**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,

and

ROSEMONT COPPER COMPANY,
Intervenor-Defendant-Appellant.

On Appeal of an Order of the U.S. District Court for the District of Arizona,
Nos. 4:17-cv-00475-TUC-JAS, 4:17-cv-00576-JAS, 4:18-cv-00189-JAS

# BRIEF OF *AMICI CURIAE* NATIONAL MINING ASSOCIATION (INCLUDING MEMBER STATE MINING ASSOCIATIONS) AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANT ROSEMONT COPPER COMPANY

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## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* states as follows:

The National Mining Association ("NMA") has no parent corporation, subsidiaries, or affiliates, that have any outstanding securities owned by the public, and there is no corporation that owns 10% or more of its stock.

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

*/s/ R. Timothy McCrum*
R. Timothy McCrum

Dated: June 29, 2020

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## INTERESTS OF *AMICI CURIAE*[1]

"Minerals are as critical to life as food, water and energy—in fact they make delivery of these basic human needs possible. Rock and mineral resources support our modern society and its global economy just as they have supported the development of societies and civilizations throughout human history."[2]

*Amicus curiae* NMA, based in Washington, D.C., is the national trade association of the mining industry, representing the majority of companies that mine and produce minerals in the United States including "locatable" minerals governed by the Mining Law of 1872, 30 U.S.C. §22 *et seq.*, as amended, including gold, silver, copper, molybdenum, uranium, lead, zinc, platinum, palladium, and rare earth minerals. NMA and its predecessors have participated in virtually all major legislative proceedings and rulemakings related to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §1701 *et seq.*, and the Mining Law. NMA's membership includes numerous state mining

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[1] No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amici curiae*, and its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] A.P. Door & A.H. Paty, American Geol. Inst., "Minerals, Foundation of Society" Preface (AGI 3d ed. 2002).

associations, including the following which have affirmatively expressed their support and requested identification in this brief:

> (1) Arizona Mining Association, which is composed of mining companies, suppliers, and firms providing services in the mining industry. While working to support the sustainable growth and development of mines and operations, the AMA also works with state officials and regulatory agencies to promote sound policy and regulations to help the mining industry operate more efficiently and with the proper oversight from state agencies;
>
> (2) Idaho Mining Association, which for well over 100 years has represented miners and mining companies engaged in mineral exploration, mineral developments, and land reclamation throughout the state of Idaho. IMA and its members are committed to responsible and sustainable mineral withdrawal in Idaho and our member companies continue to utilize and explore more innovative and science backed methods to extract minerals needed for everyday life while protecting and preserving the environment in Idaho for future generations;
>
> (3) New Mexico Mining Association, which serves as a spokesman for the mining industry in New Mexico. It works in cooperation with other state mining associations and the National Mining Association, keeping the industry informed on pending legislation and promulgating constructive programs and action that will adequately recognize and serve mining's special problems and needs. It serves the industry on a wide range of subjects, such as taxation, environmental quality, public lands, health and safety and education through the expertise of its members and member companies; and
>
> (4) Wyoming Mining Association, which is a statewide trade organization that represents and advocates for 27 mining company members producing bentonite, coal, trona (natural soda ash), and uranium. The state of Wyoming leads the nation in production of all of these. WMA also represents 120 associate member companies, one railroad, two electricity co-ops, and 200 individual members. These industries collectively account for nearly $1 billion in revenue to state and local governments in taxes, royalties and

> fees. The industry employs nearly 10,000 directly and through contracts. WMA estimates that each mining job supports another 2-3 in the service and supply sector.

*Amicus curiae* the Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber takes a strong interest in the production of minerals such as copper because of vital foundation mining provides to broader economic growth in the United States. Among those concerned is the Arizona Chamber of Commerce and Industry, the leading voice of business in Arizona, who has expressed its support and requested identification in this brief.

Unprecedented and unfounded decisions such as that of the court below undermine the confidence *Amici*'s members have in the viability of the considerable investments they make in the U.S. metals mining industry. In well over a century of Mining Law jurisprudence, not once has a federal court ruled that

a proposed valuable mine on federal lands open to mineral entry must be halted on the grounds set forth by the court below.

*Amici* present this brief to provide the Court with the unique perspective of the companies—including some similarly situated to Rosemont Copper—that make multi-billion dollar investments to develop, construct, and operate producing mines that employ hundreds of thousands of U.S. citizens, and to illuminate the harm that would result from affirmance of the lower court's unwarranted decision.

## SUMMARY OF ARGUMENT

Mining is essential to modern society.[3] Investments in mineral production not only provide direct and indirect employment associated with mining itself, but also provide enormous further economic benefits as minerals are processed and used in manufactured goods. Relevant here is the copper crucial for electrical transmission, communications, and computer technologies.[4] Copper is also critical to the production of hybrid and electric vehicles: fully-electric, battery-powered vehicles require as much as *183 pounds* (compared with 18-49 pounds in

3 *Id.* at 43.

4 *See id.* at 7.

conventional cars).[5] Arizona is the largest copper-producing state.[6] The proposed Rosemont Mine would supply as much as 10% of the nation's domestic annual copper production. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv. ("CBD")*, 409 F. Supp. 3d 738, 743 n.3 (D. Ariz. 2019). It would also contribute meaningfully to the local economy. *See, e.g.*, ER318.

*Amici* wholly support and join Rosemont Copper's and the United States' opening briefs, which persuasively explain why the lower court's decision upends decades of settled law approving congressionally-promoted beneficial use of federal lands necessary to obtain these minerals. *Amici* focus this brief on these key

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[5] Copper Dev. Ass'n Inc., "Copper Drives Electric Vehicles," https://www.copper.org/publications/pub_list/pdf/A6191-ElectricVehicles-Factsheet.pdf.

[6] U.S. Dep't of the Interior, U.S. Geological Survey, "Mineral Commodity Summaries 2019" 52 (2019), https://mineralsmakelife.org/wp-content/uploads/2019/03/mcs2019.pdf. Molybdenum, used to harden steel for civilian and military defense purposes, is a by-product of copper mining. *Id.*at 110; *see* U.S. Bureau of Mines, Bulletin 675, *Mineral Facts and Problems* 521-534 (U.S. GPO, 1985). Silver, an "indispensable" mineral, *Final List of Critical Minerals 2018*, 83 *Fed. Reg.* 23,295, 23,296 (May 18, 2018), is also a copper byproduct. *See also* "A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals," 82 *Fed. Reg.* 60,835 (Dec. 26, 2017) (Executive Order encouraging production of strategic minerals including molybdenum, lithium, and uranium). In addition, Nevada is the largest U.S. producer of gold; gold mining is one of the largest sources of revenues, jobs, and multi-billion dollar investments in the State. NMA, "40 Common Minerals and Their Uses," https://nma.org/wp-content/uploads/2016/09/NMA-Fact-Sheet-Minerals-and-Uses.pdf.

points supporting reversal:

*First*, the history of the Mining Law in the United States reflects Congress' unequivocal support for the exploration and development of mineral resources on federal lands, including National Forests. Over time, the Mining Law, implementing regulations, and policy have evolved to balance responsible mineral development with preservation of certain federal lands (*e.g.*, National Parks). Forest Service and Interior Department regulations have delineated clear areas of responsibility *vis-à-vis* approval of the mitigated surface disturbances inherent in mining plans, by the former agency, and validity determinations of the underlying mining claim property rights, by the latter. Rosemont Copper's mining claims are located on National Forest lands open to mineral entry. The Forest Service's regulations and manual directives do not require mining claim validity determinations in these circumstances.

*Second*, the proposed Rosemont mining plan of operations arises under the Mining Law's statutory rights of mineral exploration, mine development, and mining; accordingly, the plan was fully subject to and properly approved under the Forest Service's 36 C.F.R. Part 228, Subpart A ("228A") regulations. The court below misapplied these regulations when concluding that the Forest Service should have undertaken an inquiry into the validity of the underlying mining claims to

"determine" mining rights. The court compounded that error by undertaking its own *de novo* review of the mining claims' validity, and issuing an advisory opinion regarding the purported lack of availability of "mill sites" under the Mining Law as opposed to mining claims.

In sum, this Court should reverse the district court's ruling that the U.S. Forest Service's approval of the Rosemont Mine's plan of operations did not comply with the law.

## ARGUMENT

### I. Mining Policy in the United States

By act of Congress, since 1872 "all valuable mineral deposits in lands belonging to the United States" have been "free and open to exploration and purchase." 30 U.S.C. §22. Though many laws and policies have evolved over the ensuing century and a half to address public health and the environment, that basic premise remains in place.

#### A. Congressional Policy Promoting Mineral Development

The 1872 Mining Law, as amended (collectively, "Mining Law"), created "a presumption in favor of mining that is difficult—if not impossible—to overcome." *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1186 (10th Cir. 2006) (citation omitted). Congress specifically sought to "promote the development of

the mining resources of the United States," 17 Stat. 91 (1872), knowing that "[m]any branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth and the use of powerful machinery…[,] in many cases thousands of feet, into the earth…." *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889). Subsequent amendments have not diminished Congress's intent that it is "in the national interest to foster and encourage private enterprise in [] the development of economically sound and stable domestic mining." 30 U.S.C. §21a (Mining and Minerals Policy Act of 1970); *see also United States v. Iron Silver Min. Co.*, 128 U.S. 673, 675-76 (1888) (recognizing "policy of the government to favor the development of mines … and every facility is afforded for that purpose…"); Pub. L. No. 167, ch. 375, 69 Stat. 368 (July 23, 1955) (codified at 30 U.S.C. §612); 43 U.S.C. §1701(a)(12) (reiterating "policy of the United States that … the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals … from the public lands").

More than 100 years after the original Mining Law's enactment, Congress reaffirmed that

> it is the continuing policy of the United States to promote an adequate and stable supply of materials [including minerals] necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between

> resource production, energy use, a healthy environment, natural resources conservation, and social needs.

Pub. L. No. 96-479, 94 Stat. 2305 (Oct. 21, 1981) (codified at 30 U.S.C. §1602). This policy applies equally to National Forest lands. Under the 1897 Organic Act, the National Forests "are not parks set aside for nonuse, but have been established for economic reasons." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (citation omitted); 30 Cong. Rec. 966 (May 10, 1897) (Cong. McRae)).

In 1998, Congress directed the National Academy of Sciences' National Research Council (NRC) to "assess the adequacy of the regulatory framework for hardrock mining on federal lands."[7] NRC advised Congress that Western federal lands remain important for the development of locatable metallic minerals in the United States.[8] Because economic metallic ores (such as those discovered at the Rosemont Mine site) constitute "less than 0.01%" of the Earth's continental crust, "mines can only be located in those few places where economically viable deposits were formed and discovered."[9] "Geologic forces—rather than political or

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[7] National Research Council, *Hardrock Mining on Federal Lands* 1 (The National Academies Press, 1999), http://nap.edu/9682 (hereafter, "*Hardrock Mining*").

[8] *Id.* at 17.

[9] *Id.* at 2-3.

governmental boundaries—determine the location of mineral deposits."[10] As such, the availability of a large amount of federal land for potential exploration—only a small fraction of which will actually be suitable for mineral development—remains critical to the viability of the industry.

### B. Claiming and Patenting Mining Claims and Mill Sites

The Mining Law "extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and … hold[s] out to one who succeeds in making discovery the promise of a full reward." *Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346 (1919). In brief, claimants "locate" mining claims on federal land according to the Mining Law's specifications and procedures, and "have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth." 30 U.S.C. §26. Associated "mill site" claims can be located on non-mineral lands used "for mining or milling purposes," including mine waste disposal. *Id.* §42(a). A "discovery" of valuable minerals is not necessary prior to the location or approval of mining claims. *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 224 (1904) (explaining "well-known fact" that "some of the richest mineral lands in the United States … have never

[10] Door & Paty, *supra* n.2, at 4.

been patented"); *Creede & Cripple Creek Mining & Mining Co. v. Uinta Tunnel Mining & Transp. Co.*, 196 U.S. 337, 354 (1905) (requiring no particular order of necessary steps for claimants to perfect a claim); *Converse v. Udall*, 262 F. Supp. 583, 586 (D. Or. 1966) (ruling that though unauthorized to use timber resources, "mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining"), *aff'd*, *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968). Claimants may seek fee title, or "patent" to the claimed lands, 30 U.S.C. §29, but no patent is necessary for mining to occur. Mining claims "are property in the fullest sense of the word." *Bradford v. Morrison*, 212 U.S. 389, 394 (1909); *accord*, *United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) (citing *Bradford*).

Although the Mining Law remains in force, Congress suspended the patenting system for mining claims and mill sites on federal land in 1994. Pub. L. No. 103-332 §112, 108 Stat. 2499, 2519, *see also RT Vanderbilt Co. v. Babbitt*, 113 F.3d 1061 (9th Cir. 1997). However, Congress did not repudiate its prior policies favoring the development of unpatented mining claims and mill sites. For example, in 1955 Congress enacted a law specifying that any prospectively located mining claim "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." Pub. L. 167, ch. 375, 69 Stat. 368 (July 23, 1955) (codified at 30 U.S.C. §612). Though Congress suspended patenting in 1994, Congress did not alter this 1955 provision, confirming the ability to undertake mining "and uses reasonably incident thereto" on unpatented mining claims. Notably, Congress did not deviate from the longstanding practice that "perfection" of the mining claim, *i.e.*, determination of its validity, was not required prior to such uses.

In 1993, Congress imposed maintenance fees, requiring the holder of each unpatented mining claim and mill site located and filed of record with Interior's Bureau of Land Management ("BLM") to pay annually a claim-maintenance fee of $100 per mining claim and mill site. 30 U.S.C. §28f, 107 Stat. 405 (Aug. 10, 1993); 84 *Fed. Reg.* 31,219 (July 1, 2019) (reflecting fee increases under 30 U.S.C. §28j(c)). BLM has collected more than $1.2 billion in Mining Law mining claim maintenance fees and charges between 1993 and 2018. *See* BLM, *Public Land Statistics 2018* 138-39, tbl. 3-25 (Vol. 203, August 2019), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2018.pdf.

### C. Hardrock Mining and the Environment

#### *1. Balancing Multiple Uses*

The policy debate between the need to produce minerals and protection of

environmental resources has been chronicled as long ago as 1556, in the treatise *De Re Metallica* by Georgius Agricola, which recognized both the potential environmental impacts of mining and the great benefits to mankind from mineral production.[11]

Congress recognized these values and interests in 1872 when it both enacted the Mining Law, authorizing the development of locatable valuable minerals on most federal lands in the West, and created the first National Park—Yellowstone—excluding it from the operation of the Mining Law. *See* 16 U.S.C. §1. In the decades thereafter, Congress has designated dozens of additional National Parks in the West, withdrawing those lands from the operation of the Mining Law, including Yosemite National Park, the Grand Canyon National Park, and Glacier National Park.

In subsequent decades Congress continued to balance the interests of development and conservation. As it affirmed its support for mineral development through legislation establishing a multiple use policy for the management of federal lands, Congress also began to restrict mining beyond national parks. In

[11] *See* Georgius Agricola, *De Re Metallica* 8, 18-20 (Dover Publications, Inc. 1950) (H.C. & L.H. Hoover trans.) (1556) (acknowledging that "woods and groves are felled" for mining, but that the produced metals "supply many varied and necessary needs of the human race" including medicine, art, architecture, and currency).

1964, Congress enacted The Wilderness Act, designating lands that were to be preserved from future development (including operation of the Mining Law), subject to valid existing rights. Pub. L. No. 88-577, 78 Stat. 890 (Sept. 3, 1964) (codified at 16 U.S.C. §1131).[12] And in 1976, Congress reaffirmed its policy of multiple-use and sustainable-yield management for federal lands with FLPMA. National Forest lands are similarly governed by a multiple use mandate. *See* 16 U.S.C. §§1600(3), 1604(e) (requiring the Forest Service to incorporate multiple-use principles in its land and resource management plans).

FLPMA directed BLM to manage federal lands for multiple-uses, including: (1) mineral development; (2) recreation; (3) livestock grazing; (4) rights-of-way; (5) fish and wildlife; (6) timber; and (7) scenic and historical values. 43 U.S.C. §1702(l). Notably, FLPMA contains another mechanism for the Executive Branch, through Interior, to withdraw special lands from operation of the Mining Law. *Id.* §1714.

*2. Balancing Mining Claimants' Rights and Environmental Protection*

In addition to balancing the amount of land dedicated to production and preservation, a careful balance has been struck between respecting mining

[12] Congress similarly has precluded new mining operations in various areas designated as wildlife refuges, recreation areas, and wild and scenic rivers.

claimants' rights to the property interests in their mining claims and protection of other resources. Over time, Congress has enacted a suite of environmental statutes that all apply to mining operations, including the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331 *et seq*., the Endangered Species Act, 16 U.S.C. §1531 *et seq*., the Clean Air Act, 42 U.S.C. §7401 *et seq*., and the Clean Water Act, 33 U.S.C. §1251 *et seq*. *See, e.g.*, 36 C.F.R. §228.8 (requiring mining operations in National Forests to comply with laws protecting air quality, water quality, scenic values, and fisheries and wildlife habitat). States where the mining claims are located also can—and do—regulate mining on federal lands.[13]

The NRC also reviewed the adequacy of existing BLM and Forest Service regulations to protect environmental resources. The NRC found that existing regulations were "generally effective" to protect environmental resources, and that "improved implementation of existing regulations" provided the greatest opportunity for improvements in environmental protection.[14] The NRC did note concerns that "delays and uncertainties associated with the U.S. regulatory environment" were causing mining investments to leave the United States.[15]

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13 *Hardrock Mining*, *supra* n.7, at 52-54.

14 *Id.* at 5-6.

15 *Id.* at 34.

The U.S. Environmental Protection Agency ("EPA") likewise examined the efficacy of the existing suite of environmental regulations in 2018 when it declined to add financial assurance requirements for the hardrock mining industry under the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. §9601 *et seq.* EPA concluded that "modern regulation of hardrock mining facilities, among other factors, reduces the risk of federally financed response actions to a low level such that no additional financial responsibility requirements for this industry are appropriate." 83 *Fed. Reg.* 7556, 7565 (Feb. 21, 2018); *see also Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019) (upholding decision not to issue final rule).

### D. Mining in the National Forests

#### *1. Application of the Mining Laws to National Forests*

When Congress enacted the Organic Act of 1897, it specifically provided that the National Forests would be open to entry and mineral development under the Mining Law. 55th Cong., Sess. I, ch. 2, §1, 30 Stat. 34, 36 (codified at 16 U.S.C. §482). The U.S. Department of Agriculture has authority to issue regulations governing "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws," 36 C.F.R. §228.1, and acting through the U.S. Forest Service, first issued those

regulations in 1974, 39 *Fed. Reg*. 31,317 (Aug. 28, 1974). They govern the Forest Service's review of proposed mining plans of operations and development of conditions to minimize environmental impacts and reclaim the mined lands. Importantly, however, Congress expressly withheld from the Department of Agriculture (and by extension, the Forest Service), any authority to administer "such laws as affect the surveying, prospecting, locating, … entering, … certifying, or patenting of any of such lands." 33 Stat. 628 (Feb. 1, 1905) (codified at 16 U.S.C. §472). The Forest Service's regulations acknowledge this: "*It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior*." 36 C.F.R. §228.1 (emphasis added).

*2. Validity Determinations*

Given the division of authority between BLM and the Forest Service, the Forest Service regulations governing mining plans make no provision for the review or examination of mining claim and mill site validity under the Mining Law. Though the authority to administer the Mining Law on National Forest lands rests with Interior, it has delegated some mineral examination and contest prosecution to the Forest Service through a 1957 Memorandum of Understanding; nonetheless, all such Forest Service actions are subject to Interior's review and

approval. *See Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent*, Interior Solicitor's Opinion, M-36955, 93 I.D. 369, 371 n.2 (Apr. 18, 1986) (explaining that "the Forest Service conducts mineral examinations on National Forest lands, and recommends any contest charges to BLM" and that "[t]he Forest Service prosecutes the contest BLM initiates before the Interior Department"); U.S. Forest Service Manual ("FSM") §2816.4 (2007) (referencing memorandum's year of execution); *see also Wilderness Soc'y v. Dombeck*, 168 F.3d 367 (9th Cir. 1999) (upholding Forest Service determination and report of mine-claim validity prepared for BLM in withdrawn Cabinet Mountains Wilderness Area).

As Interior retains the ultimate approval authority over mineral examinations, BLM's interpretation of when claim-validity determinations must be conducted is of paramount importance. BLM's regulations do not provide for mine claim validity determinations as part of mine plan approvals. *See* 43 C.F.R. Subpart 3809. In fact, Interior has expressly rejected the notion that any law requires validity determinations before approval of mine plans of operations. *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, Interior Solicitor's Opinion, M-37012 2-4 (Nov. 14, 2005).

Notably, when the NRC reviewed existing regulations and made recommendations, it did not recommend to the Congress conducting mining claim validity exams as part of the plan of operation approval process.[16]

*3. Mining in "Withdrawn" Areas*

Whereas mine-claim validity is not a factor in typical mine-plan approvals on lands open to mineral entry,[17] such approvals are quite different where federal lands are withdrawn from the operation of the Mining Laws. In contrast to the Part 228A general regulatory provisions addressing typical National Forest lands—like the Rosemont Copper site—Forest Service regulations governing withdrawn areas emphasize the need for "validly established" mining claims in designated Wilderness Areas. *E.g.*, 36 C.F.R. §228.15(a) ("Subject to valid existing rights, no person shall have any right or interest in or to any mineral deposits ... after the legal date on which the United States mining laws cease to apply to the specific Wilderness."); *id.* §228.15(b) (providing holders of "unpatented mining claims validly established on any National Forest Wilderness ... shall be accorded the rights provided by the United States mining laws"); *id.* §228.15(c), (d) (explaining

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16 *See Hardrock Mining*, *supra* n.7, at 7-9.

17 Validity examinations more typically occur in the pursuit of mineral patents, *e.g.*, *Andrus v. Shell Oil Co.*, 446 U.S 657 (1980), but as explained *supra* the patenting system has been suspended since 1994.

rights of "[p]ersons with *valid* mining claims" and requirements for "all mining claims *validly* established" (emphasis added)). The Forest Service Manual specifies the requirement for validity determinations for proposed mining operations in withdrawn wilderness lands. FSM §2816.11 (2007) (requiring "an appropriate on-the-ground validity investigation" after a notice of intent to operate). BLM's parallel regulations likewise require mine-claim validity determinations as part of a plan of operations review *only* when the lands at issue were withdrawn from the operation of the Mining Law. 43 C.F.R. §3809.100.

*4. The Part 228A Regulations and Waste Rock.*

The process of mining necessarily entails the on-site generation of waste rock. Indeed, the NRC explained that "[t]he area required for a large mine and its facilities (e.g. waste dumps, tailings ponds) is frequently a few thousand acres …[and] often involves a combination of federal and private lands for a single mine."[18] Waste rock, in particular, "is usually placed in piles close to the mine."[19] Congress is well aware of this, and yet has made no law prohibiting the disposal of these materials on open federal lands. However, Congress has specifically acted to address concerns about apparent abuse of mining claims for such uses as "filling

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18 *Hardrock Mining*, *supra* n. 7, at 138, 140.

19 *Mine Waste Management* 19 (I.P.G. Hutchison & R.D. Ellison, eds., 1992).

stations, curio shops, cafes,… residences and summer camps." *Andrus v. Charlestone Stone Prods. Co., Inc.*, 436 U.S. 604, 616 (1978) (citing legislative history of 1955 Mining Law amendments). As a result, it prohibited *any* uses on mining claims "other than prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. §612. As mining cannot be conducted without generating waste rock, its disposal constitutes "mining or processing operations" or a use "reasonably incident thereto." 30 U.S.C. §612; *see generally St. Louis Smelting & Ref. Co. v. Kemp*, 104 U.S. 636, 655 (1881) (referencing "construction of a flume to carry off … waste material" as evidence of labor and improvements on a mining claim).

The Forest Service has recognized the realities of mining waste and designed its Part 228A regulations accordingly. Contemporaneously with development of its regulations, the Forest Service evaluated the efficacy of open pit operations and acknowledged:

> Open pit operations, such as … copper, produce far more waste rock than underground methods, and disposal of this material is a major aspect of the operation. It is common for the ratio of waste to ore to exceed 1:1, and in some cases 10 tons or more of waste are removed for each ton of ore taken from the pit.[20]

[20] USDA Forest Service, General Technical Report INT-35, *Anatomy of a Mine from Prospect to Production* 65 (USDA/USFS June 1977) (U.S. GPO 1977-

*(Continued...)*

Yet, the Forest Service also noted the advantages of open pit mine operations: "[t]hey are efficient and highly productive of metal, concentrating disruption in one local area rather than having the same production come from tens or hundreds of smaller operations scattered through the region."[21] Ultimately the Forest Service concluded:

> Society unquestionably derives major benefits from mineral production. To emphasize one commodity, the present major mining activity in the West centers upon the copper mines of Arizona, New Mexico, Utah, Nevada and Montana. Without these mines copper could not be produced in large quantities ….[22]

The Forest Service balances the benefits and impacts of mining by managing waste rock disposal through the plan of operations review and approval process. Rather than precluding mine waste placement, the Forest Service's regulations require all such materials be managed in a manner as to minimize adverse impacts to the environment and surface impacts upon forest resources. 36 C.F.R. §228.8(c). These regulations also require worksite safety measures, removal of all structures and equipment after mining operations have ceased, and financial assurance that

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0-777-023-2), https://books.google.com/books/about/Anatomy_of_a_mine_from_prospect_to_produ.html?id=-8WwsX4m_IkC (1995 ed. available at https://www.fs.fed.us/geology/anatomy_mine.pdf).

21 *Id.*

22 *Id.* at 2.

post-mining reclamation will take place. *Id.* §§228.9, 228.10, 228.13. These Part 228A regulations are thus comprehensive, intended to govern the entire life-cycle of a mine, and its accompanying structures and operations.

## II. The Court Below Misapplied the Mining Law and Forest Service Regulations, Upending Settled Norms and Threatening the Entire Mining Industry.

The court below vacated the Forest Service's approval of Rosemont Copper's plan of operations for the Rosemont Mine because it determined, despite the absence of any underlying agency finding, that some of the mining claims where waste was to be disposed were likely invalid for lack of mineral discoveries. The unpatented mining claims upon which the proposed Rosemont Mine rest are National Forest lands open to entry and development under the Mining Law. Neither Congress nor the Executive Branch has withdrawn the lands from operation of the Mining Law. Therefore, as explained above, the applicable regulations required no mine-claim validity determination prior to mine-plan approval. The court's contrary conclusion squarely conflicts with applicable statutes, regulations, case law, and the strong congressional policy favoring mineral development and multiple uses of federal lands.

### A. The District Court Misread Applicable Regulations and Procedures.

The court below correctly acknowledged that the Forest Service's regulations "do not allow for denial of an otherwise reasonable mining operation unless it violates some other substantive environmental law." 409 F. Supp. 3d at 763. However, the court strayed far afield of that principle in its interpretation and application of the law.

Forest Service regulations expressly covering activities incidental to mining confirm that mine-plan-operation review does not include validity determinations. 36 C.F.R. §228.2 (defining scope of regulations as extending to operations conducted under the 1872 Mining Law "as they affect surface resources on all [applicable] National Forest System lands"); *see United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981) (upholding regulations). In apparent recognition of this fact, the court attempted to disclaim that it was requiring the Forest Service to undertake a validity determination, asserting that "a validity determination differs significantly from establishing a factual basis *upon which the Forest Service can determine rights*." 409 F. Supp. 3d at 761 (emphasis added). However, the court made no effort (a) to support its finding that the Forest Service needed to "determine [Mining Law] rights," or (b) to distinguish a validity determination

from such a determination. The remainder of the court's discussion reveals there is no material difference—either way, the court erred.

The court cited 36 C.F.R. §228.5(d) as supporting its view that the Forest Service had to make some kind of Mining Law rights determination. As an initial matter, the court failed entirely to recognize the first provision in this part defining the purpose of the regulations, clearly explaining that "it is *not* the purpose of these regulations to provide for the management of mineral resources" and leaving such management to Interior. 36 C.F.R. §228.1 (emphasis added). In addition to overlooking that express caveat, the court omitted key contextual language of §228.5(d) itself that refutes the court's conclusion by explaining the types of issues left to the technical expertise of the Interior Department. Specifically the subsection with the provisions omitted by the court in italics provides:

> *In the provisions for review of operating plans*, the Forest Service will arrange for consultation with appropriate agencies of the Department of the Interior *with respect to significant technical questions concerning the character of unique geological conditions and special exploration and development systems, techniques, and equipment, and* with respect to mineral values, mineral resources, and mineral reserves….

36 C.F.R. §228.5(d). This provision merely provides the Forest Service can consult with the expert Interior agencies when assessing an operator's proposed plan to mine. Nothing in this provision requires or even contemplates a validity

determination must be conducted as part of the plan review process. Similarly, the Forest Service Manual does not obligate the Forest Service to conduct such determinations.

The court below misread the Forest Service Manual as to the "Rights and Obligations" of the agency and a mining claimant. 409 F. Supp. 3d at 762. The court interpreted the manual as requiring the Forest Service to "make an informed decision as to surface rights stemming from mining claims" prior to mine-plan approval. *Id.* However, the manual merely reflects that "the Forest Service … *may* exercise the rights discussed" therein, including the mine claim validity examinations and contests. FSM §§2814.1, .11. *If* the Forest Service exercises that right, "to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet" specific requirements. *Id.* §2813.2. However, whether the Forest Service exercises its enforcement authority to contest mining claim validity before the Interior Department is a law enforcement matter left solely to the agency's discretion. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to … enforce …is a decision generally committed to an agency's absolute discretion."); *see also N. Alaska Envt'l Ctr. v. Lujan*, 872 F.2d 901, 905 (9th Cir. 1989) (ruling that in "selecting the appropriate method to determine the validity of claims, the Secretary must consider the most efficient

allocation of the agencies' resources and personnel" (citing *Heckler*, 470 U.S. at 831)). Such mining claim contests are also entirely outside the scope of the applicable Part 228A regulations under which the Forest Service was acting.

Because the court erroneously held that the Forest Service could not support a conclusion that the mining claims were valid, it determined that an entirely different suite of regulations—those for special use permits—applied, and compelled the conclusion that the mine plan could not go forward. *See* 409 F. Supp. 3d at 764. However, Forest Service regulations governing special use permits are not imported, expressly or implicitly, into the statutory scheme governing mining on National Forest land. In fact, the special-use regulations expressly *exclude* "uses … authorized by the regulations governing … minerals." 36 C.F.R. §251.50. Contrary to the Part 228A regulations discussed above, the special-use regulations lack any provisions for land reclamation and other requirements specific to mining, rendering them wholly unsuited to mining operations. The court thus defied Congress' mineral development purposes in enacting the Mining Law and the unique rights afforded mining claimants.

### B. The District Court Relied on Inapposite Case Law Involving "Withdrawn" Lands.

The court below chiefly relied upon cases such as *Cameron v. United States*, 252 U.S. 450 (1920), and *Lara v. Secretary of the Interior*, 820 F.2d 1535 (9th Cir.

1987), for the conclusion that "[a]ny determination of a claimant's surface rights upon Forest Service land must begin with a discussion of the validity of their claims." 409 F. Supp. 3d at 757. In both cases, however, lands were *withdrawn* from the operation of the Mining Law. *Cameron*, 252 U.S. at 455; *Lara*, 820 F.3d at 1537. As explained above, withdrawn areas are entirely different—both the Forest Service's and BLM's regulations expressly provide for validity determinations in those areas. The district court's citation to *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994), to support the notion that special-use-permit regulations applied to the Forest Service's mine-plan-approval process, is similarly misplaced. That case dealt with (a) *withdrawn* lands, and (b) issues of motorized access in a designated Wilderness area, neither of which are relevant here. *Id.* at 1524-25.

This Court has had many occasions to review the rigorous and well-settled system of environmental review to which modern mining plans of operations are subject, and those cases do not reflect any requirement to review the validity of underlying mining claims. *See, e.g.*, *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991) (affirming approval of uranium mine near Grand Canyon); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) (rejecting claim that approved uranium mine plan of operations required additional analyses before resuming operations after hiatus). The lower court's resort to wholly

distinguishable cases involving withdrawn lands underscores the speciousness of its conclusions.

### C. The Court Erroneously Substituted Its Judgment for the Forest Service's.

One of the most fundamental principles of administrative law is that "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). But that is exactly what the lower court did when it conducted a review of the validity of some of the mining claims at issue without deferring to the Forest Service's view that such considerations were not appropriate when reviewing Rosemont's plan of operations. *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) (upholding decision not to hear condemnation suit until Interior resolved validity questions).

Here, it is undisputed that Rosemont complied with all procedural requirements in filing and maintaining its claims—the Forest Service thus had no reason, occasion, or legal right to inquire further into the substantive validity of the Rosemont mining claims. The record below establishes without any doubt that Rosemont Copper has made a substantial discovery of a large and valuable deposit of copper within the meaning of the Mining Laws, and that this discovery is covered by numerous unpatented mining claims as well as the associated patented

mining claims. ER354, ER383, ER388, ER506, ER516. Even if the Forest Service determined that it needed to contest the legal validity of the mining claims, that contest was for the Forest Service to undertake in the first instance. As explained *supra*, the Forest Service's decision to contest or not contest mine-claim validity is an unreviewable exercise of enforcement discretion. *Heckler*, 470 U.S. at 831. The Court thus doubly overstepped its authority in playing amateur geologist and undertaking a *de novo* review of the record to conclude that there was "no factual basis to determine that Rosemont had valid unpatented mining claims." 409 F. Supp. 3d at 748.

The court's discussion of the "Willow Canyon Formation" illustrates the point. The court acknowledges that the Forest Service found the geologic formation to potentially contain economic concentrations of copper oxide ore. *Id.* at 760. Instead of deferring to the agency's expertise, the court interpreted a statement about copper mineralization being "confined to rare localized areas" to conclude that "the Forest Service could not determine" that the formation contained economically viable copper. *Id*. If the court found the record to be lacking, its duty was to remand to the Forest Service to conduct the factfinding that the Forest Service reasonably concluded was not required.

### D. The Court Erred in Rendering an Advisory Opinion That Mill Sites Were Not Available for the Rosemont Mine.

The court below also erred in prematurely offering an erroneous advisory opinion on the potential applicability of the mill site provisions of the Mining Law to the Rosemont Mine. *See* Argument §I.B. The court below apparently concluded—without the benefit of briefing—that only one mill site could be located with each unpatented mining claim, 409 F. Supp. 3d at 763 n.13, seemingly unaware that the Interior Department had determined through a 2003 Solicitor's Opinion and a codified regulation that there was no one-to-one limitation upon mill sites and mining claims. In other words, the number of mill sites would be based upon the reasonable need for mill sites in conjunction with mining claims. *See* Interior Solicitor's Opinion, M-30010, "Mill Site Location and Patenting Under the 1872 Mining Law" at 2 (Oct. 7, 2003)) ("[T]he mill site provision does not categorically limit the number of mill sites that may be located and patented to one for each mining claim…."); *see also* 43 C.F.R. §3832.32 ("You may locate more than one mill site per mining claim …."); 43 C.F.R. §3832.34(a) ("…you may use and occupy dependent mill sites for: … (3) Tailings ponds and leach pads: (4) Rock and soil dumps…"); *see also Charles Lennig*, 5 LD 190, 192 (1886) (finding

depositing of tailings to be "use[] … for milling or mining purposes" under statute).[23]

Accordingly, the court below gravely erred when it surmised that the Mining Law could not provide for mine-waste-disposal if Rosemont had elected to locate additional mill sites for mine waste instead of mining claims. Indeed, the line of cases cited *supra* demonstrating that this Court has not required mine-claim validity as part of mine-plan review also reflects no reference to mill site requirements or their validity on judicial review. Regardless, this Court should make clear that the lower court's *dicta* in this regard are of no persuasive or precedential value.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the court's judgment below. A ruling in Appellees' favor would drastically alter the legal and regulatory regime established by Congress upon which the entire mining industry has relied.

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[23] *See* 68 *Fed. Reg.* 61,046, 61,054 (Oct. 24, 2003) ("Interior's prevalent practice and interpretation was to view the 5-acre mill site provision as limiting the size of individual mill sites, not the number of mill sites per mining claim."); *see also* Patrick Garver & Mark Squillace, "Mining Law Reform—Administrative Style," 45 *Rocky Mt. Min. L. Inst.* 14-1, 14-13–14-14 (1999) (discussing historical practice of locating multiple mill sites with one mining claim).

DATED this 29th day of June, 2020.

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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