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

BRIEF OF AMICUS CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are eighty-four law professors who teach and write in the areas of administrative, natural resource, public land, and environmental law and take a professional interest in the development of the law in these areas. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.

A list of *amici* is attached as Appendix A.

[1] All parties consent to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than amici and their members, contributed money to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The General Mining Law of 1872 (the "Mining Law") invites American citizens to explore federal public lands for valuable minerals and, where such minerals are found, grants certain rights to the discoverer. A citizen who stakes a claim and makes a discovery of a valuable mineral deposit on that claim acquires a property right in the discovered mineral and may extract it under regulation by the federal land management agency. A claim that lacks a discovery, however, creates no rights against the United States.

The thousands of words in the briefs submitted by the United States Forest Service, Rosemont Copper Company (collectively "Defendants"), and their allies boil down to one simple proposition: because Congress intended in the Mining Law to encourage the exploration and development of mineral deposits on public lands, the Forest Service was justified in overriding every requirement the statutory text of the Mining Law and the 1897 Forest Service Organic Act (the "Organic Act") imposes on Rosemont's desire to open and operate a new massive copper mine and ancillary facilities on thousands of acres of national forest lands.

Defendants make two somewhat interrelated arguments in support of the Forest Service decision to approve Rosemont's plan of operations for the mine and thereby allow the company to dump the nearly two billion tons of waste rock and tailings produced by the mine on almost 2,500 acres of public land in the Coronado

National Forest.[2] First, they argue that the Mining Law gives Rosemont a right to use those national forest lands as a dumping ground even without locating claims on those lands, because the use is reasonably related to the proposed mine and, in their view, uses incident to mining can occur on any public lands that have not been withdrawn from operation of the Mining Law.

Second, they argue that the Forest Service has no affirmative obligation to inquire into the factual basis of unpatented mining claims Rosemont has located on public lands and intends to use as the site of its waste dump, even though approval of the plan of operations gives Rosemont the right to dump massive amounts of mine tailings and waste on the unpatented claims. As the district court found, this proposed use as a dump strongly suggests those claims contain no valuable mineral deposits—because any mineral they supposedly contain would become inaccessible—and are thus invalid for lack of a discovery, and the Forest Service was aware of that fact. The Forest Service, consequently, could not sit idly by; instead, it must make some inquiry into the validity of these claims before granting Rosemont what amounts to a permanent right to use these public lands as a dump.

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[2] Rosemont owns in fee some of the ore body it proposes to extract, and some of it is on national forest land on which Rosemont has located mining claims under the Mining Law of 1872. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 743 n.2 (D. Ariz. 2019).

The Defendants' arguments ignore the structure and language of the Mining Law and Organic Act. Absent the discovery of a valuable mineral deposit within a mining claim, the Mining Law gives Rosemont a license to occupy the public land for the limited purpose of looking for valuable minerals; that license is fully revocable (by means of a withdrawal) before a discovery is made. Moreover, the Organic Act, which was enacted to protect national forests, does not compel the Forest Service to grant Rosemont access to bury 2,447 acres of national forest lands beneath 1.9 billion tons of mining waste.

Rosemont could seek to have the Forest Service exercise the discretion Congress has given it to allow the national forest lands outside the boundaries of its valid mining claims to be used as a dumping ground. Specifically, it could propose a land exchange or apply to the Forest Service for a special use permit. It has chosen not to do so, because either course would require the Forest Service to decide whether these lands *should become* a waste dump in light of the other public values they serve, such as preserving Native American burial grounds and biodiversity values. Furthermore, either option would require Rosemont to pay fair market value for that land and those resources. The Court should not rewrite the Mining Law and Organic Act because the Forest Service would prefer to abdicate its responsibility to manage the national forest in the public interest in order to make it easier for Rosemont to move ahead with its mining operation.

ARGUMENT

I. The Court Should Give Effect to the Statutory Text Included in the Mining Law of 1872 and the National Forest Organic Act of 1897.

The Mining Law and Organic Act recognize the right of miners to enter national forests in search of valuable minerals, to stake mining claims, and, upon the discovery of valuable mineral deposits on such claims, to enjoy a right to permanently use and occupy those claims to develop minerals. The location of valid claims is an indispensable component of a miner's right to use national forest lands.

As the Forest Service and Rosemont see it, the Mining Law's first section, read in isolation, gives miners free rein to enter, occupy and use national forest land for any purpose reasonably related to mining, whether or not they have located mining claims on that land.[3] Accepting Defendants' argument would have far-reaching consequences. The Forest Service—charged by Congress with responsibility for ensuring that these public lands are properly managed—would not simply have the authority, but the affirmative obligation to permit Rosemont and its ilk to monopolize those lands, making them unavailable for any of the other uses

[3] The argument implicitly concedes that the considerable effort Rosemont has expended to locate and maintain hundreds of mining claims on the national forest land it proposes to use as a dumping ground (*see Ctr. for Biological Diversity*, 409 F. Supp. 3d at 749-51) has been unnecessary.

Congress has directed for national forests like recreation, livestock grazing, and protecting watersheds and wildlife habitat. This cannot be what Congress intended in 1872 or in 1897.

This is not the first time federal courts have been called upon to decide whether those entrusted with managing the nation's public lands are entitled to ignore specific provisions in governing statutes many decades old that have become inconvenient for private users of public lands. In two prior landmark decisions, federal courts of appeal have held that statutes governing the management of public lands must be applied as written, rejecting executive branch practice to the contrary, and leaving Congress to decide whether and how to update the statutory framework.

The first of these decisions, *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc), involved an Interior Department decision to approve construction of the Trans-Alaska Pipeline System (TAPS) across public lands in Alaska. At the time, the Mineral Leasing Act of 1920 limited the width of permissible rights of way to twenty-five feet on either side of a pipeline. Because TAPS needed a much wider swath of public land, the Interior Department gave it a "special land use permit" (SLUP) for the remainder, contending that the SLUP was a "temporary, revocable permit" and "not an interest in land." *Id.* at 853. The court rejected the argument, finding the idea "incredible" that the SLUP was "temporary" and "revocable" once the multi-billion dollar, 789-mile-long oil pipeline was in

place and operating. *Id.* at 873-75. "Mere words and ingenuity," it wrote, "cannot by description make permissible a course of conduct forbidden by law." *Id.*at 892 (quoting *United States v. City and County of San Francisco*, 310 U.S. 16, 28 (1940)). The court rejected the Department's effort to authorize a use of public lands contrary to the limitations established by Congress.

The second decision, *West Virginia Division of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975), held unlawful the Forest Service's decades-old practice of authorizing clearcutting on the national forests, finding it inconsistent with the plain language of 1897 Organic Act, which authorized only the sale for harvest of "dead, matured or large growth of trees found upon such national forests," and only under certain conditions, including that the timber be "marked and designated," *id.* at 947.[4] Notwithstanding Forest Service and timber industry arguments that "a literal reading of the 1897 Act" should not be allowed "to frustrate the modern science of silviculture and forest management," and interfere with Forest Service efforts to produce timber, the court held:

> Economic exigencies, however, do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be. . . . We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the

[4] As discussed below, another part of that Organic Act is directly involved in this case.

> public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress.

Id. at 955.

The federal government again asks the court to ignore the structure, text, and history of old public lands statutes, because the Forest Service and mining industry find their requirements to be inconvenient. Like previous courts, the Court should reject this invitation. Either Congress can amend these laws, or the Forest Service and Rosemont can pursue other options, such as a land exchange. As will be discussed, Rosemont does not have a right to use Forest Service lands in reliance on invalid mining claims.

II. The General Mining Law of 1872 Does Not Afford Mineral Developers a Right to Enter, Occupy, and Make Exclusive and Permanent Use of National Forest Land for Mining Purposes.

The Forest Service and Rosemont argue that miners have a right to permanently use and occupy national forests for any purpose reasonably related to mining, *whether or not they have located valid mining claims on that public land*.[5]

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[5] After the Defendants' opening brief, the Interior Department Solicitor issued an opinion asserting that miners may use any lands open to operation of the Mining Law for uses reasonably incident to mining. Opinion Letter on Authorization of Reasonably Incident Mining Uses on Lands Open to the Operation of the Mining Law of 1872, M-37057 (Aug. 17, 2020). The opinion is contrary to a previously issued M-opinion, *see* Opinion Letter on Use of Mining Claims for Purposes Ancillary to Mineral Extraction, M-37004 (Jan. 18, 2001), and is legally infirm for the same reasons that the Defendants' arguments fail.

The argument appears virtually boundless. Under this view a miner would have a right to use *any public lands* as she sees fit—even to bury them and the resources they contain, like Native American burial sites or habitat for endangered species, beneath tons of mining waste—so long as those lands have not formally been withdrawn from the operation of the mining laws. This elevation of ancillary mining purposes above all other uses on all public lands contradicts the plain terms of the Mining Law itself, particularly when examining the law in its entirety and in its historical context.

A. Historical Context

Not long before the discovery of gold in California in 1848, Congress repealed laws authorizing the leasing of minerals on some public lands it had enacted earlier in the nineteenth century. Therefore, no federal law sanctioned the activities of the 49ers and their successors on the public lands.[6] Largely paralyzed by the growing controversy over slavery and then the Civil War, it took Congress nearly a quarter

[6] The Forest Service brief asserts that "mining on federal lands had proceeded with no federal interference for nearly a century before" Congress enacted the 1866 Mining Law. U.S. Brief at 24. This is simply wrong. *See, e.g.*, James E. Wright, The Galena Lead District: Federal Policy and Practice 1824-1847 (1966); Robert W. Swenson, *Legal Aspects of Mineral Development*, *in* Paul W. Gates, History of Public Land Law Development 699, 701-06 (1968); John D. Leshy, The Mining Law: A Study in Perpetual Motion (1987).

of a century to decide how to legitimize the mineral rushes that had taken place on public lands starting with the Gold Rush. The decision was made in three stages.

The first was the Mining Law of 1866. After declaring in its first section that the "mineral lands of the public domain" are "free and open to exploration and occupation," it went on to flesh out, in eleven detailed sections, a scheme that, among other things, called for the location of mining "claims" on a "vein" or "lode" of rock that contained minerals. 14 Stat. 251, 253 (1866). In 1870, Congress added six additional sections to the 1866 law to authorize similar mining "claims" on other kinds of deposits (so-called "placer" claims). 16 Stat. 217-18 (1870). In 1872, Congress further modified and merged these two into a single, sixteen-section law that remains on the books today. 17 Stat. 91-96 (1872).

The Forest Service and Rosemont ask this Court to believe that these laws simply perpetuated the free-for-all practice that prospectors and miners had been following on public lands, with the silent acquiescence of Congress, since 1848. The legislative history shows how wrong this is. When the Senate was debating what would become the 1866 Mining Law, senators from California and Oregon proposed an amendment that would have stricken the eleven detailed sections that followed the declaration in section 22 giving persons free access to explore and occupy public mineral lands. One of the amendment's sponsors, James McDougall (D-CA), explained that the rest of the bill's "machinery" (which he described as "very

ingenious") would only "promote litigation, create controversy, and occasion difficulties," and needed to be removed from the bill. Cong. Globe, 39th Cong. 2nd sess. 3225, 3231-36, 3453 (1866); *see* Leshy, *supra* at 387.

Their amendment was voted down. Congress decided not only to keep the statutory requirements in the 1866 law, but to supplement it in 1870, and then provide further details and elaboration in giving it final form in 1872.

The Forest Service and Rosemont do their best to ignore the "ingenious machinery" that Senator McDougall sought to excise. But it cannot be denied that while Congress wanted to encourage mineral activity on the public lands, it was not handing potential miners a blank check. It was, instead, legislating specific limits on how the public lands could be used for mining, limits that have basically remained unchanged ever since.

B. Permanent Use and Occupancy Rights

The Defendants argue that section 22, the first section of the 1872 Mining Law, affords Rosemont a stand-alone "general grant of access" that is "distinct and independent from the system of mining claims established in" the remainder of the statute. Rosemont Brief at 28; *see also* U.S. Brief at 25. Section 22 reads in relevant part:

> *[A]ll valuable mineral deposits* in lands belonging to the United States . . . shall be free and open to exploration and purchase, *and the lands in which they are found* to occupation and purchase . . . under regulations prescribed

> by law, and according to the local customs or rules of miners . . . so far as the same are . . . not inconsistent with the laws of the United States.

30 U.S.C. § 22 (emphasis added).[7]

The Defendants' argument fails because the plain text of section 22 grants a right of occupancy *only* to "the lands in which" "valuable mineral deposits" are found. In other words, section 22 does not grant a free-standing right to use and occupy non-mineral lands for the purpose of mining elsewhere.

In any event, section 22 cannot be read in isolation. As the Supreme Court recently reaffirmed, "[s]tatutory language 'cannot be construed in a vacuum. 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) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93 (2012) (quoting *Davis v. Mich. Dep't of Treasury*, 89 U.S. 803 (1989))). Further, one of the most basic interpretive canons is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'" *Hibbs v. Winn*, 542 U.S. 88,

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[7] Similarly, the reference to making mineral deposits available for "purchase" cannot be read in isolation from specific language in the statute that sets the terms for purchase. Specifically, 30 U.S.C. § 29 requires a demonstration that the claimant has expended $500 worth of labor or improvements on each claim and has paid the purchase price of five dollars per acre for each lode claim.

101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed. 2000)).

In context, section 22 connects rights of use and occupancy to valid mining claims. True, section 22 "says nothing at all about mining *claims*," a fact about which the Defendants make much. U.S. Brief at 22 (emphasis in original). But section 22's reference to "valuable mineral deposits" anticipates the language in the very next section that authorizes the location of mining claims on public lands only upon the "discovery" of "valuable deposits" of certain minerals. 30 U.S.C. § 23. Thus, section 22 grants to miners certain rights to valuable mineral deposits, and section 23 establishes the mechanisms by which valuable mineral deposits shall be identified—through the staking of claims and discovery of valuable minerals thereupon.

The basic test to establish a "discovery" of a "valuable mineral deposit" was crafted by Secretary of the Interior Hoke Smith in *Castle v. Womble*, 19 Land Dec. 455 (1894). Secretary Smith determined that,

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Id. at 457.

This "prudent person test" was refined by the Supreme Court in *United States v. Coleman*, 390 U.S. 599, 600 (1968), affirming a decision by the Secretary of the Interior finding that "to qualify as 'valuable mineral deposits' under 30 U.S.C. § 22,

it must be shown that the mineral can be 'extracted, removed, and marketed at a profit.'"

Far from offering evidence that it had made a discovery of a valuable mineral deposit on its claims, Rosemont proposes to bury its claims under nearly two billion tons of waste, assuring that any minerals they might contain will never be developed. This is "a powerful indication that there was not a valuable mineral deposit underneath the land." 409 F. Supp. 3d at 748.

Numerous other Mining Law provisions also qualify the broad statement in 30 U.S.C. § 22. Its third section provides that persons who locate mining claims on public lands "shall have the *exclusive right of possession and enjoyment of*" the surface and the minerals found on the claims (with certain variations not important here), so long as they comply with the laws of the United States, and with state and local regulations not in conflict with them. 30 U.S.C. § 26 (emphasis added).

Congress's intent here is unmistakable. A person may enter public lands to explore for valuable minerals, but no rights attach unless and until that person discovers a valuable mineral deposit and properly stakes its mining claim in conformity with the Mining Law. Until such time, the person is merely a licensee, who has no right of "exclusive possession and enjoyment" of the public lands it enters. Far from giving miners free rein, Congress included specific guidance and limits on just how public lands may be used for mineral development.

C. Revocable License to Explore

The Forest Service maintains that "the Mining Law does not condition use of open federal lands on the location of a valid mining claim." U.S. Brief at 35. There is a kernel of truth in this statement. Quite logically, 30 U.S.C. § 22 permits prospectors to explore for minerals on public lands before they actually locate a mining claim. But that is a far cry from Defendants' argument that 30 U.S.C. § 22 throws the door wide open for miners to make intensive, exclusive, and essentially permanent use of public lands for which they have no legal claim.[8]

The argument is not new. A unanimous Supreme Court firmly rejected it more than a century ago. In *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919), the Court noted that 30 U.S.C. § 22 "extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits." Those who accept that invitation and "proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will."[9] *Id.* The Court went on to

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[8] If the law were construed as Defendants argue, operators like Rosemont would have an "exclusive right of possession and enjoyment" of the national forest land without ever even locating a mining claim. This flies in the face of 30 U.S.C. § 26's explicit requirement that a claim be located in order to obtain such a right.

[9] Unlike the Forest Service and Rosemont, the district court paid close attention to the Supreme Court's guidance, noting that if Rosemont has not

caution that, in order to obtain a right to exclusively possess and enjoy the land, they had to conform to the Mining Law's exacting requirements. More specifically, "in order to create valid rights or initiate a title as against the United States, a discovery of mineral is essential." *Id.*

In their unsuccessful effort to wall off 30 U.S.C. § 22 from the rest of the Mining Law, the Defendants concede their argument's fatal flaw. Rosemont acknowledges that the purpose of a mining claim is to give its holder a "set of property rights" to "protect any investment a miner ultimately makes," Rosemont Brief at 26, and to "confer a property right on miners to *exclude* others." *Id.* at 28 (emphasis in original). It then argues that carrying out mining operations on public lands that are open to mineral activity but not formally claimed under the Mining Law does not "involve a right 'to possession,' but rather *'a right of use' that is 'temporary,' not 'permanent.'*" *Id.* at 29 (quoting the Forest Service's argument to the district court) (emphasis added). Similarly, the U.S. brief characterizes those parts of the Mining Law that follow its first section as giving the mineral developer "the ability to obtain *separate rights*—property rights—on those miners who locate

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established a valid claim on the national forest lands, it is merely a "tenant at will of the United States upon these lands." 409 F. Supp. 3d at 761.

mining claims, discover a valuable mineral deposit, and comply with applicable statutory requirements." U.S. Brief at 25 (emphasis added).[10]

The Defendants believe that miners can use public lands for any use reasonably related to mining without staking mining claims. They try to justify the proposed plan of operations with the absurd fiction that the proposed use of 2,400 acres of national forest land to dump 1.9 billion tons of mining waste is "temporary." The reality is that by approving Rosemont's plan, the Forest Service has effectively given Rosemont the functional equivalent of a property right on those lands, because it is inconceivable that the U.S. would ever require Rosemont to remove that massive amount of material from those lands.[11] On the contrary, Rosemont's tailings and waste piles will be a permanent scar upon our public forest lands that will forever compromise their use for anything else. *See Wilderness Soc'y*, 479 F.2d at 873-75 (rejecting argument that permit for the Trans-Alaska pipeline authorized only temporary use of public lands).

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[10] The Forest Service brief cites *Conway v. Fabian*, 89 P.2d 1022, 1029 (1939), for the proposition that mine tailings may be deposited on unclaimed public lands. U.S. Brief at 30. That state court case involved a dispute between two mining claimants, not the rights of the U.S. as owner of the underlying land.

[11] It is equally inconceivable that Congress created a statutory scheme whereby miners can "temporarily" store billions of tons of mining waste on public lands, but must remove that waste and restore the public lands should those lands be subsequently withdrawn, a task that would be astronomically expensive to attempt and impossible to accomplish.

The district court clearly understood the mischief accepting Defendants' argument would create for the tens of millions of acres of the nation's public lands that remain open to location under the Mining Law. It would effectively make all of these lands vulnerable to permanent, exclusive uses by those who claimed them for purposes reasonably related to mining. As the court found, "[n]o limiting principle would conscript surface use [of public lands] under the Forest Service's interpretation of the Mining Law." 409 F. Supp. 3d at 762. Indeed, it could "render the act of location moot" because a developer would not need to locate any mining claims in order to gain "a right to all the surface of public lands not withdrawn." *Id.* at 762-63. As the court correctly concluded, "[t]his simply does not comport with the plain language of the Mining Law." *Id.* at 763.

III. Neither the 1897 Organic Act Nor the Forest Service Regulations Authorize the Forest Service to Override the Mining Law's Limitations

As we have seen, the 1872 Mining Law does not give mineral developers the right to permanently use and occupy public lands for which they have no valid mining claim, as Rosemont seeks to do. Neither the 1897 Organic Act nor Forest Service Regulations create such a right where the Mining Law does not.

A. The 1897 Organic Act

The Forest Service argues that the 1897 Organic Act effectively requires it to allow Rosemont to use any national forest land not withdrawn from the Mining Law

for any purpose reasonably related to mining.[12] This radical position misconceives the two things that Congress accomplished in that legislation. First, it made clear that national forests would generally be open to mineral activity under the Mining Law of 1872, unless formally withdrawn. Second, it directed the executive branch to regulate such activity to protect the lands from "destruction" by "depredations." 16 U.S.C. § 551.

Congress addressed mining within national forests in three sections of that 1897 Act, codified at 16 U.S.C. § 478, § 482, and § 551. In combination, these sections provide that (1) national forests lands (unless withdrawn) are "subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto," *id.* § 482; (2) any persons "prospecting, locating, and developing . . . mineral resources" within national forests must "comply with the rules and regulations covering such national forests," *id.* § 478; and (3) the Forest Service has a mandatory duty to protect national forests from "depredations" and regulate "occupancy and use . . . to preserve the forests . . . from destruction," *id.* § 551.

[12] In 1897, the forest reserves (now the national forests) were administered by the Interior Department. In 1905, Congress transferred responsibility for the national forests to the Forest Service in the Agriculture Department. 33 Stat. 628 (1905).

The nub of the Forest Service and Rosemont's argument is that the Organic Act mandates the Forest Service to provide security for mining operations on national forest lands that the Mining Law itself does not provide, by approving a plan of operations containing a permanent right to use and occupy lands outside of valid mining claims. This is a totally backwards reading of the statute. Congress did not empower the Forest Service to *enable* or *facilitate* mining operations on national forest land; rather, it allowed prospecting and location of mining claims "*subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto*." *Id.* § 482 (emphasis added). Indeed, Congress directed the Forest Service to go further and to protect national forest lands from mineral activities that threaten "destruction" by "depredations." *Id.* § 551.[13]

[13] As the Fourth Circuit concluded after examining its legislative history in some detail, "the primary concern of Congress in passing the Organic Act was the preservation of the national forests." *W. Va. Div. of Izaak Walton League of Am., Inc.*, 522 F.2d at 952. This Court has noted, in a case brought by those who filed mining claims on national forest lands, that the Organic Act gives the Forest Service authority to adopt "reasonable rules and regulations regarding mining operations within the national forests." *United States v. Weiss*, 642 F.2d 296, 298 (9th Cir. 1981). *Weiss* went on to caution that the Forest Service must respect the rights of those "locators" of claims who have a "right of possession and enjoyment of all the surface resources within their claim[s]." *Id.* at 299. But neither *Weiss* nor any of numerous other decisions construing the Forest Service's exercise of its 1897 Organic Act authority over hardrock mining have ever even hinted, much less held, that miners may make exclusive, permanent use of large tracts of national forest lands without locating valid mining claims on them.

B. The Forest Service's Part 228 Regulations

It took the Forest Service almost seventy years to fully implement the command of the 1897 Organic Act to regulate mining operations on national forests under the Mining Law of 1872. Forest Service regulations, adopted in 1974, require operators like Rosemont to submit and secure approval of plans of operations. *See* 36 C.F.R. § 228.

The Forest Service and Rosemont argue that these Part 228 regulations authorize the Forest Service to approve mining plans of operations that would make exclusive, intensive, permanent use of large amounts of national forest lands without the need to locate claims under the Mining Law. They contend this authority is found in the regulation's definition of "operations," which includes all activities related to mining, including roads and other means of access, "*regardless of whether said operations take place on or off mining claims*." 36 C.F.R. § 228.3(a) (emphasis added).

As the district court explained, a broad definition of "operations" makes sense. 409 F. Supp 3d at 763-64. Several decisions of this circuit uphold the authority of the Forest Service to regulate how mineral developers use national forest lands outside of their mining claims in order to gain access to those claims. "[T]here can be no doubt that" the agency "possesses statutory authority to regulate activities related to mining . . . in order to preserve the national forests." *Clouser v. Espy*, 42

F.3d 1522, 1530 (9th Cir. 1994) (collecting cases). Indeed, this Court has held that regulating a claimholder's use of national forest lands outside the boundaries of its claims is appropriate even if it affects the profitability of mining operations, and thus the validity of the mining claims themselves. *Id.*

But as the court below properly noted, the Forest Service's broad regulatory definition of "operations" does *not* authorize the Forest Service to approve activities in a proposed plan of operations that contradict the Mining Law itself. To do that, the court observed, would ignore the stated purpose of these regulations, which is to:

> set forth rules and procedures through which use of the surface of National Forest System lands *in connection with operations authorized by the United States mining laws (30 U.S.C. § 21-54)*, . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. 36 C.F.R. § 228.1.

409 F. Supp. 3d at 755 (emphasis in original).

As the court correctly concluded, the Forest Service's interpretation of its own regulatory definition of "operations" to approve activities that are not "authorized" by the Mining Law "circumvent[s] the statutory law." *Id.* The judiciary's responsibility in such cases is, as the Supreme Court recently noted, to "ascertain and follow the original meaning of the law" before it, and not "favor contemporaneous or later practices *instead of* the laws Congress passed." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) (emphasis in original).

IV. The District Court Correctly Ruled That the Forest Service's Decision to Assume the Validity of the Unpatented Mining Claims that Rosemont Proposed to Use for Its Mine Waste Dump Was Arbitrary and Capricious

Rosemont located dozens of mining claims on the national forest land that it proposes to use as a dumping ground.[14] It and the Forest Service offer an alternative argument; namely, that these claims provide an adequate legal foundation for the Forest Service to approve exclusive, permanent control of the claimed lands without questioning the validity of the claims.

Accepting this argument would greatly undermine the Mining Law, which unequivocally provides that mining claims are valid only if the claimed land contains "valuable deposits" of minerals." 30 U.S.C. § 23. The Supreme Court has long recognized that mere location of a mining claim—"the act or series of acts whereby the boundaries of the claim are marked"—"confers no right in the absence of a discovery." *Cole v. Ralph*, 252 U.S. 286, 296 (1920) (citing cases).[15] By contrast, those who have located *valid* claims (supported by a discovery) have "the exclusive right of possession and enjoyment" of the claimed lands, so long as they are in

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[14] *See supra* notes 2-3.

[15] 30 U.S.C. § 23 treats discovery as the initial act: "[N]o location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located." The Supreme Court in *Cole v. Ralph* recognized, however, that the "statutory order" can be reversed, so that a location can be made first, but only "becomes effective from the date of discovery." 252 U.S. at 296.

compliance with U.S. laws and state and local laws not in conflict with them. 30 U.S.C. § 26.

Defendants' alternative argument requires ignoring the plain command of the Mining Law that only *valid* claims confer rights. Only by ignoring it could the Forest Service disregard what the district court correctly saw as a "potent indication" that the claims were invalid. Rosemont's proposal to bury the claimed land under nearly two billion tons of waste rock and tailings gives rise to the "strong inference that there is no valuable mineral deposit lying below the waste site." 409 F. Supp. 3d at 762; *see also id.* at 748, 753-754, 760-761.

Defendants attempt to recast the Forest Service decision to ignore this obvious indication of the claims' invalidity as an exercise of enforcement discretion, contending that the Forest Service merely decided not to institute a formal challenge to the validity of Rosemont's mining claims. It is true that an agency's decision not to bring an enforcement action is among a small category "traditionally left to agency discretion" by the terms of the Administrative Procedure Act. *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *see Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) ("[W]e have read the exception in § 701(a)(2) [for decisions committed to agency discretion] quite narrowly."). But the Forest Service did something substantially more than merely "passive[ly] non-enforce[]" the Mining Law—it affirmatively approved Rosemont's plan of operations. By conferring

"affirmative . . . relief" on Rosemont, the Forest Service rendered a decision subject to judicial review. *See Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1906 (2020).

As the district court found, "a validity determination differs significantly from establishing a factual basis upon which the Forest Service can determine rights." 409 F. Supp. 3d at 761. The agency's approval effectively gave Rosemont an "exclusive right of possession and enjoyment" of national forest lands that 30 U.S.C. § 26 authorizes only through the location and maintenance of valid mining claims. By obliging the Forest Service to protect against "depredations" on the national forests, 16 U.S.C. § 551, the 1897 Organic Act required it to make some inquiry as to whether Rosemont had a colorable claim of right to use national forest land as a dumping ground before it approved the plan of operations. The Forest Service decision, therefore, violated both the Mining Law and Organic Act.

Thus, as the district court concluded, the Forest Service decision, "made without first establishing a factual basis upon which the Forest Service could form an opinion on surface rights," was arbitrary and capricious because it "entirely ignore[d] an important aspect of this problem," and was based on "an opinion that runs contrary to the evidence." 409 F. Supp. 3d at 757-58 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

V. Defendants Have Alternatives Available

Rosemont's lack of a statutory right to use national forest lands outside of valid mining claims does not leave it and the Forest Service without alternatives.

The Defendants could negotiate a land exchange, whereby the Forest Service would deed the site of the waste rock and tailings dump to Rosemont in exchange for lands of equivalent value that could serve the broad range of uses for which national forests are held. Congress has given the Agriculture Secretary broad authority to exchange national forest lands upon a determination that "the public interest will be well served" by it. 43 U.S.C. § 1716(a). It is hardly unknown for large mining enterprises to use public-private land exchanges as a tool to secure the lands they need. *Cf.* Southeast Arizona Land Exchange and Conservation Provision, included in the National Defense Authorization Act, Pub. L. No. 113-291, § 3003, 128 Stat. 3732 (2014) (authorizing land exchange to further the proposed Resolution Copper mine).

Alternately, Rosemont could file an application pursuant to the Forest Service's "Special Use" regulations found at 36 C.F.R. Part 251. 409 F. Supp. 3d at 756-57. These regulations generally authorize the agency to allow use and occupancy of national forest land for special purposes, if the agency finds that the use is in the public interest, subject to regulation by the Forest Service and payment of rental or other appropriate fees. The Defendants argue these regulations cannot

apply because by their own terms they do not govern uses "authorized by the regulations governing . . . minerals (part 228)." 36 C.F.R. § 251.50(a). But that limitation is not found in the Forest Service's governing statutes, and nothing prevents the Forest Service from amending the Part 251 regulations so that they explicitly encompass the use that Rosemont would like to make.

Finally, as the district court noted, another provision of the Mining Law authorizes the location of so-called "mill-site" claims that Rosemont might use, although mill-site claims have some serious limitations. 30 U.S.C. § 42; *see also* 409 F. Supp. 3d at 763 n.13. Indeed, a recent newspaper article reported that Rosemont has recently located some 755 mill-site claims as a "possible backstop if it loses the appeal."[16]

CONCLUSION

While Congress wanted to encourage mineral activity on the public lands in 1872, it did not do so without limitation. In any event, "policy arguments cannot supersede the clear statutory text." *Universal Health Serv. Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016). Or, as Justice Gorsuch put it for a unanimous Court, "it is quite mistaken to assume . . . that 'whatever' might appear to 'further[ ] the statute's

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[16] Tony Davis, *Feds, Company Say Valid Mining Claims Not Needed for Rosemont Mine OK*, Arizona Daily Star (June 28, 2020), https://bit.ly/32yP7wI (last visited Sept. 15, 2020).

primary objective must be the law.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)).

Just like the 1897 Organic Act's detailed limitations on timber harvesting and the 1920 Mineral Leasing Act's fifty-foot width limitation for pipelines, the Mining Law simply cannot accommodate what Rosemont and the U.S. would like to do on these public lands in the Coronado National Forest. The district court here echoed the courts in those cases by observing that the defendants' "remedy lies with Congress, not the courts," 409 F. Supp.3d at 763, assuming neither a land exchange nor a permit under the Part 251 Regulations is pursued.

Upon vacating the Forest Service's decision, the district court remanded the matter to the Forest Service for it to conduct such further proceedings as it deems appropriate. *Id.* at 766 n.17; *cf.* Rosemont Brief at 57-59 (arguing for a remand so that Rosemont may "submit additional evidence" to the Forest Service on the validity of its mining claims); U.S. Brief at 50-53 (same).

Whatever post-litigation remedies are pursued, however, the relevant law and the record before the court demonstrate unequivocally the soundness of the district court's well-reasoned decision vacating the Forest Service's approval of Rosemont's plan of operations. Accordingly, this court should affirm the district court's decision.

Respectfully submitted this 18th day of September, 2020,

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