acid-forming, toxic, or other deleterious materials, the minimization of their creation, and their capture and treatment.<sup>63</sup> It also requires the construction and monitoring of waste impoundments and leaching operations using specific methods. These requirements are static and not subject to changes as best practice evolves.<sup>64</sup> Importantly, a specific legislative exemption prevents the application of the Resource Conservation and Recovery Act's hazardous waste provisions to most mining wastes, meaning that regulatory agencies cannot treat those wastes as legally hazardous even when they scientifically contain all the characteristics of hazardous waste.<sup>65</sup>

## **Water Management**

### **IRMA**

The IRMA Standard includes a robust chapter on water management. One example from this detailed chapter for comparison to the U.S. legal framework is the IRMA Standard's requirement for annual publication of monitoring data for surface water and groundwater points, including quantity monitoring. This requirement enhances

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<sup>62</sup> IRMA *Standard for Responsible Mining*, 2018 at 4.1.8.1.

<sup>63</sup> 43 CFR 3809.420(b)(11).

<sup>64</sup> 43 CFR 3809.420(b)(12).

<sup>65</sup> U.S. Environmental Protection Agency, Special Wastes. Accessed Aug. 17, 2022 at <https://www.epa.gov/hw/special-wastes#mining>.

transparency of information that is important across sectors, particularly to local community stakeholders and rights holders.

### **U.S. Legal Framework**

Unless the Clean Water Act directly applies to an operation's discharges, federal regulations do not require an operator to share monitoring data with the public.

## Conclusion

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The above examples are not comprehensive but point to a few of many gaps in the U.S. legal framework for the mining sector when considering incorporation of the good international practices in the IRMA Standard. These examples are based on a preliminary review of the U.S. legal framework. A requirement-by-requirement comparison between the IRMA Standard and the U.S. legal framework is necessary to identify all gaps between the U.S. legal framework for the mining sector and the good international practices in the IRMA Standard. A more detailed review would guide the work of the IWG and support recommendations for improvements to the U.S. legal framework. We recommend that such a study be funded and completed to inform IWG efforts.

## About IRMA

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The Initiative for Responsible Mining Assurance (IRMA) is a multi-stakeholder coalition that works to respond to the global demand for more socially and environmentally responsible mining. IRMA's vision is a world where the mining industry respects the human rights and aspirations of affected communities, provides safe, healthy, and supportive workplaces, minimizes harm to the environment, and leaves positive legacies.

IRMA works through the *Standard for Responsible Mining*, independent third-party assessment of mine site performance, detailed public audit reports, and a unique multi-stakeholder governance model that gives equal voting rights to the NGO, directly affected community, organized labor, mining company, purchasing company, and investor and finance sectors that oversee the IRMA system, its integrity, and its accountability to all sectors.

**Learn more and connect with us at: <https://responsiblemining.net/>.**