

Nos. 19-17585, 19-17586

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Defendants-Appellants,

v.

ROSEMONT COPPER COMPANY, *et al.*,
Intervenor-Defendant-Appellant.

On Appeal from United States District Court for the District of Arizona
Case Nos. 4:17-cv-00475-JAS, 4:17-cv-00576-JAS, 4:18-cv-00189-JAS
The Honorable James A. Soto

AMICUS BRIEF

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INTEREST OF AMICUS CURIAE¹

American Exploration and Mining Association (“AEMA”) is a 125-year-old, 1,700-member national trade association representing the entire mining life cycle, from prospecting and exploration, to mine development and mineral extraction, to mine reclamation and closure. More than 80 percent of AEMA members are small businesses or work for small businesses. AEMA members are actively involved in prospecting, exploring, mining, and mine reclamation and closure activities on Forest Service (“Service”) administered land in every western state and in supplying and servicing those activities. Access to these lands for all mineral activities is critical to AEMA members.

Many AEMA members engage in exploration, which functions as the “research and development” arm of the industry. The fruits of exploration lead to the discovery of minerals, development of future mines and an assured domestic supply of important minerals. The certainty of access to public lands open to location under the Mining Law (“Open Lands”) and tenure of the right to use those lands for the entire mining lifecycle, from prospecting to mine closure, is of

¹ Amicus submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amicus further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

paramount importance. If a miner cannot use public lands to support mining operations, including all surface uses reasonably incident to mining, exploration would be pointless because development will never occur. While the District Court's ruling leaves intact the right to enter and occupy Open Lands to conduct exploration, it eliminates the ability to use those lands for use reasonably incident to mining like storing waste rock (which must be removed to uncover the valuable minerals) and tailings (the rock left after ore is removed), leaving any mineral discovery ultimately undevelopable.

The ruling will have a devastating impact on the mining industry, create substantial adverse economic and social impacts nationwide, and threaten our ability to develop domestic minerals – like the copper, molybdenum, and silver at the Rosemont Project – that are needed for our technology and manufacturing sectors, renewable and conventional energy infrastructure, and our national defense.

The economic and social importance of mining has long been recognized and for more than 150 years supported under the General Mining Law, 30 U.S.C. § 22 *et seq.* (“Mining Law”), multiple amendments to the Mining Law, and agency and judicial implementation of the Mining Law. According to the U.S. Geological Survey, in 2019, U.S. mines produced raw (non-fuel) mineral materials valued at

\$86.3 billion.² See U.S. Geological Survey Mineral Commodity Summaries 2020 (“USGS Summaries”) at 5.³ In addition to providing critical minerals and helping mitigate the nation’s dependence on foreign minerals, mining provides state and federal revenues and thousands of high paying jobs.⁴ In Arizona, metal and ore mining in 2018 directly employed 11,249 people with a payroll of \$1.2 billion or average wage of \$106,676.⁵ In Nevada, over 14,000 people were directly employed by the mineral industry in 2019, with an average annual salary of \$93,600.⁶

Mining is an “economically vulnerable activity” with “significant capital risk.” Andrew P. Morriss, et al., *Homesteading Rock: A Defense of Free Access*

² Mining operations are common on National Forest lands. The General Accounting Office recently identified 131 operations on federal lands authorized to produce minerals subject to the Mining Law of 1872. Gen. Accounting Office, *Mining On Federal Lands: More Than 800 Operations Authorized to Mine and Total Mineral Production is Unknown* 4 (May 28, 2020), <https://www.gao.gov/assets/710/707200.pdf>.

³ Available at <https://minerals.usgs.gov/minerals/pubs/mcs/2020/mcs2020.pdf>. This Court may take judicial notice of this publicly available information.

⁴ Mining of raw materials is required for the foundation of the manufacturing pyramid. Without raw materials there are not manufactured products, no manufacturing jobs and no goods for our citizens to utilize to sustain their way of life.

⁵ Ariz. Mining Ass’n, *Economic Impact of the Arizona Mining Industry* 3 (2018), <https://www.azmining.com/wp-content/uploads/2020/06/AMAImpact2018-PPT-Final-1.pdf>.

⁶ Nev. Mining Ass’n, Data & Analysis, <https://www.nevadamining.org/faqs/analysis/>, (last visited June 29, 2020).

Under the General Mining Law of 1872, 34 Env'tl. L. 745, 754 (Summer 2004).

Discovering a mineral deposit that can be developed into a mine is a very high risk, time consuming, and expensive endeavor. According to the National Academy of Sciences, discovering a deposit that can become an economically viable mine requires identifying and evaluating an average of 1,000 mineral targets. Nat'l Research Council, Nat'l Acad. of Scis., *Hardrock Mining on Federal Lands* 247 (1999). Secure rights throughout the entire mining lifecycle are “critical to inducing investment in long-term mining operations.” *Id.* If there are no rights to use lands necessary to develop a discovery, there will be no point in investing in exploration as no mining will ever occur. The District Court’s opinion upends long-established Mining Law rights needed to develop a discovered mineral deposit by eliminating the right to use lands for mine waste rock and tailings storage facilities, which are essential components of any mining project. This drastic deviation from more than 150 years of federal law precedent applying and implementing the Mining Law, including 45 years of implementation of the Forest Service’s surface management regulations for locatable minerals (36 C.F.R. § 228 Subpart A (the “228A Regulations”)), would have potentially crippling impacts to the industry and our nation.

INTRODUCTION

The District Court wrote a new requirement into the Mining Law, undermining more than 150 years of precedent and the plain language of multiple statutes. The court erroneously held that the Mining Law provides no authority for the Forest Service to approve the use of Open Lands for uses reasonably incident to mining, including storage of waste rock and tailings needed to develop a mine unless the Service confirms that there has been “adequate” demonstration of a “discovery of a valuable mineral deposit” within all of the mining claims where proposed ore processing, tailings, and waste rock storage facilities will be located. The ruling creates a new mandate that mining may be conducted only on perfected “valid” mining claims that the District Court defines as a claim with a discovery on the same claim as the proposed mining use. The District Court’s unprecedented interpretation contradicts the long-established reading of Section 22 of the Mining Law and the plain language of the statute which invites “occupation” of Open Lands for mining and uses reasonably incident to mining. The ruling also conflates the use of properly located and maintained active mining claims under the Mining Law and the proper and lawful agency authorization of a plan of operations on such claims with what is required to “perfect” title in mining claims.

The District Court’s decision suffers two major legal flaws. First, it prohibits the use of the surface of Open Lands for uses reasonably incident to (and

indeed necessary for) mining except on perfected “valid” mining claims. Instead of focusing on whether the land is covered by a perfected claim, the District Court should have concerned itself (as the Service did) with the proposed use of the land and whether that use was reasonably incident to mining or mining “operations”⁷ (“Operations”) under the applicable regulations and whether it complied with those surface management regulations to minimize adverse impacts on Forest resources. Second, the decision improperly limited surface use reasonably incident to mining and Operations to lands within a perfected “valid” mining claim or within a claim for which some undefined level of “evidence” of a discovery on that claim has been provided, contrary to controlling statutes, regulations and caselaw. In addition to amounting to a judicial amendment to the Mining Law, this new mandate interferes with established rights under federal law and creates a gap in the Mining Law right to use Open Lands for all reasonably incident mining facilities that renders mining a practical impossibility.

The decision conflicts with the plain language of numerous Congressional enactments, more than 150 years of caselaw, and Forest Service regulations and constitutes an abrupt and substantial change in law that makes mining a practical

⁷ 36 C.F.R. § 228.3 defines “operations” to include **all activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto regardless of whether said operations take place on or off mining claims.** (emphasis added).

impossibility and would result in a substantial increase in the United States' reliance on foreign minerals.⁸ The decision ignored the text of Section 22 of the Mining Law that declares lands belonging to the United States that have not been withdrawn from mineral entry "free and open" to exploration and occupation for the purpose of prospecting, exploring for and developing valuable mineral deposits. 30 U.S.C. § 22. Congress has repeatedly recognized the importance of the policy underlying these rights to use Open Lands to support the "national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals . . . and mineral reclamation industries" 30 U.S.C. § 21(a). In addition to (but separate and distinct from) these Section 22 rights to explore and occupy Open Lands for purposes of mining, Sections 23, 26, 28 and 42 provide for location and maintenance of mining claims and mill sites for title purposes, due process, to exclude adverse miners, to keep a claim in good standing as an active claim, and (prior to 1994) to seek patents.

The District Court's decision adopts policy arguments advanced by the plaintiffs in the case which simply cannot, as a matter of law, displace, replace or

⁸ Available at <https://minerals.usgs.gov/minerals/pubs/mcs/2020/mcs2020.pdf> at 7-8.

disrupt the plain language Congress has adopted in numerous statutes. “[P]olicy arguments cannot supersede the clear statutory text.” *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016). The Courts’ role is “to apply, not amend, the work of the People’s representatives.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). Injecting uncertainty or undermining the Service’s authority to approve the use of Open Lands for mining Operations including all reasonably incidental use would have a crippling impact on this multi-billion dollar industry.

ARGUMENT

I. The District Court’s Ruling that Mining Operations Can Only Occur on Perfected Mining Claims is Contrary to Numerous Federal Statutes

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). A statute should be construed to give effect to all of its provisions, “so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U.S. 303, 314 (2009). “[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that ‘the legislative purpose is expressed by the ordinary meaning of the words used.’” *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). Where Congress

intended to require a validity determination prior to approval of a plan of operations, Congress expressly included that requirement. For example, legislation creating the Mohave National Preserves provides: “[t]he Secretary shall not approve any plan of operation prior to determining the validity of the unpatented mining claims . . . affected by such plan within the preserve . . .” 16 U.S.C. § 410aaa-49(a). No such mandate exists under the Mining Law on Open Lands, like the lands in question at Rosemont. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (“[t]he preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’”). The District Court’s ruling ignores Congress’ deliberately chosen language that repeatedly reaffirms the national policy to encourage mining on Open Lands.

A. Mining Claims Are Not Required for Exploration and Mining Operations Including Surface Use Reasonably Incident to Mining

The declaration in Section 22 is independent, separate, and distinct from the right to locate and maintain mining claims under Sections 23, 26, 35, and 36 and mill sites under Section 42. The District Court overlooked this difference and rendered meaningless the language of Section 22 that authorizes occupation of Open Lands for mining without a mining claim. Section 22 allows a miner to enter, prospect, explore, and occupy Open Lands and conduct activities to discover

and mine valuable mineral deposits.⁹ The District Court’s decision eliminates the ability to use Open Lands for surface use reasonably incident to mining and, in doing so, creates an unworkable gap between mineral exploration, which the Court concedes is authorized by Section 22, and mineral development, which the Court concludes can occur only on “valid” claims or claims with “some evidence” of a discovery. This would render Section 22 rights incomplete and pointless (contrary to the plain language and repeatedly documented intent of Congress): one could explore for minerals but once you find them you could not develop the discovered minerals because you could not use other Open Land for use reasonably incident to mining or Operations, such as storage of waste rock that must be removed in order to uncover the minerals.¹⁰ Section 22 says nothing about a mining claim because a mining claim is not required under this statute which intentionally authorizes

⁹ With the enactment of the Organic Act, the Mining Law was extended to Forest System Lands and the Service is precluded from prohibiting mining. The Service’s 228A regulations balance the protection of Forest resources with the language of the Organic Act and allows mining to go forward on Forest lands.

¹⁰ Finding a nearby location for waste rock is important for most mines. The “placement of these wastes is strongly influenced by their cost of handling, which limits their practical distance of transport.” The biggest part of mine development “is preparing for the removal of waste overburden and establishment of waste dumps and tailings ponds, which is one of the major cost elements for many mines.” Nat’l Research Council, Nat’l Acad. of Scis., *A Study of Mineral Mining from the Perspective of the Surface Mining Control and Reclamation Act of 1977*, 29, 122 (1979) <https://www.nap.edu/catalog/19854/surface-mining-of-non-coal-minerals-a-study-of-mineral>.

access, exploration, occupation and use of Open Lands without regard to discovery status in order to create continuous cradle-to-grave rights that cover all aspects of mining and the entire mining lifecycle.

The Supreme Court has long recognized that those who accept the invitation under Section 22 to enter and occupy Open Lands and “proceed in good faith to make such explorations . . . are not treated as trespassers, but as licensees or tenants at will.” *Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346 (1919). Section 22 does not require a miner to locate a mining claim to accept the invitation. This license is revocable only by Congressional act (such as 43 U.S.C. §1714 authorizing the Secretary of the Interior to withdraw lands from mineral entry) and, since 1872, Congress and the Supreme Court have repeatedly recognized these rights. *See, e.g.*, 16 U.S.C. § 478 (precluding prohibiting any person from entering national forests for prospecting, locating, and developing mineral resources); 30 U.S.C. § 193¹¹ (preserving the rights under the Mining Law for claims of coal, oil, gas and related minerals existing on the date of enactment by excluding them from the Mineral Leasing Act requirements and allowing maintenance and perfection of

¹¹ “The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits . . . shall be subject to disposition only in the form and manner provided in this chapter . . . except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.”

such claims pursuant to the laws with which they were initiated). The Mining Law still in effect today, allows citizens to enter unappropriated, unreserved public land to prospect for and develop minerals. *Locke*, 471 U.S. at 86. Without the invitation of Section 22, minerals could not be discovered and developed on public lands. *Union Oil*, 249 U.S. at 346, 349 (“as a practical matter, exploration must precede the discovery of minerals” and occupation of the land is necessary for exploration; where a miner chooses to locate claims the right to use those claims is protected so long as the miner “locates, marks, and records his claim” in accordance with applicable law and, in doing so, enjoys the right to extract the minerals subject to performance of the annual labor, without ever applying for a patent or seeking to obtain title to the fee).

The District Court’s decision fails to recognize these rights exist on Open Lands with or without a mining claim and with or without a discovery to “perfect” a claim. The District Court improperly conflates Section 22 with rights in other sections of the Mining Law related to perfecting title to claims. Section 22 rights are enduring, separate and distinct from rights acquired through the location, maintenance and perfection of mining claims the latter of which establish rights to protect against adverse miners, to patent claims, and to establish a right against the government in the event the lands are subsequently withdrawn from mineral entry.

B. Although No Mining Claim is Needed, the Mining Law Authorizes and Protects Locators' Use of their Claims for all Mining and Mining-Related Activities Regardless of Discovery Status.

In addition to and separate from Section 22 rights to occupy Open Lands for mining, the Mining Law also provides miners the right to locate mining claims. Those who hold properly located mining claims (in compliance with the identification and recordation procedures) and pay annual maintenance fees, as Rosemont has, have continuing rights to use and occupy those claims without a validity determination.¹² Nowhere in the Mining Law or amendments thereto, the Organic Act or the Surface Use Act did Congress require the Service to consider the discovery status of claims prior to approval of a plan of operations. As discussed below, the District Court's novel requirement is unsupported by and, in fact, inconsistent with, well and long-established law.

The Mining Law provides the comprehensive list of requirements for claimants to legally locate and maintain their claims. The Mining Law historically required demonstration of annual assessment work. 30 U.S.C. § 28e. Prior to 1993, Section 28 of the Mining Law required claimants to perform assessment work consisting of \$100 of labor on their claims or subject their claims to potential

¹² Section 26 of the Mining Law establishes a locator's "rights of possession and enjoyment" on their claims and the Supreme Court has long recognized that the order in which location, recording and discovery of a claim occurs is not essential to establishing claim "validity." *Union Oil*, 249 U.S. at 347.

entry and location by rival locators. Claimants could perform assessment work on any and all claims regardless of “discovery” status. In 1993, Congress amended the Mining Law, modifying the Section 28 assessment work provision by requiring claimants who own more than ten mining claims or mill sites to pay an annual Claim Maintenance Fee (“CMF”) in lieu of assessment work in order to keep their mining claim or mill sites. *See* 30 U.S.C. §§ 28f-28k. Section 28g, also enacted in 1993, requires claimants to pay a location fee when they file a notice of a new claim with the BLM.¹³

These rights associated with properly located claims are subject to reasonable regulation by the land management agency, in this case the Service, but the agency must not unreasonably circumscribe or prohibit mining. *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981). The Service reviews proposed plans of operations for mining to minimize adverse effects. *See* 36 C.F.R. § 228.1. Discovery status of a claim or a “validity determination” has never been relevant to the Service’s approval of a plan of operations. The regulations do not require that an operator submit any information related to claim validity. In fact, the 228A Regulations expressly recognize that the Service may review and approve mining

¹³ The current CMF is \$165 per claim and the location fee is \$40 per claim. *See* <https://www.blm.gov/programs/energy-and-minerals/mining-and-minerals/locatable-minerals/mining-claims/fees>.

Operations (including all activities reasonably incident to mining) both “on and off mining claims.” *Id.* § 228.3. The District Court’s extinguishment of the Service’s approval of operations on Rosemont’s active mining claims amounts to a judicial amendment of the Mining Law that conflicts with plain statutory language and Rosemont’s statutory and due process rights as well as the plain language of the Service’s 228A Regulations.

Despite Rosemont’s proper location, maintenance and annual payment of the CMF, the District Court’s decision impairs those rights through its novel requirement of “evidence of a discovery” on every claim prior to authorization of the plan of operations.¹⁴ The District Court’s decision constitutes an unlawful

¹⁴ The Department of the Interior is the federal agency that adjudicates mining claims on both BLM-administered lands and on National Forest System lands. *See Clouser v. Espy*, 42 F.3d 1522, 1530 n.9 (9th Cir. 1994). In addition to the lack of any basis in law, the District Court’s requirement of a discovery or investigation into the “evidence of valuable minerals” on claims prior to approval of a plan of operations would come with a cost that far exceeds the Department of the Interior’s resources. *See, e.g.*, 72 Fed. Reg. 8139, 8141 (Feb. 23, 2007) (noting the BLM “cannot feasibly embark on a program to make technical determinations of the validity of all unpatented mining claims.”). The BLM estimates that the “cost per mining claim for a full validity determination, including an administrative contest hearing, ranges between \$12,000 and \$80,000. There are over 250,000 active mining claims on the public lands. Conducting validity determinations for all 250,000 mining claims would exceed the BLM’s annual operating budget many times over.” *Id.* The agency further noted this would be an outright waste of resources because even if a claim were determined “invalid” those same lands can simply be located once again. While Interior *may* investigate mining claim validity at any time, there are few circumstances in which Interior *must* determine validity. Mandatory validity investigations generally occur only when a mining claim is seeking to obtain a mineral patent (*see* 43 C.F.R. § 3862.1-1(a)) or, has proposed

mandate on the Service to improperly interfere with the ability to use Open Lands for use reasonably incident to mining (and, indeed, necessary to extract the minerals) under properly located and maintained claims.

An unperfected claim (*e.g.*, a properly located mining claim) still vests the locator with rights for mining and use reasonably incident to mining regardless of the discovery status of the claim. The District Court conflated the concept of “perfection” of a mining claim—at which point a claimant has the same property rights as it would have to qualify for a patent or to preserve a vested right on lands proposed for withdrawal from mineral entry under the Mining Law—with proper location, maintenance and lawful use of active claims and other Open Lands. *See United States v. Shumway*, 199 F. 1093, 1099 (9th Cir. 1999). In *Shumway* this Court acknowledged that an unpatented mining claim is “property in the fullest sense of the word . . .” *Id.* at 1100 (citation and internal quotations omitted).

operations on withdrawn lands (*id.* § 3809.100). When Interior does investigate claim validity it conducts an on-the-ground mineral examination and an economic analysis and presents its findings in a mineral report. If a mineral examination discloses that the mining claim does not meet the Mining Law’s requirements, the United States can seek to invalidate the claim in an administrative proceeding called a “contest.” Unless and until a contest is resolved in favor of the government (including any administrative or judicial appeals), the contested mining claim cannot be declared invalid. *Collord v. U.S. Dep’t of the Interior*, 154 F.3d 933, 937 (9th Cir. 1998). The District Court here impaired Rosemont’s properly located and maintained claims by ruling that use of those claims for storage of waste rock, which is indisputably necessary to extract the valuable minerals from nearby claims, is prohibited.

The *Shumway* Court went on to explain that a “perfected” claim, that is, one with a discovery, protects the claimant against rival claimants and any change in law or land status by the government. *Id.* The Service sought to evict the Shumways from their two mill sites alleging they were not conducting any milling, had no approved plan of operations, failed to post the required bond and, thus, were trespassing. The *Shumway* district court granted the Service summary judgment. This Court reversed that decision, distinguishing prior cases where there had been an administrative adjudication that the claimant “had no valid mining claim,” from the *Shumway* case where claim validity had not been adjudicated and, concluded in the latter that summary judgment on the basis that the claims are invalid is improper. *Id.* at 1101. Here, there has been no administrative adjudication of Rosemont’s mining claims at issue (an action that only BLM can complete, not the Service or the court).¹⁵ Thus, it was improper for the District Court to grant summary judgment, depriving Rosemont of its protected rights under the Mining Law to make use of its active mining claims based on the court’s finding of a lack of evidence of discovery of minerals on the claims.

¹⁵ The 228A Regulations do not provide for management of mineral resources because that responsibility rests with the Secretary of Interior, even for claims located on Forest System lands. 36 C.F.R. § 228.1; *see also Cameron v. United States*, 252 U.S. 450, 460 (1920); *Clouser*, 42 F.3d at 1525.

C. FLPMA Is Another Example in which Congress Recognized that Active Mining Claims have Mining Law Rights Regardless of Discovery Status

Congress provided for the BLM's management of properly located and maintained claims regardless of discovery status, in the Federal Land Management and Policy Act of 1976, 43 U.S.C. § 1701 *et seq.* ("FLPMA"). In FLPMA, Congress amended the Mining Law to require claimants to record each mining claim with the BLM by filing a copy of the notice of location and file annual proof of having completed assessment work for each claim. 43 U.S.C. § 1744. Congress did not require claimants to demonstrate validity nor did it require the BLM to determine validity of mining claims to accept these filings. Congress created no distinction in FLPMA based on the discovery status of a claim, directing that Open Lands be managed "in a manner which recognizes the Nation's need for domestic sources of minerals" and included a directive and savings clause for permissible activities under the Mining Law. 43 U.S.C. §§ 1701(a)(12), 1732(b) ("[n]o provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress."). In 1992, Congress again recognized and protected rights under active mining claims in the Appropriations Act, 106 Stat. 1374 (1992) (codified at 30 U.S.C. § 28f), which

required holders of unpatented mining claims, without regard to discovery status, to pay an annual maintenance fee.

The District Court's ruling fails to recognize Congress' numerous actions that intentionally preserve and protect rights under the Mining Law and, that under FLPMA and the Mining Law, Rosemont's mining claims are active claims in good standing because Rosemont has complied with FLPMA filing and fee requirements. The lack of "evidence" of a discovery on certain of these claims is irrelevant to qualifying these claims as lawfully located and is not a basis to prohibit mining and uses reasonably incident to mining.

D. Congress Has Repeatedly Reaffirmed Rights to Mining and Use Reasonably Incident to Mining on Open Lands and Active Mining Claims¹⁶

Subsequent to the Mining Law, numerous Congressional enactments such as the Organic Act and the Surface Use Act make clear that authorized use of Open Lands includes uses reasonably incident to mining. The District Court's opinion

¹⁶ The Multiple-Use and Sustained-Yield Act of 1960, directed the Secretary of Agriculture to develop and administer the surface resources of the national forests "for multiple use and sustained yield." 16 U.S.C. § 529. Congress once again made clear that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands" *Id.* The National Forest Management Act of 1976, requires the Secretary of Agriculture to "develop . . . land and resource management plans for units of the National Forest System," 16 U.S.C. § 1604(a), in a manner to assure that they "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960," *id.* § 1604(e)(1).

amounts to a judicial repeal of statutory rights conferred by Congress in 1872, reaffirmed in subsequent statutes, and (as discussed above) long recognized by the Supreme Court.

The Organic Act of 1897 authorized the establishment of National Forest System lands and the Service's administration of those lands. 16 U.S.C. §§ 473–82 and 551. Congress unambiguously reaffirmed the application of the Mining Law to *all* Forest System lands and provided that nothing in the Organic Act “shall . . . prohibit any person from entering upon . . . national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof.” *Id.* § 478. This recognition of rights under the Mining Law, includes, as explained above, both the Section 22 right to enter and occupy Open Lands (in this case open National Forest System lands) and the provisions of other Mining Law sections that authorize location of mining claims. The Organic Act provides no support for the District Court's limitation of mining, including Operations and all uses reasonably incident to mining, to claims with a discovery. To the contrary, regulations promulgated under that authority define “operations” as including reasonably incident uses both “on and off of mining claims.” 36 C.F.R. § 228.3 Congress also was clear that the Secretary of Agriculture and the Service lack authority to prohibit prospecting, locating and developing mineral resources on Forest System lands. This Court held in *United States v. Weiss*, that

“prospecting, locating and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition.” 642 F.2d at 299. Prohibiting operations necessary to uncover the minerals amounts to a prohibition to develop the economic ore.

In 1955, Congress again amended the Mining Law while taking care to preserve the broad rights under Section 22 when it enacted the Surface Use Act to prohibit non-mining use of mining claims and illegal occupation of Open Lands for activities and facilities **unrelated** to mining. 30 U.S.C. §§ 610-615. In the Surface Use Act, Congress broadly defined legitimate mining activity to include “prospecting, mining or processing operations and uses reasonably incident thereto.” *Id.* § 612(a). The Act reserved the ability of third parties to use the surface of claims for non-mining purposes, but only subject to the requirement that such use not endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto. *Id.* § 612(b).

The District Court quoted from legislative history to the Surface Use Act in an effort to support its restriction of mining and mining related use to the same mining claim on which there is evidence of a discovery. *See* 1ER23. The District Court cited language from the House Report prohibiting management, disposal or use of the surface of lands within mining claims to the extent those activities would “endanger or materially interfere with [the claimant’s] mining, or related

operations or activities *on the mining claim.*” *Id.* (citing H.R. Rep. No. 84-730, *reprinted in* 1955 U.S.C.C.A.N. 2474, 2483) (“Report”). A review of that Report makes clear that the District Court misinterpreted it and the Surface Use Act provision that was intended to clarify that third-party use of the surface of a mining claim could not endanger or materially interfere with mining “or related operations or activities *on the mining claim.*” *Id.* The District Court’s inapposite citation from the Report is not applicable to Rosemont’s use for mine Operations.

The “Purpose” section of the Report notes that the proposed bill would “[a]mend the general mining law to prohibit use of any hereafter located unpatented mining claim for any purpose other than prospecting, mining, processing, and related activities.” Congress intended to prevent uses unrelated to mining – but in no way limited a claimant’s use of her mining claims for mining related activities. The Report recognizes that the “Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain” acknowledging the many phases of the mining lifecycle and the necessary use of Open Lands (under Section 22) or active claims for all mining related activities, including reasonably incident uses such as storage of waste rock. 1955 U.S.C.C.A.N. at 2476. It also discusses the rights of locators:

[b]y posting notice of location, which notice contains the name of the claimant, date of location, and a description of the claim (forms used vary from mining district to mining district), the locator, ***without further requirement***

under Federal law, as of that moment, acquires the immediate right to exclusive possession, control and use of the land within the corners of his location stakes. He must, of course, to protect this right to exclusive possession –

(1) comply with the State law having to do with recordation, etc.; and

(2) carry out under the Federal law . . . annual assessment work. . . .

Having thus complied, he retains exclusive possession, control and use of the area, and may remove the minerals from the land without first proceeding to patent.

Id. at 2477-78 (emphasis added). The Report recognizes the rights to use properly located and maintained claims – with no mention of proving “validity” or evidence of a discovery. The Report notes that the “language, carefully developed, ***emphasizes the committee’s insistence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator . . .***” *Id.* at 2483 (emphasis added). This unequivocally confirms Congress did not require evidence of a discovery to vest essential rights “springing from the location of a mining claim.”

Moreover, the Report acknowledges that the “national forests of the United States are generally open to entry under the mining laws” and then notes that an exception to this is made in some instances where Congress enacts legislation such as that found in 16 U.S.C. § 482n which applies to lands within the Coconino

National Forest and confers more limited rights on the locator than is generally authorized. *Id.* at 2477. The Coconino National Forest legislation still confers rights on the locator to occupy and use the surface of the land as reasonably necessary for mining but with certain express restrictions (still allowing placement of buildings or structures used in connection with mining operations) related to timber cutting on adjoining national-forest land. 16 U.S.C. § 482n.

Finally, Congress affirmed its commitment to encouraging mining in the Mining and Minerals Policy Act of 1970¹⁷ and again in 1980 in the National Materials and Minerals Research, Policy and Development Act declaring “it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production . . .” 30 U.S.C. § 1602.

II. The Service Properly Applied the 228A Regulations

Under the authority of the Organic Act, the Service promulgated the Section 228A Regulations in 1974 regulating mining on national forest lands. *Weiss*, 642 F.2d at 298-99 (upholding the Part 228A Regulations as properly promulgated under the Organic Act); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468,

¹⁷ 30 U.S.C. § 21(a) (“it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining . . .to help assure satisfaction of industrial, security and environmental needs”).

478 (9th Cir. 2000) (same). These regulations require mining operators to comply with air and water quality standards, include standards for the disposal and treatment of solid wastes 36 C.F.R. § 228.8(a)–(c), and require that surface use for mining be conducted in a manner that minimizes adverse environmental impacts.

Id. § 228.1. As discussed above, these regulations define “operations” to include all activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto regardless of whether said operations take place on or off mining claims. *Id.* § 228.3.

Contrary to the District Court’s conclusion that the Service improperly applied the 228A Regulations on lands not subject to the Mining Law, the plain language of those regulations is clear that the Service’s authority to regulate mining operations (including all uses reasonably incident to mining) is without regard to whether such activity is on or off mining claims.

By prohibiting storage of waste rock and tailings, which use is necessary to mine and extract minerals, the District Court essentially invalidated a portion of those regulations without any formal challenge and long after those regulations have been in place and previously affirmed as lawful by this Court.

CONCLUSION

The District Court’s decision upended more than 150 years of federal law and essentially extinguished important and long-standing rights to use the surface

of Open Lands for mining and uses reasonably incident to mining. Vacatur of the Service's proper approval of the Rosemont plan of operations based on the novel and legally unsupported requirement that that waste rock and tailings can be stored only on claims for which there is evidence of a discovery is contrary to established law and should be reversed.

Respectfully submitted this 29th day of June, 2020

s/ Laura K. Granier

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Amicus AEMA states that there is one related case of which it is aware pending before this Court: *Center for biological Diversity v. United States Fish and Wildlife Service v. Rosemont*, No. 20-15654.

Dated: June 29, 2020

/s Laura K. Granier

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF E-filing system on June 29, 2020.

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