Center for Biological Diversity v. U.S. Fish and Wildlife Service—Divided Ninth Circuit panel remands approval of copper mine project to USFS for consideration of whether 36 C.F.R. Part 228A applies to the project and, if so, whether it authorizes use of National Forest lands where no mineral interests exist for disposing of the project's waste rock

Rosemont Copper Company in 2007 submitted to the Fish and Wildlife Service a preliminary mine operation plan for a proposed open-pit copper mine located partially in the Coronado National Forest. The mine, as eventually approved, is deep (3000 feet) and large (6500 feet in diameter and extending over 955 acres). Rosemont also estimated that its operation would generate 1.9 billion tons of waste rock, which it sought to place onto 2447 acres of nearby National Forest land. Once the mine project is completed, the waste rock's depth will average 700 feet on that land. A final environmental impact statement adopting one of five alternative action alternatives (the "Barrel Alternative") was completed in 2013, and 42 months later the Service issued a record of decision adopting the FEIS and largely approving the MOP, including most importantly use of the National Forest land for the waste rock.

Two federal statutes were particularly relevant to the Forest Service's FEIS and ROD: the Mining Law of 1872, ch. 152, 17 Stat. 91, codified as amended at 30 U.S.C. §§ 21 to 54; and the Surface Resources and Multiple Use Act of 1955, Pub. Law No. 87-713, 69 Stat. 368, codified as amended at 30 U.S.C. §§ 611 to 615. Rosemont had unpatented claims in both areas under the Mining Law, and § 612(a) of the Multiple Use Act provides that "[a]ny mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." Relying on this section, the ROD concluded that the Multiple Use Act authorized use of the National Forest land as the waste-rock repository "whether or not the claims were valid, because the dumping would be a 'use[] reasonably incident' to its mining operations."

In 2017 and 2018, various environmental groups and Indian tribes sued the Forest Service, several of its officials, and the United States over the mine project's approval and, in particular, the use of the National Forest land for the waste-rock deposits. The district court granted summary judgment to the plaintiffs, reasoning in relevant part that "the Forest Service believed that 'Rosemont ... has a possessory interest for mining purposes in unpatented mining claims on the land where the project is proposed'" and that "[t]hese statements could accurately reflect the Mining Law of 1872 if the administrative record before the Forest Service reflected that Rosemont held valid unpatented mining claims in these areas." *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 409 F. Supp. 3d 738, 759-60 (D. Ariz. 2019). But, as to the 2447 acres of National Forest land to be used as the waste-rock dump, the court found that belief incorrect because "the administrative record shows no basis upon which the Forest Service could find Rosemont discovered a valuable mineral deposit within the facilities, tailings, and waste rock areas. In fact, the evidence in the FEIS shows the absence of any such deposit within those lands." *Id.* at 760. The court therefore vacated the FEIS and the ROD and remanded the matter to the Service. A divided Ninth Circuit panel affirmed. *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, Nos. 19-17585 & 19-17586, 2022 WL 1495007 (9th Cir. May 11, 2022).

On appeal, both the federal defendants and Rosemont abandoned any reliance on § 612. The former instead "propose[d] a new rationale based on Section 22 of the Mining Law" not raised before the district court. Although the majority stated that "we cannot sustain the Service's approval of the MPO based on the rationale now proposed by the Government[,]" it "nonetheless address[ed] the Government's newly proposed rationale in the interest of judicial efficiency, given the likelihood that on remand the Service would seek to rely on the Government's interpretation of Section 22." 30 U.S.C. § 22 provides in part that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States ... under regulations prescribed by law[.]" In response to the federal defendants' argument that this section "gives Rosemont the right to occupy 'open' Forest Service land with its waste rock, whether or not it has valid mining claims on that land[,]" the majority stated:

> The plain meaning of Section 22 is that government lands, without restriction, shall be "free and open to exploration and purchase" of "valuable mineral deposits." ... Section 22 further provides that government lands "in which they [i.e., valuable mineral deposits] are found" shall be free and open to "occupation and purchase." ... That is, the right of "occupation" depends on valuable minerals having been "found" on the land in question. ... If no valuable minerals have been found on the land, Section 22 gives no right of occupation beyond the temporary occupation inherent in exploration.

It then observed that "[t]he Government's argument is not only foreclosed by the text of Section 22. It is also foreclosed by a century of precedent. In 1919, a unanimous Supreme Court explained that Section 22 authorized temporary occupancy for the purpose of prospecting for valuable minerals, writing that 'some occupation of the land ordinarily is necessary for adequate and systematic exploration' to permit 'the discovery of minerals.'" *Union Oil of Cal. v. Smith*, 249 U.S. 337, 346 (1919). The Supreme Court, the majority stressed, further held that to "'create valid rights ... a discovery of mineral is essential.'" *Id.* The majority then rejected the federal defendants' contention that Rosemont's occupation of the waste-rock area would only be temporary, reasoning that such "argument ... does violence to the English language. Rosemont proposes to bury the existing surface of 2,447 acres of National Forest land beneath a 700-foot-deep layer of waste rock. Under any ordinary definition, the layer of waste rock will 'occupy' the land on which it sits, and will do so permanently." It found equally unpersuasive the federal defendants' position "that the Service may assume the validity of Rosemont's mining claims even where, as here, that assumption is contradicted by the evidence."

The majority, lastly, addressed the argument "that [36 C.F.R.] Part 228A regulations authorize Rosemont to occupy open federal land with its waste rock, whether or not the land is covered by valid mining claims, because of the broad definition of 'operations' in those regulations." Section 228.1 states in part that "[i]t is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws[.]" Another provision, § 228.3(a), defines the term "operations" as "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to regulations in this part, regardless of whether said operations take place on or off mining claims." As the majority explained,

> The Government and Rosemont point out that the definition of "operations" in Section 228.3(a) encompasses "all uses reasonably incident" to mining operations "regardless of whether said operations take place on or off mining claims." Based on its valid mining rights on the land where its pit would be located, Rosemont argues that Section 228.3(a) allows it to deposit its waste rock—as a "use[] reasonably incident" to mining in the pit—on National Forest land "off" its mining claims.

It noted that the dissent similarly "argue[d] that the Service's authority to regulate Rosemont's proposed dumping is governed by Part 228A because, in her view, 'not every activity subject to Part 228A need be independently authorized by the Mining law.'" These arguments, however, were "premature":

> The Service relied on Part 228A regulations in its FEIS and ROD, but it did so based on Section 612 of the Multiple Use Act and on its assumption that Rosemont's mining claims are valid under the Mining Act. The Government has now abandoned any argument based on Section 612. Further, for reasons explained above, the Service incorrectly assumed that Rosemont's mining claims are valid under the Mining Law. That is, neither of the statutes upon which the Service relied to support its application of Part 228A regulations to Rosemont's MPO provides such support. Thus, the Service's approval of Rosemont's MPO is unsupported by the bases upon which the Service relied.

Following "black-letter law 'that an agency's action may not be upheld on grounds other than those relied on by the agency[,]'" the majority left for agency determination on remand whether "Part 228A regulations are applicable to Rosemont's proposed occupancy of invalid mining claims with its waste rock" and, if so, whether "the Service construes those regulations to permit such occupancy[.]"

The dissent contended that

> the Part 228A regulations apply to: (1) surface use of forest lands; (2) related to; (3) all functions, work, and activities related to prospecting, exploration, development, mining or processing of mineral resources that are authorized by the Mining Law and uses reasonably incident thereto. ... The core prospecting, exploration, development, or processing of mineral resources must be authorized by the Mining Law, but because Section 228.1 broadened the regulatory scope of Part 228A to uses "in connection with" operations, rather than just uses that themselves qualify as operations, not every activity subject to Part 228A need be independently authorized by the Mining Law.

It found each of these elements present with respect to Rosemont's proposed use of the National Forest lands for the waste rock, "[a]nd as such, the lawfulness of this activity does not depend on whether Rosemont has valid mining claims covering the proposed disposal area." The dissent concluded that it "would reverse the district court's decision. The question remains, however, whether the USFS's approval of the Barrel Alternative was proper under Part 228A because the district court failed to assess the agency's decision under these regulations. Therefore, I would remand for the district court to review the USFS's decision under the proper regulatory scheme in the first instance."

Decisional link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/12/19-17585.pdf