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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Intervenor-Defendant-Appellant Rosemont Copper Company ("Rosemont") states that Rosemont is a wholly-owned subsidiary of Hudbay Minerals, Inc., a Canadian corporation. Hudbay Minerals, Inc. is a publicly traded company (NYSE: HBM; TSE: HBM).

Dated: June 22, 2020

s/ *Julian W. Poon*
Julian W. Poon

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3 Lindley on Mines § 843 (3d ed. 1914).....33

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John R. Jacus & Thomas E. Root, *The Law of Mine Waste: A Primer*,
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INTRODUCTION

Based on a fundamental misunderstanding and misapplication of federal mining law, as well as established doctrines requiring deference to expert administrative agencies, the District Court has ground to a halt Appellant Rosemont Copper Company's efforts to launch a significant mining project that will employ cutting-edge technology to minimize environmental impacts, produce more than a tenth of our nation's copper production, and generate valuable new jobs.

The Forest Service, along with several other agencies, subjected the Rosemont Project to twelve years of scrutiny, and conditioned approval on substantial mitigation and monitoring requirements. Yet the District Court prevented the Rosemont Project from proceeding because it believed the Forest Service was required to assess whether Rosemont had mining claims that were "valid"—*i.e.*, claims containing valuable mineral deposits—for *all* of the national-forest lands that Rosemont proposed to use for mining-related activity. The District Court compounded this error in concluding that the Forest Service should not have reviewed Rosemont's proposed storage of mine waste rock and tailings—an activity integral to almost all mining projects—under the agency's regulations governing mining in the national forests. This Court should reverse because these unprecedented holdings conflict with the governing statutes and regulations, the relevant caselaw, and longstanding administrative guidance and practice.

Prior to the District Court's decision, no court had ever held that a mining plan of operations may only be approved if all mining and mining-related operations will occur exclusively on valid mining claims. The District Court imposed this novel requirement on the Forest Service after misreading both the relevant statutes, which provide a broad grant of free and open access to federal lands for mining and mining-related operations, and the relevant regulations, which authorize the Forest Service to approve those operations on or off of mining claims. In fact, the Forest Service's definition of mining operations says exactly that: it encompasses "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, . . . regardless of whether said operations take place ***on or off*** mining claims." 36 C.F.R. § 228.3(a) (emphasis added).

The District Court's new rule not only contradicts that on-point regulation, but will also frustrate the longstanding policy of the United States to promote mining on federal lands, including in national forests. If the District Court's decision is left uncorrected and followed by other courts, miners would no longer be authorized under federal law to extract and process the valuable minerals underneath valid mining claims, unless all operations are confined entirely to the four corners of the claims. Such a rule would preclude most, if not all, significant mining operations in

national forests and on other federal lands, despite over 100 years of Congressional intent to encourage mining on those lands.

The District Court's ruling is further flawed because no statutory or regulatory basis exists for requiring the Forest Service to assess whether there are valuable mineral deposits in the land that is to be used as part of the mining plan of operations before the Service may approve such a plan. Well-settled administrative practice and guidance affirmatively contradict this key premise of the District Court's ruling, and for good reason: Whether a claim is supported by a valuable mineral deposit and is thus "valid" has nothing to do with whether mining operations should be permitted on open federal lands. Moreover, claim validity is no simple matter, as it turns on complex geological assessments, changing market values for mineral deposits, and changing costs of extraction.

The District Court's insistence that the Department of Agriculture's Forest Service must assess the factual basis for mining-claim validity is also erroneous because it foists upon the Service a responsibility that lies within the jurisdiction of a different agency—the Department of the Interior's Bureau of Land Management. And tellingly, *that* agency has expressly declined to require proof of mining-claim validity before approving mining plans of operations on the lands it administers.

Because the District Court erred as a matter of law and exceeded its authority in overriding the expert agency's approval of Rosemont's mining plan of operations, this Court should reverse.

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1346. On July 31, 2019, the District Court entered an order granting Appellees' summary-judgment motion, and on August 2 entered judgment. 1ER4-40; 1ER3.[1] Rosemont filed a motion under Federal Rule of Civil Procedure 59 on August 30, 2019, 5ER873, which the District Court denied on October 25, 2019, 1ER1-2. Rosemont filed a timely notice of appeal on December 20, 2019. 2RER41-45. The Government filed a timely notice of appeal on December 23, 2019. 2ER41-47. Both appeals were consolidated by this Court on March 12, 2020. No. 19-17585, Dkt. 21.

This Court has jurisdiction under 28 U.S.C. § 1291. *See Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990); *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 935 (9th Cir. 1998).

STATEMENT OF THE ISSUES

I. Whether the District Court erred in holding that mining and mining-related operations on open federal lands are authorized to take place only on valid mining

[1] "ER" refers to the Government's Excerpts of Record; "RER" refers to Rosemont's Excerpts of Record.

claims, and that the Forest Service's Part 228A mining regulations therefore apply only to such operations on valid mining claims.

II. Whether the District Court erred in holding that the Forest Service is without power to approve a mining plan of operations unless it first finds a factual basis to support the validity of the mining claims encompassed within the plan.

III. Whether the District Court erred in undertaking its own analysis of the factual basis for the validity of the mining claims at issue, instead of remanding to the agency to do so in the first instance.

STATUTORY AND REGULATORY FRAMEWORK

Before federal law expressly authorized mining and mining-related operations on federal lands, mining was conducted by miners who understood that our nation's mineral resources belong to its citizens. 2 Rocky Mountain Mineral Law Foundation, American Law of Mining § 33.01[1] (2d ed. 2019). In those early years, "the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules and customs of miners in any particular district were enforced as valid." *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 62 (1898). "[U]nder this [territorial] legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have

grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." *Sparrow v. Strong*, 70 U.S. 97, 104 (1865).

In 1872, Congress enacted the General Mining Law that governs to this day, codifying and expressly incorporating these customs and local mining practices. Under that law, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . ., under regulations prescribed by law." 30 U.S.C. § 22. The General Mining Law "permit[s] citizens to enter and explore unappropriated federal lands in search of 'valuable mineral deposits.'" *McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013) (quoting 30 U.S.C. § 22). "The general mining laws, 30 U.S.C. § 22 *et seq.*, still in effect today, allow United States citizens to go onto unappropriated, unreserved public land to prospect for and develop certain minerals." *United States v. Locke*, 471 U.S. 84, 86 (1985).

Roughly two decades later, Congress passed the Organic Administration Act of 1897 ("Organic Act"), which provides that the Secretary of Agriculture must protect against "depredations" of the national forests, and grants the Secretary the authority to promulgate regulations "to preserve the forests thereon from destruction." 16 U.S.C. § 551. But in accordance with the General Mining Law and

the fact that national forests are "not parks set aside for nonuse, but [were] established for economic reasons," *United States v. New Mexico*, 438 U.S. 696, 708 (1978) (quoting 30 Cong. Rec. 966 (1897) (Cong. McRae)), the Organic Act also states that any such regulations may not "*prohibit* any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478 (emphasis added). Thus, while mining activity in national forests may be subject to "reasonable rules and regulations," "prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

The Secretary of Agriculture, through the Forest Service, has promulgated a set of regulations known as the Part 228A regulations "to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1. Under these regulations, before mining operations that will "likely cause a significant disturbance of surface resources" may commence, the Forest Service must first approve a mining plan of operations. 36 C.F.R. § 228.4(a)(3). The Part 228A regulations define mining

"[o]perations" to mean "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and *all uses reasonably incident thereto*, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place ***on or off*** *mining claims*." *Id.* § 228.3(a) (emphases added).

Reflecting historical local customs, federal mining law provides certain incentives in the form of property rights when a miner properly locates a mining claim. *See, e.g.*, *United States v. Shumway*, 199 F.3d 1093, 1099-1101 (9th Cir. 1999). After locating a claim, a miner has "a property interest, which is itself real property in every sense, and not merely an assertion of a right to property." *Id.* at 1100. Mining claims are valid if supported by a "mineral" "discovery" that is "valuable"—*i.e.*, "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.'" *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 335-36 (1963) (citation omitted). A mining claim may be unpatented (in which case the United States retains title to the land but the miner has rights of use) or patented (in which case the claimant acquires the land in fee simple). *See, e.g.*, *id.* at 336; *United States v. Backlund*, 689 F.3d 986, 991 & n.3 (9th Cir. 2012). Since 1994, Congress has prohibited the processing of applications to patent mining claims. *See, e.g.*, *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1169 & n.2

(10th Cir. 1997); *Freeman v. U.S. Dep't of Interior*, 83 F. Supp. 3d 173, 179 (D.D.C. 2015).

In 1955, Congress addressed the problem of "sham" use of unpatented mining claims by enacting the Surface Resources and Multiple Use Act ("Surface Use Act"), 30 U.S.C. § 612 *et seq.* Examples of such abuse included use of mining claims for private fishing and hunting camps, timber extraction, and saloons. *See, e.g.*, *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1282 (9th Cir. 1980); *Teller v. United States*, 113 F. 273 (8th Cir. 1901); *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910). The Surface Use Act thus restricted the use of unpatented mining claims to legitimate mining and mining-related activities: specifically, "prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a).

As a general matter, mining-related activities may only take place on federal lands open to mineral entry. The Government can and does protect land of particular cultural, environmental, or other value by withdrawing it from mineral entry through legislation or administrative action, creating, for example, national parks, wilderness areas, and military reservations. *See, e.g.*, *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 854-58 (9th Cir. 2017) (land withdrawn near Grand Canyon National Park). The Rosemont Project seeks to use national-forest land that is indisputably open to mineral entry.

Although the General Mining Law dates back to the nineteenth century, in the late twentieth century Congress again "declare[d] that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries," as well as "the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a.

STATEMENT OF THE CASE

I. Factual Background

Rosemont Copper Company is developing an open-pit copper mine and mineral-processing facilities—the Rosemont Project—in the Santa Rita Mountains in southeastern Arizona. The Project is located within the Rosemont Mining District, an area with a history of mining and mineral processing dating back to 1880. 5ER695-96; 4ER516-17. The Rosemont Project is expected to produce an estimated 5.88 billion pounds of copper, 194 million pounds of molybdenum, and 80 million ounces of silver. 5ER696. This will represent approximately 11 percent of total U.S. copper production (based on 2011 statistics). 5ER696.

The Rosemont Project consists of an open-pit-mine; a processing plant; waste rock and tailings storage facilities; and ancillary facilities, including access and

maintenance roads, and electrical and water supply lines. *E.g.*, 5ER696-98 (summary with maps); 5ER793-815 (detailed description). The Project covers an estimated 5,431 acres of land, consisting of 1,197 acres owned by Rosemont, 574 acres owned by the State of Arizona, and 3,653 acres of land in the Coronado National Forest managed by the Forest Service. 5ER725 (summary of selected action). The central mining area where ore will be extracted occupies 955 acres, consisting of 590 acres of patented mining claims owned in fee simple by Rosemont and 365 acres of its unpatented mining claims on national-forest land. 3ER383; 4ER517.

The rock that must be removed to reach the economic ore deposit is the "waste rock." 4ER547. The residue remaining after ore processing, called "tailings," will be dewatered using a state-of-the-art method that produces "dry-stack" tailings. 3ER385-86. The water removed from the tailings will be recycled and reused on-site, 3ER385-86, significantly reducing the Project's overall water needs, 4ER638, and minimizing the reduction in downstream surface and subsurface water flows, 5ER711. Waste rock and tailings will be stored on Rosemont's unpatented claims outside the open pit. 5ER796.

Rosemont holds 132 patented claims within the Project area, some of which date from 1898, predating Arizona statehood. 4ER517. Rosemont's remaining

mining claims on national-forest land are unpatented. 4ER517; *see also* 3ER353-54 (project map).

A. The Forest Service's Review of the Rosemont Project

Rosemont spent over twelve years working with federal, state, and local agencies to secure approval of the Project, including the Forest Service's approval under the Part 228A regulations of Rosemont's mining plan of operations. 3ER358; 2ER49. Rosemont submitted its preliminary mining plan to the Forest Service in July 2007. 3ER358. On March 13, 2008, the Service published, in the Federal Register, a Notice of Intent to Prepare an Environmental Impact Statement, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1500 *et seq.*, notifying the public of potential issues identified by resource specialists and setting forth other information required by NEPA. 2RER150-52.

During the NEPA "scoping period," the Forest Service held six public meetings and three public hearings, solicited oral and written comments, and used a toll-free hotline to solicit public input (ultimately receiving over 11,000 comments) all in order to define the range of issues and possible alternatives to be addressed in the Environmental Impact Statement. 5ER762; 3ER365-66.

As a result, the Service evaluated the impact of the Project on: (1) land stability and soil productivity; (2) air quality; (3) water resources; (4) springs, seeps,

and riparian vegetation; (5) plants and animals; (6) cultural resources; (7) visual resources; (8) dark skies and astronomy; (9) recreation; (10) public health and safety; (11) social and economic resources; and (12) transportation/access. 5ER699-704.

In October 2011, the Service published its Draft Environmental Impact Statement, triggering another round of public comments. 2RER148-49; *see also* 5ER763. The Service evaluated a "no-action alternative" and five "action alternatives." ER379-80. The Forest Service developed these alternatives after considering: "(1) the purpose of and need for the action; (2) the details of the proposed action (preliminary [mining plan]); (3) how to address significant issues raised during the scoping period; and (4) additional alternatives suggested by the public and agencies during the scoping period." 5ER827; 3ER379. After publishing its Draft Environmental Impact Statement, the Service held seven public meetings between November 2011 and January 2012, and considered more than 25,000 submissions from the public. 5ER763.

Ultimately, in December 2013, the Forest Service published its Final Environmental Impact Statement and Draft Record of Decision. 3ER279; 2RER143-47. When the FEIS and Draft ROD were issued, the Forest Service solicited objections from the public. 5ER817. The objection-filing period lasted 45 days, and the objections were considered and responded to by the Regional Forester. 5ER817. The Service then issued two supplemental information reports addressing

new information. 2RER127-33; 2RER134-42; 5ER693-94. Following this decade-long review process, the Forest Service issued its final Record of Decision in June 2017. 5ER791. Although the Forest Service required numerous changes to Rosemont's mining plan of operations, it did acknowledge that it could not entirely prohibit mining in the Coronado National Forest. *E.g.*, 5ER755; 3ER358-59. The Forest Service granted final approval of Rosemont's mining plan of operations in March 2019. 2ER49.

B. Key Components of the Rosemont Project

The Forest Service selected for implementation the Barrel Alternative—the one that "best achieves the minimization of impacts to Forest Service surface resources while allowing mineral operations and all uses reasonably incident thereto"—and exercised its discretion to amend the 1986 Coronado National Forest Land and Resource Management Plan accordingly. 5ER704, 706. That alternative, which modified the proposed location and configuration of the waste-rock and tailings facilities, was selected for several reasons, including:

- It will directly impact the least amount of land (compared to any other action alternative), including the least amount of land bordering natural waterways, the fewest number of springs, and the fewest acres of upland vegetation. 5ER708-09.
- It will result in the smallest affected area that could become susceptible to invasive plant species. 5ER709.

- It will result in the smallest potential reduction in groundwater outflow to Cienega Creek and retain the greatest amount of surface water flow into downstream drainages. 5ER711.
- It is the only action alternative that does not include on-site oxide-ore leaching, known as heap leaching. 5ER713.
- It has the smallest impact of the action alternatives on animal-movement corridors and connectivity between wildlife habitats. 5ER716.
- Aside from one other action alternative, it will have the least direct impact on the "waters of the U.S." 5ER708.

Under the Barrel Alternative, ore will be crushed until it is reduced to the size and consistency of sand, and then copper and molybdenum will be separated from the remaining material by a flotation circuit. 3ER385-86. The resulting copper and molybdenum concentrates will be dewatered, thickened, filtered, and shipped off-site for additional processing. 3ER385-86. Concentrates will be smelted or refined off-site. 3ER296.

C. Environmental Mitigation Requirements

Based on its environmental review and exercising its authority under its Part 228A mining regulations, the Forest Service required substantial changes to the Project and measures to minimize or mitigate the Project's environmental, cultural, and other impacts. 5ER706; 5ER730-54; 3ER445-47. These measures include:

- Purchasing surface water rights (including 1,122 acre-feet of water rights) and using them to enhance biological functions and to offset potential impacts in the Cienega Creek watershed. 4ER577-78.
- Acquiring and restoring Sonoita Creek Ranch (including 1,200 acres of land and 590 acre-feet of water rights). 4ER587-88.

- Funding camera studies for large predators, including jaguar and ocelot. 4ER588.
- Establishing the $2,000,000 Cienega Creek Watershed Conservation Fund for mitigation projects in the Cienega Creek watershed. 4ER595.
- Recording a restrictive covenant or conservation easement on private parcels in Davidson Canyon (covering 383 acres). 4ER599-600.
- Contributing $1,250,000 for enhancing and managing habitat for yellow-billed cuckoos and southwestern willow flycatchers. 5ER745-46.

Rosemont also committed to establishing the Santa Rita Mountains Community Endowment Trust totaling over $25 million, in addition to contributing $500,000 per year during operations (*i.e.*, an additional $12.5 million) to fund community projects, including recreational, cultural, and conservation projects. 4ER653.

Finally, the Forest Service also required Rosemont to properly close the mine and reclaim the Project area, and to post a bond to guarantee compliance with these requirements. 5ER730-32, 734-35; 5ER786-87.

D. Cultural Mitigation Requirements

After completing an extensive government-to-government consultation with the Tohono O'odham Nation and other Indian tribes, conducting archival and oral-history investigations, and considering all the alternatives, the Forest Service mandated almost a dozen cultural mitigation measures, including:

- Archaeological excavation and data recovery on directly-affected sites. 5ER752; 4ER621-22.

- Respectful and appropriate treatment of human remains. 5ER752; 4ER622.
- Curation of archaeological collections, including storage and interpretation. 5ER752; 4ER622-23.
- Monitoring and treatment of previously unknown archaeological sites, including burial and proper handling of anything discovered during Project activities. 5ER752; 4ER623.
- Limiting ground-disturbing activity between the Project's perimeter fence and security fence to protect cultural resources. 5ER752; 4ER624.
- Training all Rosemont employees and contractors on how to identify, avoid, and protect cultural sites. 5ER752; 4ER624.
- Allowing continued access, with five days' advance notice, to sacred and other sites for cultural practices. 5ER752; 4ER625.
- Allowing continued access to springs for ceremonies, plant collections, and similar activities. 5ER752; 4ER625.

E. Review by Other Agencies

The Forest Service's approval of the Rosemont Project is explicitly conditioned on obtaining, and complying with all of the terms of, the federal, state and local permits and authorizations also required to operate the mine. 5ER787-89; 3ER412-13. Rosemont has obtained permits and authorizations from the U.S. Army Corps of Engineers, the U.S. Department of Transportation, the U.S. Environmental Protection Agency, the Arizona Corporation Commission, the Arizona Department of Agriculture, the Arizona Department of Environmental Quality, the Arizona Department of Transportation, the Arizona State Land Department, the Arizona

State Mine Inspector, the Arizona Department of Water Resources, and various Pima County departments and agencies. 3ER408-11; 5ER787-89.

II. Procedural History

After the Forest Service issued its Record of Decision approving Rosemont's mining plan of operations as modified during the review process, Plaintiffs-Appellees Save the Scenic Santa Ritas, Arizona Mining Reform Coalition, Center for Biological Diversity, and the Grand Canyon Chapter of the Sierra Club (collectively, "SSSR"), as well as the Tohono O'odham Nation, Pasqua Yaqui Tribe, and Hopi Tribe (collectively, the "Tribes") sued the United States, the Secretary of Agriculture, the Forest Service, and several Forest Service officials, asserting claims that, *inter alia*, the Forest Service failed to properly exercise its discretion to protect the Coronado National Forest from "depredations," in violation of the Organic Act, NEPA, and the Administrative Procedure Act ("APA"). 1ER7-8.[2] Rosemont intervened in the actions as a defendant. 5ER857; 5ER881-82; 5ER887.

After the parties briefed and argued cross-motions for summary judgment, the District Court granted summary judgment in favor of SSSR and the Tribes on

[2] The Center for Biological Diversity separately sued the Fish and Wildlife Service and the Forest Service asserting violations of the Endangered Species Act; Rosemont brought a cross-claim against the Fish and Wildlife Service related to the designation of critical habitat for jaguars. The District Court resolved the claims in that separate action in an order dated February 10, 2020, and Rosemont has appealed that ruling. *See* 9th Cir. No. 20-15654.

July 31, 2019, and "vacate[d] and remand[ed] the Forest Service's FEIS and ROD," entering judgment on August 2. 1ER39; 1ER3; *see also* 1ER40 n.17 (ruling that "allowing the Rosemont Mine to proceed while the Forest Service conducts further proceedings on remand is unwarranted"). The District Court's decision was premised on two legal conclusions.

First, the District Court held that before approving Rosemont's mining plan of operations, the Forest Service should have determined whether there was a "factual basis" supporting the validity of the claims to be used for storing the waste rock and tailings. 1ER26-27. In the District Court's view, the Service's failure to make that determination constituted an "[a]bdicat[ion of] [i]ts [d]uty to [p]rotect the Coronado National Forest from [d]epredation." 1ER26. Such a "factual basis" determination, which the District Court asserted "differs significantly from" a "validity determination," is necessary because mining and mining-related operations can supposedly only occur on claims as the "Mining Law authorizes occupation of the surface *only within a claim*." 1ER33 (emphasis added). Accepting Rosemont's "unpatented mining claims [as] valid" was, in the District Court's view, "a crucial error" that "tainted the Forest Service's evaluation of the Rosemont Mine from the start." 1ER11.

The District Court then undertook its own geological and economic analysis in the first instance of whether such a factual basis existed, 1ER31-32, concluding

that Rosemont's unpatented claims at issue were not supported by economically valuable mineral deposits. 1ER33. "[T]he fact that Rosemont proposed to dump 1.9 billion tons of waste on its unpatented claims on 2,447 acres of the Coronado National Forest was a potent indication," in the District Court's view, "that Rosemont's unpatented claims on the land in question were invalid." 1ER33.

Second, the District Court held that the Forest Service applied the wrong set of regulations to evaluate Rosemont's proposed storage of waste rock and tailings. 1ER37. The District Court concluded that because Rosemont's proposed operations were not "authorized" under the Mining Law—because, in its view, they contemplated activity on unpatented mining claims, the validity of which had not been established—the Part 228A regulations governing mining operations could not apply. 1ER37. Instead, the District Court held that a different set of regulations—the Part 251 regulations governing "special uses"—applied, and under those regulations the Forest Service had "significant authority and discretion to prohibit activity on Forest Service lands, whereas the Part 228 regulations merely balance competing interests." 1ER25-26, 37. The District Court thus criticized the Forest Service for "fail[ing] to take the requisite hard look" at a no-action alternative and for "informing the public that [the Service] could not truly consider any alternative that rejected the [mining plan of operations] or substantially modified it as to make the mine economically unfeasible." 1ER39.

On August 30, 2019, Rosemont filed a motion to alter or amend judgment under Federal Rule of Civil Procedure 59, contending that the District Court erred in conducting its own analysis in the first instance of the factual basis for the validity of Rosemont's unpatented mining claims; basing its decision on the purported invalidity of those claims; and vacating the Forest Service's Final Environmental Impact Statement. 5ER875. The District Court summarily denied Rosemont's motion without hearing argument, in a two-page order on October 28, 2019. 1ER1-2. The Government and Rosemont each appealed. 2RER41-45; 2ER41-47.

STANDARD OF REVIEW

A district court's ruling on summary judgment is reviewed *de novo*. *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (per curiam). "Section 706(2)(A) of the APA requires a reviewing court to uphold agency action unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1042 (9th Cir. 2015) (quoting 5 U.S.C. § 706(2)(A)). This Court "must consider [de novo] whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (citation omitted). "[T]he standard of review is highly deferential"

to the agency's exercise of its discretion, *id.*, especially when a "high level of technical expertise" is required. *Ctr. for Biological Diversity*, 807 F.3d at 1043.

SUMMARY OF ARGUMENT

I. The District Court erred in holding that before the Forest Service could approve Rosemont's mining plan of operations, it first had to determine that there was evidence that valid mining claims existed on all of the lands Rosemont proposed to use. No other court has ever reached such a conclusion, and for good reason, because it runs counter to the plain meaning of the pertinent statutory and regulatory provisions, which broadly permit entry onto open federal lands for the purposes of mining and mining-related activities and expressly contemplate that such activities may "take place *on or off* mining claims." 36 C.F.R. § 228.3(a) (emphasis added).

A. The plain language of the General Mining Law broadly provides that all "lands belonging to the United States . . . shall be free and open" to mining and mining-related operations, subject to "regulations prescribed by law," never distinguishing between lands covered or not covered by mining claims. 30 U.S.C. § 22. And in enacting the Organic Act, Congress specified that nothing therein "shall . . . prohibit any person from entering upon . . . national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478. By imposing a requirement that prospective miners must first provide sufficient evidence of valuable mineral

deposits before using any land encompassed within a mining plan in national forests for mining or mining-related activity, the District Court read into the pertinent statutory provisions a major limitation not grounded in any statutory text.

B. The District Court's holding reads an "on-a-mining-claim" limitation into the statutes that not only finds no support in the statutory text, but also directly contradicts on-point regulations. Those regulations define "operations authorized by the United States mining laws" to mean "*[a]ll* functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and *all uses reasonably incident thereto*, . . . regardless of whether said operations take place ***on or off*** *mining claims*." 36 C.F.R. §§ 228.1, 228.3(a) (emphases added). The Forest Service's own regulations, in other words, specifically allow for mining-related activity to occur on lands *not* covered by any mining claim, and specifically call for the agency to regulate mining and mining-related activity occurring on *all* national-forest land (whether claimed or not). Such activity includes storing waste rock and tailings, which plainly qualifies as "uses reasonably incident" to the "development, mining or processing of mineral resources." 36 C.F.R. § 228.3(a). By concluding otherwise, the District Court failed to accord the requisite deference mandated by the Supreme Court and this Court to the Forest Service's interpretation and application of the governing statutes and of its own regulations and administrative guidance. *See, e.g.*, *Chevron, U.S.A., Inc. v.*

Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 625-26 (9th Cir. 2018) (en banc).

C. Building upon its misreading of the governing statutes and regulations, the District Court erred in concluding that the Forest Service applied the "[w]rong [r]egulations" and "regulatory framework"—the Part 228A regulations, rather than the Part 251 special-use regulations—to Rosemont's proposed storage of waste rock and tailings. 1ER36-37, 39. The Part 228A regulations "set forth [the] rules and procedures" governing "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws . . . so as to minimize adverse environmental impacts." 36 C.F.R. § 228.1. The Part 251 special-use regulations, in contrast, apply to "[a]ll uses of National Forest System lands, improvements, and resources, ***except*** *those authorized by the regulations governing . . . minerals (part 228).*" 36 C.F.R. § 251.50(a) (emphases added). The Part 251 regulations were therefore, by their plain terms, inapplicable here.

II. The District Court also erred in holding that the Forest Service must first determine that a factual basis exists for believing that any mining claims covered by a proposed mining plan of operations are valid before the Service may approve such a plan. Once again, the governing statutes offer no support for this holding, and such a requirement contradicts the on-point regulatory provisions and administrative

guidance to which the District Court failed to give the requisite deference, and erects a nearly insuperable barrier to conducting major mining operations on federal lands. Moreover, exclusive jurisdiction to determine the validity of mining claims lies with the Department of the Interior's Bureau of Land Management, not the Department of Agriculture's Forest Service.

III. Even if the Forest Service had to determine that there was a factual basis to believe that all of Rosemont's mining claims were valid before it could approve Rosemont's mining plan of operations, the expert agency—the Forest Service, not the District Court—should have made that technical, fact-intensive determination in the first instance.

ARGUMENT

I. The District Court Erroneously Concluded That Mining and Mining-Related Operations Are Only Authorized on Open Federal Lands Over Which Valid Mining Claims Have Been Substantiated.

The District Court misread the relevant statutes, as well as the Forest Service's on-point regulations and administrative guidance, and erred as a matter of law in concluding that the "Mining Law authorizes occupation of the surface *only within a claim*." 1ER33 (emphasis added). It then concluded that because Rosemont's mining plan of operations provided for the placement of waste rock and tailings on what the District Court determined were presumptively invalid unpatented mining

claims, the Forest Service erred in applying the Part 228A mining regulations in assessing and approving Rosemont's plan. 1ER36-37.

The District Court's approach cannot be reconciled with the governing statutes and regulations that allow for mining and mining-related operations on open lands either *on or off* mining claims. No statute or regulation requires that a person wishing to explore and develop the mineral resources of the national forests and other federal lands must first have mining claims—let alone valid ones—covering all of the land to be used. A mining claim exists for an entirely different purpose: it serves to protect any investment a miner ultimately makes by granting a set of property rights, including the right to exclude competing claimants.

Based on its fundamental misapprehension of the law and refusal to defer to the Forest Service's regulations and sound judgment, the District Court erroneously vacated the Service's Final Environmental Impact Statement and Record of Decision and, with them, over a decade's worth of exhaustive and expert regulatory review.

A. Under the Plain Meaning of the Governing Statutes, Authorized Mining and Mining-Related Operations in National Forests Are Not Limited to the Four Corners of a Mining Claim.

The District Court's foundational premise that the "Mining Law authorizes occupation of the surface [of federal lands] *only within a claim*," 1ER33 (emphasis added), cannot be reconciled with the plain meaning of the governing statutes.

Under those statutes, mining and mining-related operations in national forests and other federal lands may occur on or off a claim.

As this Court has recognized, "[m]ining has been accorded a special place in our laws relating to public lands." *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). In 1872, Congress broadly provided in the General Mining Law—without drawing any distinction between lands covered and not covered by mining claims—that "*all valuable mineral deposits in lands belonging to the United States*, both surveyed and unsurveyed, *shall be free and open* to exploration and purchase, and the lands in which they are found to occupation and purchase." 30 U.S.C. § 22 (emphasis added). The *only* limitations on this broad grant are "regulations prescribed by law, and according to the local customs or rules of miners . . . so far as . . . not inconsistent with the laws of the United States." *Id.*

The General Mining Law thus embodies "a strong encouragement to the private sector to engage in mineral activity on federal lands," and "[i]ts free access policy went so far as to allow the private sector to undertake such activity unilaterally, without any advance notice or permission." John D. Leshy, The Mining Law: A Study in Perpetual Motion 19 (1987). And it remains to this day "the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in," among other things, "the development of economically sound and stable domestic mining, minerals, metal and mineral

reclamation industries." 30 U.S.C. § 21a; *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

The general grant of access to federal lands for mining codified in 30 U.S.C. § 22 is distinct and independent from the system of mining claims established in separate statutory provisions of the General Mining Law (30 U.S.C. §§ 23, 26, 28, 35). Mining claims existed and were codified by statute to confer a property right on miners to *exclude* others. *See, e.g.*, *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 934 (9th Cir. 1998) ("A mining claim confers the right to exclusive possession of the claim, including the right to extract all minerals from the claim without paying royalties. . . ."). Specifically, 30 U.S.C. § 26 provides that those who have located a valid mining claim "shall have the *exclusive* right of possession and enjoyment of all the surface included within the lines of their locations." *Id.* (emphasis added). While the Government, after the 1955 enactment of the Surface Use Act, can permit other surface uses of land subject to unpatented mining claims, those uses may not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b).

The General Mining Law's grant of an exclusionary right upon location of a valid mining claim was in no sense a limitation on the general rule that "all valuable mineral deposits in lands belonging to the United States" are "free and open" to

mining. 30 U.S.C. § 22. The District Court's contrary view was grounded in the Supreme Court's observation in *Cameron v. United States*, 252 U.S. 450, 460 (1920), and *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 337 (1963), that "no right arises from an invalid claim of any kind." 1ER22. But the immediately preceding sentence in *Cameron* and *Best* makes clear that the "right" that does not "arise[]" from an invalid claim is the right to possess the land and exclude others: "If valid, [a claim] gives to the claimant certain exclusive possessory rights. . . ." *Cameron*, 252 U.S. at 460; *Best*, 371 U.S. at 337. And as the Government explained to the District Court, conducting mining operations on open land off a claim does not involve a right "to possession," but rather "a right of use" that is "temporary," not "permanent." 2RER49.

Twenty-five years after enactment of the General Mining Law, Congress passed the Organic Act, which instructed the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests." 16 U.S.C. § 551. But at the same time, Congress restricted the Secretary from "prohibit[ing] any person from entering upon such national forests for all proper and lawful purposes, including that of *prospecting*, *locating*, *and developing* the mineral resources thereof." *Id.* § 478 (emphasis added). The Organic Act thus re-affirmed that Congress has authorized miners to enter upon and use national forests to conduct mining-related operations, and it did so without

drawing any distinction between lands covered by mining claims and those that are not.

Half a century later, in enacting the Surface Use Act of 1955 to "eliminate some of the abuses that had occurred under the mining laws," *Converse v. Udall*, 399 F.2d 616, 617 (9th Cir. 1968), Congress once again did not impose any kind of on-a-claim limitation before a miner may engage in mining and mining-related operations. Instead, Congress prohibited the use of mining claims for non-mining purposes by defining what activity can permissibly occur on an unpatented mining claim. Congress specified that "[a]ny 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." 30 U.S.C. § 612(a); *see also* 30 U.S.C. § 612(b) (broadly prohibiting any non-mining-related uses of the surface of mining claims from "endanger[ing] or materially interfer[ing] with prospecting, mining or processing operations or uses reasonably incident thereto").

Significantly, the Surface Use Act never says that mining or mining-related activity may take place *only* on a claim. Instead, it says that a miner's use of an unpatented mining claim is limited to legitimate mining-related purposes. And consistent with the General Mining Law, the Surface Use Act broadly defines such legitimate mining-related purposes to include "prospecting, mining or processing

operations *and uses reasonably incident thereto*." 30 U.S.C. § 612(a) (emphasis added)*; see also* 30 U.S.C § 612(b).

The District Court's misplaced focus on mining claims is also undermined by another statute, the Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701 *et seq*. Enacted a century after the General Mining Law, this statute for the first time created a federal system—distinct from the local systems already in place—for recording mining claims on federal lands. 43 U.S.C. § 1744. If the District Court were right that claim validity is the *sine qua non* of mining operations on federal lands, it is inconceivable that 104 years would elapse before Congress created a federal system to track those claims.

The plain language of the governing statutes thus broadly provides for the free and open exploration, development, and use of national forests and other federal lands for mining and mining-related operations, without imposing any kind of on-a-claim limitation. Holding that such an extra-textual limitation exists would invade "Congress's province" and "add words to the law to produce" what Plaintiffs believe would "be a desirable result." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015). That flawed "approach is the one that inheres in most incorrect interpretations of statutes." *Id.* This Court should instead follow the statutes as written, because where Congress has directly spoken on the issue, as it has here, "that is the end of the matter; for the court as well as the agency, must give

effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Under the plain language of the governing statutes, the particular mining-related operations at issue in this appeal—storage of waste rock and tailings that will be generated as a result of mining and processing ore from Rosemont's nearby and indisputably valid mining claims—demonstrably qualify as an activity that is permitted on federal lands open to mining. Storage of waste rock and tailings fits readily within the definition of the statutorily enumerated list of mining-related activities permitted on open lands under the relevant federal statutes—it is part of, and encompassed within, "explor[ing]," "prospecting," "developing," "mining," "processing," and is certainly "reasonably incident" to mining. 30 U.S.C. § 22, 16 U.S.C. § 478; 30 U.S.C. § 612.

In fact, using federal lands to deposit waste rock and tailings has long been understood as essential to mining. "At common law, the miner had an absolute right to deposit tailings on his own land as well as the right to dump waste rock and tailings on vacant and unoccupied public domain." John R. Jacus & Thomas E. Root, *The Law of Mine Waste: A Primer*, 35 Rocky Mtn. Min. L. Inst. ch. 9 (1989). As the California Supreme Court explained in *Jones v. Jackson*, 9 Cal. 237 (1858), "[w]hen a *place of deposit for tailings* is necessary, for the fair working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be

reasonably necessary for *this* purpose." *Id.* at 244 (first emphasis added); *see also* 3 Lindley on Mines § 843 (3d ed. 1914) (noting that a "miner had a right to appropriate unoccupied public land" to "deposit . . . tailings" as long as "he did not interfere with existing rights" (citations omitted)).

This common-law practice continued following enactment of the General Mining Law of 1872. In *Conway v. Fabian*, 89 P.2d 1022 (Mont. 1939), for example, the Montana Supreme Court recognized that "[t]he owner of tailings may deposit them either upon the public domain or on lands of which he has possession." *Id.* at 1029. And in *Esmeralda Water Co. v. Mackley*, 208 P.2d 821 (Nev. 1949), the Nevada Supreme Court never questioned the permissibility of depositing tailings "upon open and unappropriated public domain." *Id.* at 821. Indeed, until the District Court's decision in this case, "the right of the miner to dump waste rock and tailings upon vacant and unoccupied public domain seem[ed] to be unquestioned." George E. Reeves & Stephen D. Alfers, *Dumps & Tailings*, 23 Rocky Mtn. Min. L. Inst. ch. 10 (1977) (citations omitted).

As this authority confirms, the District Court committed legal error when it read into the pertinent statutes an extra-textual on-a-claim limitation that no court has ever recognized. That alone warrants reversal.

B. The Forest Service's Regulations Specify That Mining and Mining-Related Operations in National Forests Are Not Limited to Operations on Mining Claims.

Were there any doubt that the plain meaning of the governing statutes permits mining and mining-related operations in national forests both *on and off* mining claims, the text of the Forest Service's controlling Part 228A regulations resolves it. In recognition of the "statutory right to enter upon the public lands to search for minerals," the Part 228A regulations "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 . . . shall be conducted so as to minimize adverse environmental impacts." 36 C.F.R. § 228.1. These regulations "apply to *operations* hereafter conducted under the United States mining laws . . . as they affect surface resources on *all* National Forest System lands under the jurisdiction of the Secretary of Agriculture." 36 C.F.R. § 228.2 (emphasis added). Critically, the "operations" regulated under Part 228A are defined as:

> *All* functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and *all uses reasonably incident thereto*, including roads and other means of access on lands subject to the regulations in this part, *regardless of whether said operations take place* ***on or off*** *mining claims*.

36 C.F.R. § 228.3(a) (emphases added).[3] And the Part 228A regulations specifically address the management of "tailings" and "waste" from such mining "operations": "All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources." 36 C.F.R. § 228.8(c).

Consistent with this definition of "operations," the Forest Service expressly (and correctly) noted, during the notice-and-comment period for the Part 228A regulations, that: (i) "prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and [the Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production," and (ii) "[e]xercise of that right may not be unreasonably restricted." 39 Fed. Reg. 31,317 (Aug. 28, 1974).

Other administrative guidance further confirms that mining and mining-related operations may take place on or off mining claims. The Forest Service Manual states in no uncertain terms that "[t]he regulations at 36 C.F.R. Part 228, Subpart A apply" even to mining and mining-related activity that occurs

[3] Bureau of Land Management regulations contain a materially identical definition of mining "operations" that specifically covers "all other reasonably incident uses, *whether on a mining claim* ***or not***." 43 C.F.R. § 3809.5 (emphases added).

"*not on claims.*" Forest Service Manual § 2817.03 (emphasis added).[4] It further specifies that "[a]ny person prospecting, locating, and developing mineral resources in National Forest System lands under the 1872 mining law has a right of access for those purposes." *Id.* § 2817.25. And "persons need not have located a mining claim to exercise that right." *Id.* This Court has previously granted "wide deference" to the Forest Service Manual, and it should do so again here. *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (interpretations of the law in an "agency manual[]" are "'entitled to respect'" when persuasive).

Applying its own regulations according to their plain terms, the Forest Service explained, in approving Rosemont's mining plan of operations, that "placement of waste rock and mill tailings on the Forest are considered to be activities connected to mining and mineral processing as per 36 C.F.R. 228 subpart A, and as such they are authorized activities *regardless of whether they are on or off mining claims*." 3ER259 (emphasis added) (citation omitted). The District Court, however, held that mining and mining-related operations may only take place "within a claim." 1ER33.

The District Court's ruling flies in the face of the Part 228A regulations, which are entitled to "considerable weight" as they reflect the "construction of a statutory

[4] The chapter of the Forest Service Manual cited in this brief is available at https://www.fs.fed.us/im/directives/fsm/2800/wo_2810_Amend-2007-2.doc.

scheme [the agency] is entrusted to administer." *Chevron*, 467 U.S. at 844; *see also United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (notice-and-comment rulemaking is afforded the highest level of deference). And given that the Part 228A regulations—and, specifically, the broad definition of "operations" under 36 C.F.R. § 228.3(a)—are clear and unambiguous, this Court "must give [them] effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415.

The District Court's refusal to give effect to the Part 228A regulations is particularly inexplicable because there has been no challenge in this case to the validity of *any* of those regulations, which this Court has already upheld as properly promulgated under the Organic Act. *See Weiss*, 642 F.2d at 298-99; *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000). Refusing to follow clear, on-point, and unchallenged regulations is a textbook violation of the established standard of review under the APA. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1042 (9th Cir. 2015) (agency action may be set aside when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (quoting 5 U.S.C. § 706(2)(A))).

Even if there were some ambiguity in the Part 228A regulations and their definition of mining and mining-related "operations," the District Court still should have given deference to the agency's reasonable interpretation of those regulations that it made in approving Rosemont's mining plan of operations and in litigating this

action. *See Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 625-26 (9th Cir. 2018) (en banc) (reversing because the district court failed to defer to an agency's interpretation of its regulations in a legal brief); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1222 (9th Cir. 2015) (deferring to an agency's interpretation of its own regulations in its "briefing on appeal"); *see also Kisor*, 139 S. Ct. at 2414 ("[W]e presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules."). The District Court once again erred as a matter of law in failing to accord any such deference to the Forest Service's interpretation of the Part 228A regulations.

In fact, in its entire 37-page opinion, the District Court never once identified the statutory or regulatory source for its conclusion that mining and mining-related operations such as the placement of waste rock and tailings may only take place on mining claims. There is none. Nor did it engage in any serious analysis of the administrative-law doctrines of deference that govern here, instead string-citing inapt caselaw without explaining why deference was not warranted. 1ER18-19. The District Court thus improperly failed to defer to the Forest Service's reasoned and correct interpretation and application of the governing statutes and of its own regulations, contrary to well-established precedent. *See Chevron*, 467 U.S. at 844; *Kisor*, 139 S. Ct. at 2415; *Auer*, 519 U.S. at 461; *see also Sierra Pac. Indus. v. Lyng*,

866 F.2d 1099, 1105 (9th Cir. 1989) (holding that "a court may not substitute its judgment for that of the agency").[5]

C. The Forest Service Correctly Applied the Part 228A Mining Regulations, Rather Than the Part 251 Special-Use Regulations.

The District Court also erred in concluding that the Forest Service applied the "[w]rong [r]egulations" and "regulatory framework"—the Part 228A regulations, rather than the Part 251 special-use regulations to a portion of the mining plan. 1ER36-37, 39. The Part 228A regulations "set forth [the] rules and procedures" 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 (emphasis added); *see also* 36 C.F.R. § 228.2 ("These regulations apply to operations hereafter conducted *under the United States mining laws* . . . , as they affect surface resources on all National Forest System lands. . . ." (emphasis added)). The Part 251 special-use regulations, in contrast, apply to "[a]ll uses of National

[5] The District Court also issued what amounted to an impermissible advisory opinion when it suggested, in dicta, that waste rock and tailings from mining on open federal lands can only be placed on mill-site claims, which it erroneously believed were limited to five acres per mining claim. 1ER35 n.13. Nothing in the relevant statutes, regulations, or caselaw stands for the proposition that mill-site claims are *required* in order to use open lands for the placement of waste rock and tailings. Mill-site claims simply give a claimant *priority* over other claimants to use non-mineral land for mining-related activities. *See, e.g.*, 1 Rocky Mountain Mineral Law Foundation, American Law of Mining § 32.06[5] (2d ed. 2019); *Valcalda v. Silver Peak Mines*, 86 F. 90, 94–95 (9th Cir. 1898). And the governing regulations specifically provide, contrary to the District Court's view, that miners can "locate more than one mill site per mining claim." 43 C.F.R. § 3832.32.

Forest System lands, improvements, and resources, ***except*** *those authorized by the regulations governing . . . minerals (part 228).*" 36 C.F.R. § 251.50(a) (emphases added). The Part 251 regulations are therefore *expressly* inapplicable to all uses of the national forest "authorized by the United States mining laws." Those uses are instead governed exclusively by the Part 228A regulations, which apply to all operations—from start to finish—involved in mineral extraction, including storing waste rock and tailings. 36 C.F.R. § 228.1.

The District Court nonetheless held that the Forest Service should have adopted a patchwork-quilt approach under which the Part 228A regulations would apply to some portions of the land within the proposed mining plan, but the Part 251 regulations would apply to other portions of the land, including that to be used for storing waste rock and tailings. This counterintuitive and unworkable framework was necessary because, in the District Court's view, the placement of waste rock and tailings—natural byproducts of almost all mining operations—is not "authorized" under federal mining law, unless it occurs on valid claims. 1ER37. This reasoning directly contradicts the expert view of the Service that the "placement of waste rock and mill tailings on the Forest are considered to be activities connected to mining and mineral processing as per 36 CFR 228 subpart A, and as such they are *authorized* activities regardless of whether they are on or off mining claims." 3ER259 (emphasis added). The District Court's second-guessing of the Service's considered

determination that the Part 228A regulations applied to the entirety of Rosemont's proposed mining plan exceeded the proper scope of review under the APA. *See Sierra Pac.*, 866 F.2d at 1105.

The District Court's conclusion was all the more perplexing because its opinion earlier states that "[t]he Mining Law of 1872 authorizes activities which necessarily must occur *off a mining claim*," and even agreed that 36 C.F.R. § 228.3(a)'s broad definition of "operations"—which "encompass[es] essentially any mining activity, . . . regardless of whether they occur on or off a claim"—did "not, on its face, run afoul of the Mining Law." 1ER35-36. Yet when it came time to apply those regulations to the facts here, the District Court created an unwritten exception to the clear and unambiguous scope of the comprehensive Part 228A regulations—one that excluded the placement of waste rock and tailings off a valid claim. 1ER36-37.

The District Court's reasoning on this score is unpersuasive and circular. According to the District Court, if "a mine must use pack animals as a means of transport through the forest," the "construction of a stable" could be "reasonably incidental" to mining and thus properly within the scope of the Part 228A regulations. 1ER36. But the District Court viewed depositing waste rock and tailings outside the bounds of a valid mining claim as "not authorize[d]" by the General Mining Law, for reasons that were never explained, and thus not subject to

the Part 228A regulations. 1ER36-37. The District Court did not cite a single statutory or regulatory provision to support carving out such a vague, expansive exception to the scope of the Part 228A regulations. Nor did it explain why the placement of waste rock and tailings is not fairly encompassed within the statutory and regulatory terms defining the scope of mining and mining-related operations; instead, it simply relied on its *ipse dixit* assertion that "the Mining Law did not authorize" such activities. 1ER37. *But see* 30 U.S.C. § 22, 16 U.S.C. § 478; 30 U.S.C. § 612; 36 C.F.R. § 228.8(c).

Under the District Court's Kafkaesque reading of federal mining law, miners are caught between a rock and a hard place: Miners may not place waste rock and tailings *off* of a valid mining claim (doing so would be "unauthorized"), nor may they place them *on* such a claim as that would invalidate the claim (because covering up valuable mineral deposits with waste rock and tailings would render claims invalid in the District Court's view). *E.g.*, 1ER33. Yet under the District Court's holding, mining-related operations such as depositing waste rock and tailings may only occur on *valid* claims. The upshot of the District Court's ruling then is that waste rock and tailings may not be placed *anywhere* on national-forest land.

The District Court's view also makes no sense as a practical matter. Significant mining operations like the Rosemont Project simply cannot be undertaken without responsibly removing and storing waste rock and tailings on

lands nearby the mining pit. Given that reality, it is difficult to see how such an essential mining-related activity could be deemed to be not "in connection with" the "development, mining or processing of mineral resources" or "reasonably incident thereto," 36 C.F.R. § 228.3(a), whereas the construction of a stable is.

The caselaw confirms that the District Court erred in concluding that the Forest Service should have assessed the placement of waste rock and tailings under the Part 251 special-use, rather than the Part 228A mining, regulations. For example, in *United States v. Lex*, 300 F. Supp. 2d 951 (E.D. Cal. 2003), the court held that merely residing on a claim was activity "reasonably incident" to mining and was therefore subject to the Forest Service's Part 228A mining regulations, rather than its Part 251 special-use regulations. *Id.* at 959-60. And this Court in *United States v. Cruthers*, 523 F.2d 1306 (9th Cir. 1975), held that cutting timber for a residential cabin on an adjacent patented mining claim was "reasonably incident to or in connection with" mining because any other conclusion "would place an arbitrary obstacle in the way of orderly mining operations on unpatented claims and would thwart the statute's purpose of promoting proper development of mining claims on public lands." *Id.* at 1307 (quotation marks omitted).

According to the District Court, the Part 251 special-use regulations "provide significant authority and discretion" to "prohibit" outright the placement of waste rock and tailings on national-forest land, whereas the Part 228A regulations "merely

balance competing interests." 1ER37. The District Court was wrong once again: No matter which set of regulations apply, the Forest Service lacks authority to "prohibit[]" the "prospecting, locating, and developing of mineral resources in the national forests." *Weiss*, 642 F.2d at 299; 16 U.S.C. § 478. But even if there were any merit to the District Court's assertion that the Forest Service has authority to "prohibit" mining-related activity under the Part 251 special-use regulations, that cannot justify reading into the plain text of the Part 228A regulations an expansive unwritten exception. 1ER39. To the extent Plaintiffs believe that mining should be outright prohibited on certain federal lands, they are free to petition the Government to withdraw the land from mineral entry (or to amend the governing statutes). But rewriting the governing law and regulations to achieve such a prohibition—as the District Court did here—is impermissible.

What the law instead requires is a careful balancing of "the 'important and competing interests' of preserving forests and protecting mining rights." *Okanogan*, 236 F.3d at 478 (quoting *Weiss*, 642 F.2d at 299). That balance is precisely what the Part 228A regulations empower the Forest Service to maintain, when exercising its powerful gatekeeping role in considering proposed mining plans of operations. And it is beyond serious dispute that the Forest Service vigorously fulfilled that obligation here when it spent a decade evaluating the Project's impacts and has required extensive and costly measures to avoid, minimize, and mitigate potential

environmental, cultural, and other impacts before approving Rosemont's mining plan of operations. *See supra* pp. 10-18.

Because it constituted a clear error of law, this Court should reject the District Court's arbitrary and amorphous exception to the scope of the Part 228A regulations.

* * *

The District Court's holdings that "[t]he Mining Law authorizes occupation of the surface only within a claim," 1ER33, and that the Part 251 special-use, rather than the Part 228A mining, regulations apply to the placement of waste rock and tailings on national-forest land, 1ER37, cannot be reconciled with the plain language of the governing statutes and controlling regulations. The District Court's misreading of the applicable law will also render impossible or infeasible mining operations of any consequence on national-forest lands open to mineral entry, contrary to not only the text but also the purpose of these statutes and regulations. The District Court's judgment should be reversed.

II. Even If All Mining and Mining-Related Operations Must Occur on Mining Claims, the District Court Erred in Holding That Evidence of Claim Validity Is Required to Approve a Mining Plan of Operations.

In addition to its foundational error that mining and mining-related operations may only take place on mining claims, the District Court also erred as a matter of law in holding that the Forest Service had to have a "factual basis" supporting the "validity" of claims before it may approve a proposed mining plan of operations.

1ER27. According to the District Court, "[a]ny determination of a claimant's surface rights upon Forest Service land must begin with a discussion of the *validity* of their claims." 1ER26-27 (emphasis added). Yet there is no legal authority for the notion that the Forest Service must assess the *validity* of mining claims before it may approve a mining plan of operations. In fact, such a requirement contradicts on-point regulatory provisions and administrative guidance to which the District Court erroneously failed to defer. Nothing in the governing statutes, the Forest Service's regulations, or its administrative guidance limits mining or mining-related operations to mining claims, let alone only *valid* ones.

Forcing the Forest Service to determine that a factual basis exists to believe that there are valuable mineral deposits in the lands to be used for mining or mining-related activity is also contrary to the established division of responsibility between the Department of the Interior and the Department of Agriculture. As this Court has explained, "agencies other than Interior may regulate matters related to mining activities so long as they *do not purport to adjudicate the validity of mining claims*, since that is a matter over which adjudicative authority is clearly vested in Interior." *Clouser v. Espy*, 42 F.3d 1522, 1530 n.9 (9th Cir. 1994) (emphasis added). Requiring the Forest Service to go beyond regulating surface uses of national forests for mining and mining-related activities, and to determine—in some unspecified

way—that a "factual basis" exists for claim validity before approving any proposed mining plan of operations would run afoul of that settled law.

A. The Forest Service Need Not Determine That There Is a Factual Basis Supporting the Validity of Mining Claims Before Approving a Mining Plan of Operations.

There is nothing in any of the Forest Service's regulations that requires a factual basis for finding that the land to be used for mining or mining-related operations contains valuable mineral deposits before the Forest Service may approve a mining plan of operations. To the contrary, the pertinent Part 228A regulations expressly state that "[i]t is not the purpose of these regulations to provide for the management of mineral resources" by inquiring, for example, into the validity of mining claims, because "the responsibility for managing such resources is in the Secretary of the Interior." 36 C.F.R. § 228.1. Rather, the purpose of the Part 228A regulations is "to set forth rules and procedures through which [mining or mining-related] use of the surface of National Forest System lands" is "conducted so as to minimize adverse environmental impacts on National Forest System surface resources." *Id.* These regulations have been applied for over 45 years and the Forest Service has never viewed claim validity as a prerequisite for approval of a mining plan of operations.

To be sure, the Part 228A regulations provide that where proposed mining operations will likely cause "a significant disturbance of surface resources," the

Forest Service must first approve a mining plan of operations. 36 C.F.R. § 228.4(a)(3). But nowhere do those regulations refer to, or even imply, any obligation to assess claim validity in any way before a mining plan of operations may be approved. This telling absence in the relevant regulations, despite the far-reaching consequences that an evidence-of-claim-validity requirement would have on mining in national forests, is powerful evidence that such a requirement does not exist. Federal agencies, like Congress, do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

The irrelevance of claim validity to the approval of mining plans of operations is also apparent from longstanding Forest Service practices under which the validity of any mining claims involved in a proposed mining plan of operations is taken as given. As the Forest Service has explained, even if "[a] mining claim may lack the elements of validity and be invalid in fact, . . . it must be recognized as a claim until it has been finally declared invalid by the Department of the Interior or Federal courts." Forest Service Manual § 2811.5. The District Court should have, but failed to, defer to that on-point, persuasive guidance. *See Christensen*, 529 U.S. at 587; *Pub. Lands for the People*, 697 F.3d at 1199.

Instead, the District Court cited another provision of the Forest Service Manual that concerns the "Rights and Obligations of *Claimants*" to support its conclusion that "Forest [S]ervice policy and mining law 'require a claimant . . . [b]e

prepared to show evidence of mineral discovery.'" 1ER25 (citing Forest Service Manual § 2813.2). But that proposition, set forth in a provision of the Manual outlining the legal requirements for acquiring and maintaining a *claim* against a third party or the United States, does not support the District Court's expansive conclusion that evidence of claim validity is a necessary prerequisite to the approval of any mining plan of operations. Rather, by its terms, this provision simply specifies that in order to establish a valid claim as against a third party or the United States, a mining *claimant* must be prepared to show evidence of mineral discovery. It says nothing at all about a miner who seeks to conduct mining and mining-related operations on national forest land.

Similarly inapposite were the cases on which the District Court relied, *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994), and *Lara v. Sec'y of Interior*, 820 F.2d 1535 (9th Cir. 1987). 1ER33-34. *Clouser* is readily distinguishable because the land at issue in that case had been designated as a "wilderness area" and had thus been withdrawn from mineral entry, thereby triggering a different set of statutes and regulations not applicable here. *Clouser*, 42 F.3d at 1524-25 (citing 16 U.S.C. § 1131 *et seq.* (Wilderness Act of 1964); 16 U.S.C. § 1271 *et seq.* (National Wild and Scenic Rivers System Act); 36 C.F.R. § 228.15 (addressing mining claims within the National Forest Wilderness); Forest Service Manual § 2816 (same)). Because the land was a wilderness area, the Forest Service explained that under its

own regulation, 36 C.F.R. § 228.15(c), the Department of the Interior had to first determine the mining claims on that area were valid before the Forest Service could grant a right of access to those claims. *Clouser*, 42 F.3d at 1524, 1534-35 (deferring to the Forest Service's interpretation). Without noting this very different legal context, the District Court spliced together language quoted out of context to support a proposition for which *Clouser* does not stand. 1ER34.

Lara is similarly distinguishable, as that case addressed whether or not claims on land *withdrawn* from mineral entry were valid such that the claimant retained the property rights to those claims. 820 F.2d at 1537. In that case, it was the Department of the Interior, not the Forest Service, that conducted the validity assessment, *id.* at 1538, and nothing in *Lara* supports imposing any kind of requirement (as the District Court did here) that the Forest Service inquire into evidence of claim validity before approving a mining plan of operations. 1ER34.

What the caselaw actually shows is that claim validity is not a prerequisite for the use of open public lands for mining-related operations. In *Jackson v. Roby*, 109 U.S. 440 (1883), for example, in concluding that placement of waste rock and tailings from one claim onto another did not constitute the requisite "working" of the land necessary to maintain a claim and exclude another prospective miner, the Supreme Court never suggested that such placement was in any way improper or

that its propriety hinged on the existence of any valuable mineral deposits. *Id.* at 441, 444-45.

This Court's decision in *United States v. Brunskill*, 792 F.2d 938 (9th Cir. 1986), is also instructive. After the Department of the Interior found a mining claim to be invalid, the defendants subsequently located a new claim covering, in part, the previously invalidated claim. *Id.* at 939. The Forest Service approved a limited plan of operations covering that new claim, but once the plan expired the Forest Service requested, and the district court entered, an order evicting the defendants. *Id.* at 939-40. This Court affirmed not because of the invalidity of any claims, but because no mining plan of operations existed authorizing the defendants' physical structures and occupation of the claim. *Id.* at 941. In fact, this Court expressly "d[id] not pass on . . . whether the mining claims at issue [we]re valid." *Id.* at 939.

The only authority the Forest Service possesses with respect to claim validity is to initiate a validity proceeding before the Department of the Interior's Bureau of Land Management when, for example, it believes it appropriate (in the exercise of its discretion) to challenge sham or other unauthorized uses of unpatented mining claims asserted over national-forest lands for activities wholly unrelated to mining. *See* 30 U.S.C. § 612; Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 261 (1985) ("In

addition to protecting surface resources through regulations, the Forest Service also can cause the BLM to initiate contests challenging the validity of unpatented mining claims on national forest land."). For example, in *United States v. Goldfield Deep Mines Co.*, 644 F.2d 1307 (9th Cir. 1981), a company "cut trees, dug roads, and used heavy equipment and machinery" related to mining and milling operations in the San Bernardino National Forest without filing or obtaining approval of a mining plan of operations, which caused the Forest Service to initiate a claim-validity proceeding before the BLM and an action for trespass in the district court. *Id.* at 1308-09.

Expanding the Forest Service's role to encompass the routine assessment of mining-claim validity is particularly nonsensical given that claim validity continuously fluctuates over time depending upon the market price for a given mineral. Because a claimant must show that "the mineral can be extracted, removed and marketed at a profit," *United States v. Coleman*, 390 U.S. 599, 600 (1968) (quotation marks omitted), a claim previously found "invalid" may, just months or even weeks later, become "valid" with a change in commodity prices.[6] To tie approval of a mining plan of operations to the vicissitudes of market changes would

[6] In fact, futures prices for copper ranged from $1.26 to $4.63 per pound while the Forest Service was reviewing Rosemont's plan of operations. *See* Copper Prices—45 Year Historical Chart, Macrotrends, https://bit.ly/2LtmxU7; *see also In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 799 (9th Cir. 2017) (taking judicial notice of historical stock prices).

prove unworkable and frustrate the purpose of federal mining law to encourage the "development of economically sound and stable domestic mining." 30 U.S.C. § 21a.

This Court should not repeat the District Court's error and should refuse to read into the statutory and regulatory framework for approving a mining plan of operations any kind of requirement to assess claim validity.

B. The Department of the Interior's Bureau of Land Management Does Not Require Evidence of Claim Validity Before Approving a Mining Plan of Operations on the Federal Lands It Administers.

Even the agency of the Government that does have jurisdiction over claim validity—the Bureau of Land Management within the Department of the Interior[7]—has made clear that there is no need to inquire into claim validity before approving mining plans of operations on federal lands open to mineral entry.

The BLM is entrusted with the management of other federal lands, and the same federal mining statutes discussed earlier are applicable to those lands. *See supra* pp. 5-10. Moreover, the BLM's regulations, 43 C.F.R. Subpart 3809, like the Forest Service's Part 228A regulations, require miners to obtain approval of mining plans of operations before conducting operations on lands under its jurisdiction. Because these parallel regulations have been promulgated under similar authorizing statutes and apply to mining and mining-related operations on open lands under the

[7] *See Clouser*, 42 F.3d at 1530 n.9 ("[V]alidity of mining claims . . . is a matter over which adjudicative authority is clearly vested in Interior."); 36 C.F.R. § 228.1.

BLM's jurisdiction, the BLM's interpretation of the governing statutes and its own regulations are instructive here, and they flatly contradict the District Court's conclusion that claim validity must be assessed before a mining plan of operations may be approved.

Specifically, a carefully reasoned opinion issued by the Solicitor of the Interior—which the District Court cited in passing, but did not discuss or analyze, 1ER24—has rejected any requirement of assessing claim validity before mining and mining-related operations may be approved on federal lands. *See* Dep't of the Interior, Office of the Solicitor, *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M-37012, 2005 WL 7139266, at *1 (Nov. 14, 2005). In the 2005 M-Opinion, the Solicitor "analyzed whether the Department is legally obligated to determine the validity of mining claims . . . before it may approve a plan of operations," and concluded that "the Department is under no legal obligation to determine mining claim . . . validity before approving a proposed plan of operations to explore for *or develop* minerals on lands open to the Mining Law's operation." *Id.* (emphasis added).

Surveying the on-point statutory, regulatory, caselaw, and other administrative authority and practice, the Solicitor explained that "no law requires that the Secretary determine mining claim or mill site validity before approving a mine plan on open lands," and that, "[i]n practice, the Department has determined

the validity of only a very small percentage of the hundreds of thousands of unpatented mining claims and mill sites on the public lands" because "the Mining Law allows citizens to enter the public lands and locate mining claims . . . without pre-approval from the government." *Id.* at *2-3. "Because the government has discretionary power but no legal obligation to determine claim validity on open lands, neither the claimant nor any third party can compel BLM to determine claim validity as a condition of mine approval." *Id.* at *2 n.1 (citation omitted).

The Forest Service has reached a similar conclusion for lands it administers. Specifically, in connection with assessing Rosemont's mining plan, the Service concluded that "there is no basis for pursuing a validity exam" before approving a mining plan of operations unless "proposed operations are within an area withdrawn from mineral entry," "when a patent application is filed," or "the proposed uses are not incidental to prospecting, mining, or processing operations." 2RER153.

These considered opinions are persuasive guidance from the responsible agencies to which the District Court should have deferred. *McMaster v. United States*, 731 F.3d 881, 896 (9th Cir. 2013) (holding Solicitor's Opinion entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The District Court's holding is particularly remarkable in that it echoes a prior 2001 M-Opinion that the 2005 M-Opinion withdrew because it "conflicted with current Departmental regulations" and with the law. 2005 WL 7139266, at *1 (citing

Dep't of the Interior, Office of the Solicitor, *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004, 2001 WL 35823597 (Jan. 18, 2001)). As the 2005 M-Opinion explained, "no Departmental regulations require validity determinations before approving a mine plan on open lands"; validity determinations are required "before approving a plan of operations only if the lands are *withdrawn* from appropriation under the Mining Law." *Id.* at *2. The District Court's contrary conclusion here has effectively resurrected the now-withdrawn 2001 M-Opinion.

The District Court attempted to sidestep the persuasive import of the 2005 M-Opinion, as well as the Forest Service's lack of jurisdiction to determine claim validity, by distinguishing between "a validity determination" and an assessment of the "factual basis" for claim validity, without ever explaining what the "factual basis" determination entails or how it differs from a "validity determination." 1ER33. This is ultimately a distinction without a difference. Under the District Court's rule, the Forest Service must examine evidence of the validity of all mining claims contained within a mining plan of operations, and must conclude that any "assertion of rights" is supported by a "factual basis." 1ER33.

Tellingly, the District Court never explains what standard governs its "factual basis" determination, or what it entails. But even assuming this assessment is somehow more superficial than a validity determination, it still would require the Forest Service to draw conclusions from an analysis of the underlying geology and

the current market values of any mineral deposits. Thus, under the District Court's rule, the Forest Service will be forced to engage in the same type of determination over which the BLM has exclusive jurisdiction.

In short, the agency with the authority to assess the validity of mining claims has expressly refused to tether approval of mining plans of operations on any such assessment. The District Court's refusal to follow that sound, settled approach constitutes yet another legal error calling for this Court to reverse.

III. It Was Improper for the District Court to Analyze in the First Instance the Validity of Rosemont's Mining Claims.

If the Court concludes that the validity of claims contained in a proposed mining plan of operations must be evaluated before the Forest Service may approve the plan, the Court should remand to the Forest Service to make that evaluation in the first instance: The fact-intensive nature of such a technical inquiry calls for the expertise of an administrative agency, not a court. "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Here, the District Court exceeded its authority when it appeared to undertake an assessment of claim validity without giving the Forest Service the opportunity to

do so in the first instance. Specifically, the District Court examined "geological studies and geological maps in the record before the Forest Service" and asserted that "there is primarily common sand, stone, and gravel beneath the land at issue" that "does not constitute a valuable mineral deposit." 1ER13; *see also* 1ER31-32 (inquiring into the geology of the Willow Canyon Formation, the Gila Conglomerate, the Mount Fagan Rhyolite and Schellenberger Canyon Formation, and the Apache Canyon Formation).

The District Court's apparent determination of claim validity was flawed for two reasons. First, the District Court lacked the scientific expertise to assess the complex geological aspects of determining claim validity. Second, the geological information that happened to be in the administrative record, *e.g.*, 4ER511, was never submitted in order to support the validity of Rosemont's claims because, prior to the District Court's ruling, review of a proposed mining plan of operations did not entail any kind of validity determination. If claim validity had been at issue before the Forest Service, Rosemont would have submitted far more extensive information regarding whether there were valuable mineral deposits underlying all of its claims. And depriving Rosemont, without fair notice, of the opportunity to be heard on this issue and submit all relevant evidence would violate due process. *See Best*, 371 U.S. at 338 (claim-validity proceedings must comport with due process, including by providing "notice and a hearing"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

In sum, the District Court should have left these scientific, technical and economic determinations for the Forest Service to resolve, particularly because Rosemont was never given fair notice that it needed to submit evidence regarding claim validity in order to obtain approval of its proposed mining plan of operations. Therefore, if this Court were to hold that an assessment of claim validity is at issue, it should remand with instructions to have the Forest Service make that determination in the first instance and to allow Rosemont to submit additional evidence in connection with any such determination.

CONCLUSION

The District Court erred in concluding that before the Forest Service may approve a mining plan of operations that contemplates the use of national-forest lands for the placement of waste rock and tailings, it must first determine that all such lands are covered by valid mining claims supported by a factual basis to believe all those lands contain valuable mineral deposits. That unprecedented holding conflicts with the plain meaning of the governing statutes and on-point regulations, and has resulted in the erroneous vacatur of the Forest Service's approval of the Rosemont Project after more than a decade of exhaustive, multi-agency review. This Court should reverse.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-17585, 19-17586

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STATEMENT OF RELATED CASES

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

Dated: June 22, 2020

s/ *Julian W. Poon*

Julian W. Poon

CERTIFICATE OF SERVICE

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Julian W. Poon