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Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.

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Ctr. for Biological Diversity v. United States Fish & Wildlife Serv., 33 F.4th 1202 (9th Cir. 2022)

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Mining in the United States has been an economic privilege since the early 1800s, and Congress has permitted citizens to use public lands for mineral extraction, free of charge. But how much land are mining companies allowed to take away from public use? The Ninth Circuit Court of Appeals affirmed the District Court of Arizona's decision to deny a proposed mining plan of operations that exceeded the boundaries of valid mining claims. The issue the court addressed is whether a permanent occupancy of waste rock and tailings on land, absent the discovery of valuable minerals, is a reasonable use related to mining activities.

I. INTRODUCTION

In *Center for Biological Diversity v. United States Fish & Wildlife Serv.*,[1] the Ninth Circuit Court of Appeals affirmed the District Court of Arizona's holding that the United States Forest Service ("USFS") acted arbitrarily and capriciously when they approved Rosemont's mining plan of operation ("MPO").[2] The USFS incorrectly assumed that Rosemont Copper Company ("Rosemont") had valid mining claims under Section 22 of the Mining Law of 1872 ("Mining Law").[3] The USFS then improperly relied on Section 612 of the Surface Resources and Multiple Use Act of 1955 ("Section 612") and concluded that dumping of the waste rock was a mining activity reasonably related to the mining operations, regardless of whether the claims were valid.[4] Because the USFS relied on Section 612 and assumed that Rosemont had valid mining claims under the Mining Law, the USFS believed they only had regulatory authority under Part 228A of the Organic Act of 1897, which only required a reasonable regulation of impacts to the surface prior to granting the MPO.[5] The proposed MPO would permanently occupy an additional 2,447 acres of national forest land for mining-related purposes, absent any mining claims on that land.[6] Three separate cases were filed with similar legal issues and were consolidated in the District Court of Arizona.[7]

Once the USFS issued the Record of Decision ("ROD"), a coalition of parties including Save the Santa Ritas, Arizona Mining Reform

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1. 33 F.4th 1202 (9th Cir. 2022).
2. *Id*. at 1223.
3. *Id*. at 1223 (citing 30 U.S.C § 22).
4. *Id*. at 1212 (citing 30 U.S.C. § 612).
5. *Id*. at 1210–11 (citing 16 U.S.C. § 551).
6. *Id*. at 1211–12.
7. Ctr. for Biological Diversity v. United States Fish & Wildlife Serv., 409 F. Supp. 3d 738, 745 (D. Ariz. 2019).

Coalition, Center for Biological Diversity, the Grand Canyon Chapter of the Sierra Club, Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe ("plaintiffs"), sued the USFS, several USFS officials, the Secretary of Agriculture, Rosemont Copper Company ("Rosemont"), and the United States (collectively referred to as "defendants").[8] Plaintiffs claimed the USFS misapplied numerous statues and mining regulations and failed to protect the Coronado National Forest.[9] The district court granted summary judgment in favor of plaintiffs, vacating the final environmental impact statement ("FEIS") and the ROD.[10] Defendants appealed the district court's decision that vacated the FEIS and ROD.[11]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2007, Rosemont submitted a proposal for an MPO to operate an open-pit copper mine.[12] Part of the mine would sit within the Coronado National Forest and would cover 955 acres for which Rosemont had valid mining claims.[13] The proposed mine would produce an excess of 1.25 billion tons of waste rock and 660 million tons of tailings.[14] Waste rock and tailings (collectively referred to as "waste rock") is the rock left over after processing the ore deposit.[15] While the rock may still contain minerals, it is not considered economically valuable.[16] No valuable minerals have been found on the 2,447 acres of national forest land that Rosemont's waste rock would occupy.[17] In 2017, the USFS approved the MPO.[18]

Before the USFS issued an ROD that approved Rosemont's MPO in 2017, the USFS issued the FEIS in 2013.[19] The USFS relied on two grounds when they approved the MPO.[20] First, in the FEIS, they assumed that Rosemont had valid mining claims under the Mining Law[21] which would allow a permanent occupancy of waste rock on that land. A valid mining claim requires discovery of valuable minerals made upon the land intended to be used for extraction.[22] The Mining Law allows an owner with valid mining claims to obtain rights to other lands for "mill sites," or,

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8. *Id.* (Rosemont intervened in the cases).
9. *Id.*
10. *Id.* at 766.
11. *Ctr. for Biological Diversity*, 33 F.4th at 1216.
12. *Id*. at 1211.
13. *Id*.
14. *Id*. at 1212.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*. at 1212.
19. *Id*. (considering the alternatives under the EIS but finding none had major modifications nor varied substantially).
20 *Id*.
21. 30 U.S.C. § 22, et seq.
22. *Id*. at 1212; 30 U.S.C. §§ 21, 22.

non-mineral land used for waste rock occupancy.[23] Second, in the ROD, the USFS relied on Section 612 and concluded that dumping the waste rock was a mining activity reasonably related to the mining operations, regardless of whether the claims were valid, creating a "possessory interest."[24] Because the USFS relied on Section 612 and assumed that Rosemont had valid mining claims under the Mining Law, the USFS believed they only had regulatory authority under Part 228A of the Organic Act of 1897.[25] The use of Part 228 regulations is dependent on whether Section 612 was properly relied on, and whether there were valid mining claims under the Mining Law.[26] Part 228A of the Organic Act only requires a "reasonable regulation of surface estates to minimizing impacts to surface resources."[27] The USFS concluded in the FEIS that the proposed MPO achieved minimization of impacts, thus approving the MPO.[28]

Defendants no longer support the USFS's reliance on Section 612. Abandoning their argument from the district court, defendants now argue that the determination of valid mining claims is not needed under Section 612 in order to occupy the land with waste rock.[29] They rely on a 2020 Opinion Letter of the Solicitor General ("2020 Letter") which states that a determination of a mining claims validity is not required if there is a reasonably incident use connected with the open land.[30] Reasonably incident means any activity related to mining including occupancy of the land.[31] However, the court declined to defer to the 2020 Letter, and instead referenced a 2001 Opinion Letter ("2001 Letter") that disagrees with the finding in the 2020 Letter.[32] The court found the 2001 Letter carried greater weight than the 2020 Letter because the 2020 Letter referenced Bureau of Land Management ("BLM") authority and not the USFS.[33]

Once the USFS issued the ROD, plaintiffs sued defendants, seeking summary judgment and a preliminary injunction to prevent Rosemont from starting operations.[34] The district court granted summary judgment for plaintiffs, vacating the FEIS and ROD.[35] The court held that the USFS approval of the MPO was arbitrary and capricious,[36] and the decision was

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23. 30 U.S.C. § 42(a).

24. *Ctr. for Biological Diversity*, 33 F.4th at 1212; *Id*. at 1209 (Possessory interest refers to the right of a person to occupy a piece of land).

25. *Id.* at 1211.

26. *Id*.

27. *Id.* at 1213; 36 C.F.R § 228.1, 228.4(a)(4).

28. *Ctr. for Biological Diversity*, 33 F.4th at 1213.

29. *Id.* at 1218–19.

30. *Id.* at 1221–22.

31. *Id*. at 1218; 30 USCS § 612(a)-(b).

32. *Ctr. for Biological Diversity*, 33 F.4th at 1222.

33. *Id.*

34 . Ctr. for Biological Diversity v. United States Fish & Wildlife Serv., 409 F. Supp. 3d 738, 746–747 (D. Ariz. 2019).

35. *Id.*

36. *Id. at* 1216 (citing Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

inconsistent with the Mining Law and relevant mining statutes.[37] The district court denied plaintiffs' request for a preliminary injunction because Rosemont was unable to begin operations without an approved MPO.[38] The district court vacated and remanded the FEIS and ROD, which defendants appealed.[39]

III. ANALYSIS

The Ninth Circuit upheld the lower courts holding that the USFS's reliance on Part 228A regulations to approve Rosemont's MPO was arbitrary and capricious because the USFS misunderstood Section 612 and incorrectly assumed Rosemont's mining claims were valid under the Mining Law.[40]

A. Invalidity of Rosemont's mining claims

The court held the USFS acted arbitrarily and capriciously when it assumed that Rosemont had valid mining claims.[41] The court further held that Rosemont's mining claims were invalid because no valuable minerals had been found.[42] Defendants supported the USFS's assumption that Rosemont had valid mining claims under the Mining Law, and further claimed a right to occupy 2,447 acres with waste rock.[43] The court addressed three arguments that defendants made under the Mining Law: (1) whether Section 22 provides a right of occupancy, (2) whether the USFS needed to determine the validity of Rosemont's mining claims, and (3) whether the district court abused its discretion by overstepping.

1. Section 22 of the Mining Law

Defendants proposed a new rationale, unused by the USFS in their initial approval, based on Section 22 of the Mining Law. This new rationale was centered around the idea that valid mining claims were never required to use open land for waste rock.[44] The argument is different than that used by the USFS in 2019, as the agency originally concluded that Rosemont could dump waste rock because of an assumed valid mining claim.[45] The court found that the argument asserted by defendants could not be sustained because an agency decision can only be based on "the

37. *Ctr. For Biological Diversity*, 33 F.4th at 1216.
38. *Ctr. For Biological Diversity*, 409 F. Supp. 3d at 746–47.
39. *Id*. at 746.
40. *Id*.
41. *Id*. at 1202.
42. *Id.*
43. *Id*. at 1217–18.
44. *Id*. at 1218–19.
45. *Id*. at 1207.

grounds that the agency invoked when it took the action."[46] Regardless, the court addressed the proposed rationale for purposes of judicial efficiency and the probability that the USFS will rely on defendants' Section 22 interpretation on remand.[47]

Defendants claimed that Section 22 "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."[48] Defendants further argued that because the land is not being used, there is a statutory right for them to exclusively use that land without the USFS evaluating the validity of the mining claims.[49] In determining whether Section 22 gives Rosemont the right to occupy open land without a valid mining claim, the court evaluated the language of the text.[50] Section 22 states "government lands in which [valuable mineral deposits] are found shall be free and open to '*occupation* and purchase.'"[51] The court held in interpreting Section 22, there is no right of occupancy if no valuable minerals were found.[52] In *Union Oil*,[53] the Supreme Court found that Section 22 allowed temporary occupancy when prospecting for valuable minerals, but stated, "to 'create valid rights . . . a discovery of mineral is essential.'"[54] Here, the court determined that defendants' arguments were invalid because Rosemont did not have valid mining claims under Section 22, which were required because no minerals were found on the land that Rosemont wanted to occupy.[55]

Defendants then stated that Rosemont's waste rock was lawful because it would not be a permanent occupancy of the land, and would still be usable.[56] They argued that the land will be covered in waste rock, but it can be used in other meaningful ways, such as grazing, recreating, and wildlife habitat, once it is revegetated.[57] The court reiterated that the right to occupy the land is contingent on valuable minerals being found.[58] Here, the court held that because the land that would be covered by 1.9 billion pounds of waste rock and would never be seen, touched, or used again by another person, is in fact a permanent occupancy.[59] Therefore, the waste

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46. *Id.* at 1223 (citing SEC v. Chenery Corp., 318 U.S. 80, 87 63 S. Ct. 454, 87 L. Ed. 626 (1943)).
47. *Ctr. For Biological Diversity*, 33 F.4th 1219.
48. *Id*.
49. *Id*.
50. *Id.* (citing Star Athletica, LLC v. Varsity Brands, Inc., 580 U.S. 405, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017)).
51. *Id.* (citing 30 U.S.C. § 22).
52. *Id.*
53. *Id*. 1219-20 (citing Union Oil Co. of Cal. V. Smith, 249 U.S. 337, 39 S. Ct. 308 (1919)).
54. *Id*. (citing Union Oil Co. of Cal., 249 U.S. at 346).
55. *Id.* at 1220.
56. *Id*. at 1219–20.
57. *Id*. at 1220–21.
58. *Id.* at 1220.
59. *Id*.

rock would create a permanent occupancy which is invalid without the discovery of valuable minerals on that land.[60]

2. Rosemont's mining claims are invalid

After the court determined that occupancy of open land is contingent on the discovery of valuable minerals, the court addressed whether Rosemont had valid mining claims on the 2,447 acres of land. Defendants argued in their brief that the USFS had no obligation to assess whether Rosemont had valid mining claims, and only the BLM could determine the validity of the claims.[61] Defendants requested the court base its decision on the 2020 Letter which read, "mining claim validity determinations [by the BLM] are not required before allowing reasonably incident mining uses on open lands."[62] As discussed above, the court did not defer to the 2020 Letter.[63]

For the sake of defendants' arguments, the court interpreted the 2020 Letter, and concluded that the 2020 Letter was irrelevant to the arguments in this case.[64] The court made clear that the USFS's authority was at issue in determining validity of mining claims, and not the BLM's, which was only discussed in the 2020 Letter.[65] First, the court found that the 2020 Letter did not define whether a "700-foot mountain of waste rock"[66] was a "reasonably incident mining use."[67] Second, the court pointed out that undisputed geological evidence in the ROD showed no valuable minerals had been found on the land that Rosemont claimed.[68] Further, the evidence showed that valuable minerals were unlikely to ever be found.[69] Accordingly, the court held that it would be irrelevant for the BLM to determine the validity of the mining rights because the record clearly showed the absence of valuable minerals.[70] The court concluded that Rosemont's mining claims are invalid because evidence from the record indicated that no valuable minerals existed.[71]

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60. *Id*.
61. *Id*. at 1222.
62. *Id*. at 1215 (citing Office of the Solicitor on Authorization of reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872, Op. M-37057, at 3 (2020)).
63. *Id.* at 1222.
64. *Id*.
65. *Id*
66. *Id*
67. *Id*.
68. *Id*. at 1221.
69. *Id*.
70. *Id*. at 1222.
71. *Id*.

3. "Overstepping" by the district court

Defendants alleged that the district court overstepped its authority by concluding that no valuable minerals existed on the land.[72] The court agreed with defendants that the district court improperly concluded that no valuable minerals could exist on the land.[73] However, the court noted that the question before them was "whether valuable minerals have been 'found' on the claims, not whether valuable minerals might be found."[74] Thus, defendants' argument that the district court overstepped its authority was irrelevant.[75] The court referred to the undisputed geological evidence that showed there are no valuable minerals that have been discovered.[76] Therefore, the court upheld the district court's holding which found the mining claims were invalidly assumed by the USFS.[77]

B. Part 228A regulations

Lastly, the court addressed the portion of defendants' claim that asserted Part 228A regulations authorized waste rock to occupy federal land regardless of valid mining claims.[78] The use of Part 228 regulations is dependent on whether Section 612 of the Multiple Use Act was properly relied on, and whether there were valid mining claims under the Mining Law.[79] Defendants alleged, and the dissent agreed, that "operations" listed in the regulations have a broad definition.[80] Defendants relied on Section 228.3(a) to argue that Rosemont's dumping of waste rock is a "use reasonably incident" to mining relating to its mining claims.[81] Likewise, the dissenting Judge Forrest agreed with defendants that Part 228A regulations are independent of the Mining Law because the phrase "in connection with" in Section 228.1 is enough to include invalid mining claims with valid mining claims.[82]

However, the court held that both of those arguments were premature because the USFS used Part 228A regulations only after it incorrectly relied on Section 612 of the Multiple Use Act, when the USFS incorrectly assumed that Rosemont had valid mining claims pursuant to the Mining Law.[83] The two statutes that the USFS relied on to enforce Part 228A regulations no longer supported the approval of Rosemont's MPO because

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72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *Id*. at 1223–24.
80. *Id*. at 1223; *Id*. at 1229.
81. *Id*. at 1223.
82. *Id*. at 1231 (citing Judge Forrest, dissenting).
83. *Id*. at 1223.

they were premature.[84] When deciding that the arguments were premature, the court held "that an agency's action may not be upheld on ground other than those relied on by the agency."[85] For these reasons the court held that a ruling on this issue would be premature.[86]

IV. CONCLUSION

The court's decision has effectively prevented mining companies from amending the Mining Law on the administrative record. Their decision makes it clear that this amendment is for Congress to decide, not agencies or the courts.[87] On July 27, 2022, Appellant Rosemont filed for a rehearing and a rehearing en banc, and both have been denied.[88]

84. *Id.*

85. *Id*. (citing Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 420, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992)).

86. *Id.* at 1224.

87. *Id.*

88. Ctr. for Biological Diversity v. United States Fish & Wildlife Serv. Nos. 19-17585, 19-17586, 2022 U.S. App. LEXIS 23431 (9th Cir. Aug. 22, 2022).