



MEMORANDUM

Date: August 1, 2019

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "C.H. Huckelberry", is written over the typed name and title.

Re: **July 31, 2019 Rosemont Court Decision**

Yesterday evening the Honorable James A. Soto, United States District Judge for Arizona, issued the attached orders regarding litigation over the Forest Service's approval of a Final Environmental Impact Statement (EIS) and Record of Decision (ROD) for the proposed Rosemont Mine. (Attachments 1 and 2)

In short, Judge Soto found that the Forest Service never established that Rosemont's unpatented mining claims were valid and that dumping that much waste and tailings on Forest Service land was not incidental to their development of the pit on their patented claims.

This is precisely what Pima County argued from the beginning, and argued repeatedly during the review process. Attached is my December 19, 2006 letter to former Forest Service Supervisor Jeanine Derby questioning the validity of Rosemont's unpatented mining claims and requesting that the Forest Service save itself, taxpayers, interested parties, and Rosemont much time and money by requiring that Rosemont prove the validity of those claims. (Attachment 3) Attached also is Supervisor Derby's February 11, 2007 response stating that "it is not common practice, nor is it Forest Service policy, to challenge mining claim validity..." In addition, Supervisor Derby stated "The placement of waste rock and mill tailings on the Forest are considered to be activities connected to the mining and mineral processing....and as such they are authorized activities regardless of whether they are on or off mining claims." (Attachment 4)

The Judge found these arguments from the Forest Service to be unsupported and therefore concluded that the Forest Service improperly evaluated and misapplied (1) Rosemont's right to use the Forest Service surface land, (2) the regulatory framework in which the Forest Service needed to analyze those surface rights, and (3) to what extent the Forest Service could regulate activities upon Forest Service land in association with those surface rights.

That latter point speaks directly to the issue of whether the Forest Service has the authority to say "no" to the mining proposal, versus only condition approval of the proposal. This was

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also a central point of public debate during the entire 12-year review process, whereby the Forest Service insisted that they could not select a "no action" alternative.

Judge Soto granted summary judgment in favor of Save the Scenic Santa Rita's (SSSR) and the Tribes, and overturned the Forest Service's EIS and ROD. No work on Federal land can proceed until either the Judge's decision is overturned or the Forest Service revises the FEIS and issues a new ROD. The ruling does not directly impact mine work on non-federal lands subject to other permits, unless authorization for that work is contingent on Rosemont acquiring a valid Forest Service permit. In the case of the transmission lines, the Certificate of Environmental Compliance, clearly states that the applicant shall not commence construction on the project until a Record of Decision is issued by the Forest Service.

Judge Soto has yet to rule on the Center for Biological Diversity's pending motion for summary judgment related to Endangered Species Act claims, and has set no date for that ruling. In addition, the challenges to the Corps Section 404 permit are still in the early stages. As currently proposed by the parties, motions for summary judgment and a related briefing is scheduled to extend until early May, 2020.

I assume that Hudbay Minerals will urge the Forest Service to appeal Judge Soto's decision to the Ninth Circuit Court of Appeals and possibly the Supreme Court. In the event the case is eventually decided in favor of the Tribes and SSSR, the worst case for Hudbay is that the Forest Service would have to take a much harder look at the mining plans. This is the best case for Southern Arizona because it would mean the Forest Service would have discretion to prevent or truly limit the impacts of open-pit mining on this public land. This would include considering a much smaller mine, or none at all.

In the event the Forest Service resumes its deliberations for this mine, Pima County will continue to advocate for real alternatives and meaningful mitigation to address the effects of mining, and protect the health, safety and welfare of County residents as we have done throughout the process.

In the event that Judge Soto's ruling is overturned at the highest level, the Forest Service would continue to conduct its business as usual. The Forest Service would continue to alter the Coronado National Forest Plan to ensure mining is always allowed everywhere, and companies would retain their discretion to dump waste and tailings on public lands, even where the plain facts would indicate their claims to the nation's mineral estate were false.

There are those who would argue that a great deal of taxpayer money has been wasted on all this. I would be one of them. Long ago, I read a 1987 book about the very problems that confronted the Forest Service at the outset (The Mining Law by John D. Leshy). The problems are well known to the federal government. However, their resolutions resides with Congress. Congress has never changed the 1872 Mining Law to reflect modern mining technologies and environmental law. The Mining Law has been abused to stop the Central

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Arizona Project and scam private property owners, and to obstruct even legitimate mining operators, yet it has persisted. Instead, it has been left to ordinary citizens and their tribal and local governments to question the legitimacy of federal practices that have fossilized around perceived entitlements of this relic.

CHH/anc

Attachments

c: Jan Leshar, Chief Deputy County Administrator
Tom Burke, Deputy County Administrator for Administration
Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Andrew Flagg, Chief Civil Deputy County Attorney
Charles Wesselhoft, Deputy County Attorney
Suzanne Shields, Director, Regional Flood Control District
Linda Mayro, Director, Office of Sustainability and Conservation
Ursula Nelson, Director, Department of Environmental Quality
Julia Fonseca, Environmental Planning Manager, Office of Sustainability and Conservation
Nicole Fyffe, Executive Assistant to the County Administrator

ATTACHMENT 1

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Center for Biological Diversity, et al.,
Plaintiffs,

v.

United States Fish and Wildlife Service, et
al.,
Defendants.

No. CV-17-00475-TUC-JAS (L)
No. CV-17-00576-TUC-JAS (C)
No. CV-18-00189-TUC-JAS (C)
CONSOLIDATED

ORDER

Pending before the Court are motions for summary judgment filed by Plaintiffs and Defendants,¹ and motions for preliminary injunction filed by Plaintiffs. The litigation in these cases stems from the evaluation and ultimate approval of the Rosemont Mine by various agencies of the federal government. These motions are discussed below.

PART ONE: OVERVIEW OF THE LITIGATION RELATING TO THE ROSEMONT MINE

The United States Forest Service (“Forest Service”) gave final approval to Rosemont Copper Company (“Rosemont”) to conduct a large-scale pit-mining operation within the boundaries of the Coronado National Forest. The Santa Rita Mountains lie to the south of Tucson, Arizona and are within the Coronado National Forest, which is managed by the Forest Service. Rosemont’s proposed mining operation is projected to impact thousands of acres of the Santa Rita Mountains.

¹ References to Defendants throughout this Order include the Intervenor-Defendant (i.e., Rosemont).

1 The open-pit mine itself, which contains the valuable minerals (primarily copper)
2 that Rosemont proposes to extract, will directly impact approximately 955 acres of land.²
3 After Rosemont has completed extraction of material from the pit over the next 20 to 25
4 years, the circular pit will measure approximately 3,000 feet in depth and 6,000 feet in
5 diameter.³ In the course of digging through 3,000 feet of geologic material, Rosemont will
6 penetrate the wall of the groundwater table lying beneath the Santa Rita Mountains and
7 will need to pump groundwater out of the pit to continue their mining operations. After
8 Rosemont ceases its mining operations in 20 to 25 years, Rosemont will turn off the pumps,
9 and the pit will then act as a hydraulic sink such that the pit will fill with groundwater. To
10 gain access to the valuable copper, molybdenum, and silver in the ore, Rosemont will have
11 to extract approximately 1.2 billion tons of waste rock (i.e., geologic material without
12 economic value) and approximately 700 million tons of tailings (i.e., waste material left
13 over after extracting the valuable fraction from the uneconomic fraction of the ore)
14 (collectively “1.9 billion tons of waste”). The Rosemont Mine will impact approximately
15 3,653 acres of the Coronado National Forest. Outside of the 955-acre pit, Rosemont will
16 dump approximately 1.9 billion tons of its waste on approximately 2,447 acres⁴ of the
17 Coronado National Forest.

18 The Forest Service found that the Rosemont Mine would not be consistent with the
19 Forest Service’s “Coronado National Forest Land and Resource Management Plan”
20 (“Forest Plan”). *See* Forest Service’s Final Environmental Impact Statement for the
21 Rosemont Copper Project (“FEIS”) at 114. The Forest Service found that the Rosemont

22 ² The 955 acres is a combination of private and public land. This would include 590 acres
23 of private land and 365 acres of the Coronado National Forest (i.e., comprising a total of
24 955 acres).

25 ³ Rosemont estimates that the pit will produce 5.3 billion tons of copper, 142 million tons
26 of molybdenum, and 79 million ounces of silver; at full production, Rosemont estimates
27 that the mining project will produce 10% of the nation’s domestic copper supply.

28 ⁴ The 1.2 billion tons of waste rock will be dumped on approximately 1,460 acres of the
Coronado National Forest, and the 700 million tons of tailings will be dumped on
approximately 987 acres of the Coronado National Forest (i.e., comprising a total of
approximately 2,447 acres). The Court notes that the numbers cited throughout this Order
(i.e., acres, weight, volume, areas of land, locations and volumes of minerals and mineral
formations, etc.) are approximations; for ease of reference, the Court will omit constant
references to “approximately.” Unless otherwise noted by the Court, the numbers
discussed herein are approximations.

1 Mine would be:

2 Inconsistent with standards and guidelines [of the Forest Plan] related to the
3 following:

4 Maintenance, rehabilitation, and enhancement of visual resources

5 Protection of cultural resources

6 Maintenance and improvement of wildlife habitat

7 Maintenance and protection of existing riparian resources

8 Maintenance of wildlife and plant diversity

9 Maintaining buffers around watering and feeding areas

10 Retention of riparian area

11 Amount of riparian area

12 Diversity of riparian species

13 Maintenance of riparian area productivity

14 Minimizing soil damage

15 . . .

16 Maintenance of vegetative structure

17 Loss of horizontal structure

18 Loss of vertical structure

19 Delisting threatened and endangered species and reoccupying historic
20 habitat

21 *See* FEIS at 115 (“Table 8. Coronado National Forest Plan consistency considerations”).

22 As recognized by the Forest Service, among the cultural resources impacted by the
23 Rosemont Mine would be the disturbance and desecration of 33 ancient Native American
24 burial grounds containing, or likely containing, the human remains of ancestors of the
25 Tohono O’odham Nation, Pasqua Yaqui Tribe, and Hopi Tribe (collectively “Tribes”);
26 there is also the potential for additional disturbance and desecration of unmarked and
27 unrecognized graves outside known cemetery areas. *See* FEIS at 1036-1040. The Forest
28 Service further acknowledged that the Rosemont Mine would adversely impact the Tribes’:
“historic properties, human burials, sacred sites . . . villages and graves of ancestors and
traditional resource gathering areas, would be destroyed . . . These impacts are severe,
irreversible, and irretrievable . . . [The Rosemont Mine] would destroy this historical and
cultural foundation [of the Tribes], diminish tribal members’ sense of orientation in the
world, and destroy part of their heritage.” *See* FEIS at 1036-1037.

As referenced above, as the Rosemont Mine would be inconsistent with the
preexisting Forest Plan, the Forest Service changed the Forest Plan to accommodate

1 Rosemont’s mining plan (“Rosemont Plan”). *See* Forest Service’s Record of Decision
2 (“ROD”) at 32 (“[The Forest Service] determined that modifying [Rosemont’s Mining
3 Plan] to comply with the current Coronado [Forest Plan] would materially interfere with
4 [Rosemont’s] mineral operations . . . [therefore, the Forest Service amended the Forest
5 Plan] contemporaneously with the approval of [Rosemont’s Mining Plan] so that
6 [Rosemont’s mining] project or activity will be consistent with the [Forest Plan] as
7 amended.”); *see also* FEIS at 115 (Table 8: discussing how the Rosemont Plan was
8 inconsistent with the preexisting Coronado National Forest Plan).

9 Due to the extensive impact of the Rosemont Mine on the Coronado National Forest,
10 numerous parties have filed lawsuits arguing that the approval of the Rosemont Mine
11 violates the law. All of these lawsuits have been consolidated with this Court.

12 In CV 17-475-TUC-JAS (“Case 1”), the Center for Biological Diversity (“CBD”)
13 filed suit against the U.S. Fish and Wildlife Service (“FWS”) and the Forest Service. CBD
14 argues that the Forest Service’s consultation and reliance on the FWS’s Biological Opinion
15 as to the Rosemont Mine is erroneous as the FWS violated the Endangered Species Act
16 (“ESA”) in analyzing the adverse impacts of the mine on threatened and endangered
17 species (including the jaguar, ocelot, Gila chub, Gila topminnow, desert pupfish,
18 Chiricahua leopard frog, northern Mexican garter snake, southwestern willow flycatcher,
19 western yellow-billed cuckoo, lesser long-nosed bat, Huachuca water umbel) and their
20 remaining habitat. Rosemont brought a cross-claim against FWS. In the cross-claim
21 Rosemont argues that FWS exceeded its statutory authority when designating portions of
22 the Santa Rita Mountains as a critical habitat for the jaguar species and that FWS also
23 violated the Endangered Species Act (“ESA”) by failing to review the designation of the
24 jaguar as an endangered species.

25 In CV 17-576-TUC-JAS (“Case 2”), Save the Scenic Santa Ritas, Arizona Mining
26 Reform Coalition, Center for Biological Diversity, and the Grand Canyon Chapter of the
27 Sierra Club (collectively “SSSR”) filed suit against the United States, the Forest Service,
28 and several supervisory officials of the Forest Service.

1 In CV 18-189-TUC-JAS (“Case 3”), the Tohono O’odham Nation, Pasqua Yaqui
2 Tribe, and Hopi Tribe (collectively “Tribes”) filed suit against the Forest Service, the U.S.
3 Secretary of Agriculture, and several supervisory officials of the Forest Service. In Cases
4 2 and 3, SSSR and the Tribes both argue that the Forest Service misapplied various statutes
5 and regulations relating to mining and management of federal lands (such as the Mining
6 Law of 1872, the Organic Act of 1897, and the Multiple Use Act of 1955), and therefore
7 failed to properly exercise its broad discretion and authority (and consider project
8 alternatives) to protect the Coronado National Forest from depredations. In Case 2, SSSR
9 also argues that the Forest Service erroneously evaluated its authority, impacts, and
10 mitigation relating to: the mine pit lake (which will form when mining ceases), dewatering
11 of the groundwater table which will dry up surrounding streams, springs, and seeps, and
12 the impact these water issues will have on wildlife that depend on the water. In Case 3, the
13 Tribes also argue that the Forest Service failed to comply with the National Historic
14 Preservation Act (“NHPA”) in failing to protect historic and archaeological treasures that
15 form a core part of the cultural legacy of the Tribes; the NHPA claims are closely connected
16 to the Tribes claims referenced above inasmuch as the Tribes argue that the Forest Service
17 misapplied its discretion and authority from the inception of its analysis of the Rosemont
18 Mine.

19 Cases 1, 2, and 3 have been consolidated (“Consolidated Case A”) as they partially
20 share a common administrative record and some factual and legal issues overlap (especially
21 Cases 2 and 3). Shortly after the summary judgment motions became fully briefed in
22 Consolidated Case A, two new cases related to the Rosemont Mine were filed with this
23 Court. In CV 19-177-TUC-JAS (“Case 4”), Save the Scenic Santa Ritas, Center for
24 Biological Diversity, Arizona Mining Reform Coalition, and the Grand Canyon Chapter of
25 the Sierra Club (collectively “SSSR”) filed suit against the U.S. Army Corps of Engineers
26 (“Corps”) and a U.S. Army Brigadier General with the Corps. In CV 19-205-TUC-JAS
27 (“Case 5”), the Tohono O’odham Nation, Pasqua Yaqui Tribe, and Hopi Tribe (collectively
28 “Tribes”) filed suit against the same Defendants in Case 4. Plaintiffs in Cases 4 and 5 both

1 argue that the Corps improperly issued a permit for the Rosemont Mine to discharge
2 “dredged or fill material” into the “Waters of the United States” (“WOTUS”). Plaintiffs
3 argue that the discharges contain toxic pollutants that will seriously degrade numerous
4 waterways connected to, and running like capillaries through, thousands of acres of the
5 Coronado National Forest impacted by the Rosemont Mine. Cases 4 and 5 were
6 consolidated as they implicate a common administrative record and have some overlapping
7 factual and legal issues (“Consolidated Case B”).⁵

8 Although the Forest Service is the lead agency in charge of evaluating and
9 ultimately issuing the final approval for the Rosemont Mine to commence operations, the
10 Forest Service would not issue a final approval for the mine until the Corps issued a permit
11 for discharges into the WOTUS. The Corps issued their permit to Rosemont in March of
12 2019, and shortly thereafter, the Forest Service issued its final approval for Rosemont to
13 commence mining activities in the Coronado National Forest. Rosemont filed a notice in
14 these cases indicating that ground-disturbing activities would start in the near future, and
15 after holding a status conference with the parties, Rosemont indicated that such activities
16 would begin on August 1, 2019. In light of these circumstances, all of the Plaintiffs in
17 Consolidated Cases A and B filed separate motions for preliminary injunction. All of the
18 preliminary injunction motions became fully briefed in approximately the second week of
19 July 2019.

20 The Court estimates that just the briefing pertaining to the summary judgment and
21 preliminary injunction motions (i.e., memoranda, responses, replies) exceed a thousand
22 pages (exclusive of the lengthy statements of fact). The administrative record in
23 Consolidated Case A includes more than 50,000 documents, and the administrative record
24 in Consolidated Case B also includes thousands of documents. In all, Plaintiffs argue that
25 Defendants violated numerous laws, including: the Administrative Procedures Act

26
27 ⁵ While the focus and legal rulings in this Order only pertain to Consolidated Case A, the
28 Court has included a brief discussion of Consolidated Case B to give a fuller picture of the
Rosemont Mine Litigation. From the inception of Consolidated Cases A and B, Rosemont
has been an intervenor-defendant in all five cases. The Court will be issuing a separate
Order as to the pending motions in Consolidated Case B.

1 (“APA”), the National Environmental Policy Act (“NEPA”), the Mining Law of 1872, the
2 Organic Act of 1897, the National Historic Preservation Act (“NHPA”), the Clean Water
3 Act (“CWA”), and the Endangered Species Act (“ESA”). Oral arguments as to
4 Consolidated Cases A and B were held before this Court on July 23, 2019. Given the
5 important interests and exigent circumstances involved, the Court informed the parties that
6 it would issue an Order by August 1, 2019.

7 **PART TWO: SUMMARY OF THE DISPOSITIVE ISSUES IN CASES 2 AND 3**
8 **(“DISPOSITIVE CASE”)**

9 In light of the extensive briefing, voluminous record, and time constraints, the Court
10 does not address every single argument sprawled across all five cases in this Order. Rather,
11 this Order only focuses on several dispositive issues raised in similar arguments made by
12 both the Tribes and SSSR in Cases 2 and 3 (hereinafter, “Dispositive Case”). Given the
13 sheer volume of information in the Dispositive Case, and the arcane areas of law at issue,
14 Part Two summarizes this Court’s view of the most significant issues and rulings as to the
15 Dispositive Case, and then Part Three goes into a much deeper, extensive discussion of
16 many of these issues. As Part Two is meant to briefly summarize the issues to serve as a
17 roadmap for Part Three, the Court purposely omits legal citations and detailed discussion
18 of language from statutes, cases, regulations, and manuals; this is covered in Part Three.

19 The focus of the Dispositive Case is the arbitrary and capricious actions of the Forest
20 Service. The Court is granting summary judgment in favor of the Tribes and SSSR in the
21 Dispositive Case and vacating and remanding the Forest Service’s ROD and FEIS such
22 that the Rosemont Mine cannot begin operations at this time. As there are no longer exigent
23 circumstances justifying immediate injunctive relief, the Court is denying without
24 prejudice all of the preliminary injunction motions filed in Consolidated Cases A and B.⁶
25 While this Order grants relief in the Dispositive Case, the Court will issue a separate Order
26 as to Case 1 on a future date.

27 ⁶ As referenced above, the Court will issue a separate Order in Consolidated Case B. The
28 Court notes that Consolidated Case B is in its early stages, and no other motions were filed
other than the motions seeking injunctive relief. An Order setting the briefing schedule for
Consolidated Case B will be filed later in the week.

1 As to the Dispositive Case, the Court will often collectively refer to the Tribes and
2 SSSR as the Plaintiffs, and all of the Federal Defendants and Rosemont as Defendants.
3 Unless otherwise noted by the Court, all further discussions in this Order pertain only to
4 the Dispositive Case.

5 Pertinent statutory authority⁷ in this case includes: (1) the Mining Law of 1872 (30
6 U.S.C. §§ 22, 23, 26, 29, 42) (“Mining Law”); (2) the Organic Act of 1897 (16 U.S.C.
7 §§ 478, 482, 551) (“Organic Act”); (3) the Surface Resources and Multiple Use Act of
8 1955 (30 U.S.C. § 612) (“Multiple Use Act”); (4) 30 U.S.C. § 611 (“Common Varieties
9 Act”); (5) the APA and NEPA. Pertinent Forest Service regulatory authority in this case
10 includes: (1) Part 228 (36 C.F.R. §§ 228.1, 228.2, 228.3, and 228.5(d)) (“Mining
11 Regulations”); (2) 36 C.F.R. §§ 261.1(a) and (b), 261.9, and 261.10 (“General Prohibition
12 Regulations”); (3) 36 C.F.R. §§ 251.50, 251.56(a), 251.54(e)(1), (e)(2), and (e)(5)
13 (“Special Use Regulations”). Lastly, instructive Forest Service Manual provisions include:
14 §§ 2813.2(2) and (7), and 2819.1(1).

15 As noted above, all of this statutory and regulatory authority, along with the relevant
16 case law, is discussed in detail in Part Three of this Order. However, a summary of the
17 issues at this point will streamline a fuller understanding of the discussion in Part Three.

18 The primary errors the Forest Service made in this case relate to Rosemont dumping
19 1.9 billion tons of its waste on 2,447 acres of the Coronado National Forest. As Rosemont
20 had unpatented mining claims covering those 2,447 acres, the Forest Service accepted,
21 without question, that those unpatented mining claims were valid. This was a crucial error
22 as it tainted the Forest Service’s evaluation of the Rosemont Mine from the start.

23 The Mining Law of 1872 grants exclusive property rights to miners who have valid
24 unpatented mining claims. To have a valid unpatented mining claim, there must be a
25 valuable mineral deposit⁸ underlying the claim. If there is a valuable deposit underlying

26 _____
27 ⁷ The Court has included citations to the most relevant provisions of the statutes,
regulations, and Forest Service Manual.

28 ⁸ Generally, a mineral deposit is considered valuable if a reasonable person would conclude
that the minerals could be sold at a profit considering the costs of extraction, processing,
transportation, and other related costs in bringing the mineral to market.

1 the claim, the miner has the exclusive right to extract and profit from those minerals, and
2 the right to use the surface above those minerals for purposes of mining (even if the
3 minerals and surface are located on federal lands such as the Coronado National Forest).
4 As a practical matter, the process of obtaining unpatented mining claims has been a
5 historically low bar; a miner could simply enter upon federal land, put up some stakes
6 marking the land above a purported valuable mineral deposit (along with some “no
7 trespassing” signs proclaiming the rights to the valuable minerals within the stakes), and
8 record a notice with local authorities setting out the parameters of the purported deposit.
9 However, having a piece of paper reflecting that one has unpatented mining claims does
10 not show that one actually has *valid* unpatented mining claims. If there is no valuable
11 mineral deposit beneath the purported unpatented mining claims, the unpatented mining
12 claims are completely *invalid* under the Mining Law of 1872, and no property rights attach
13 to those invalid unpatented mining claims.

14 The administrative record before the Forest Service reflected that there was no
15 location of a valuable mineral deposit underlying the unpatented mining claims covering
16 the 2,447 acres in question; as such, the record reflected that the unpatented claims were
17 invalid.

18 Nonetheless, the Forest Service assumed that the claims were valid, assumed that
19 Rosemont had the right to use those 2,447 acres to support its mining operation (i.e., by
20 dumping 1.9 billion tons of its waste on that land), and from those assumptions attempted
21 to minimize the environmental and cultural impacts stemming from Rosemont’s purported
22 rights connected to their invalid unpatented mining claims.

23 Defendants argue that the Forest Service (which is within Department of
24 Agriculture) had no jurisdiction to issue a final decision as to the validity of Rosemont’s
25 unpatented mining claims; rather, jurisdiction over such claims lies with the Bureau of
26 Land Management (“BLM”, which is within the Department of the Interior). While
27 Defendants are correct as to jurisdiction, that does not mean that the Forest Service had no
28 obligation to assess Rosemont’s surface rights. The Forest Service had no factual basis to

1 determine that Rosemont had valid unpatented mining claims giving them property rights
2 over those 2,447 acres of land. Rather, the record strongly indicated the opposite. As a
3 threshold matter, Rosemont's proposal to bury its 2,447 acres of unpatented mining claims
4 under 1.9 billion tons of its own waste was a powerful indication that there was not a
5 valuable mineral deposit underneath that land. Furthermore, geological studies and
6 geological maps in the record before the Forest Service indicate there is primarily common
7 sand, stone, and gravel beneath the land at issue; this does not constitute a valuable mineral
8 deposit. Despite no jurisdiction to issue a final ruling as to validity, the Forest Service
9 certainly was not powerless. The Forest Service's regulations and the Forest Service
10 Manual specifically allow for the Forest Service to consult and request analysis from the
11 BLM as to mining claims on Forest Service land, and the Forest Service can also have its
12 own mineral examiner assess purported mining claims. In addition, there is case law in the
13 Ninth Circuit reflecting that the Forest Service has pursued such options, initiated
14 administrative complaints with the Department of the Interior to successfully declare
15 mining claims on Forest Service land invalid, and these administrative decisions were
16 ultimately affirmed via judicial review on appeal.

17 Relying on the Organic Act of 1897 and the Multiple Use Act of 1955, Defendants
18 further argue that the Forest Service correctly recognized the limits of its authority, and
19 therefore properly determined that Rosemont had the right to use those 2,447 acres of the
20 Coronado National Forest to dump its 1.9 billion tons of waste (with the caveat that the
21 Forest Service properly exercised its duties by attempting to limit the adverse
22 environmental and cultural impacts of the waste site). Defendants correctly argue that the
23 Organic Act states that mining cannot be prohibited on National Forest lands, and the
24 Multiple Use Act states that mining and reasonably incidental mining activities are
25 permitted and cannot be materially interfered with on federal lands. As such, Defendants
26 argue that since Rosemont clearly has valuable mineral deposits underlying the 955 acre
27 mine pit, Rosemont therefore has a right to dump 1.9 billion tons of its waste on the 2,447
28 acres of the Coronado National Forest because it is reasonably incident to its valid mining

1 claims. Thus, Defendants claim that it is irrelevant if Rosemont's unpatented mining
2 claims on the 2,447 acres are completely invalid for lack of any valuable mineral deposit.
3 These arguments are unpersuasive, however, as the Organic Act and Multiple Use Act did
4 not create freestanding mining rights outside of the specific parameters of the Mining Law
5 of 1872. The Organic Act simply recognized that the Forest Service could not prohibit
6 mining activities on Forest Service land allowed by the Mining Law. Likewise, as relevant
7 here, the Multiple Use Act also simply recognized that the United States could not prohibit
8 mining activities allowed by the Mining Law on federal lands; in fact, the Multiple Use
9 Act was specifically passed to curb abuses of the Mining Law (i.e., individuals and
10 companies using fraudulent mining claims to monopolize federal land at no cost for non-
11 mineral extraction purposes; in a report submitted to Congress related to the proposed
12 Multiple Use Act, the Department of Agriculture estimated that likely no more than 40%
13 of unpatented mining claims on Forest Service lands were valid). As the Organic Act and
14 Multiple Use Act did not create rights independent of the Mining Law, and the record
15 before the Forest Service reflects that Rosemont's mining claims on the 2,447 acres in
16 question are invalid under the Mining Law, the Forest Service improperly found that
17 Rosemont had the right to dump 1.9 billion tons of its waste on that land.

18 Lastly, Defendants argue that the Forest Service regulations allow Rosemont to use
19 the 2,447 acres to dump its 1.9 billion tons of waste. However, the regulations state that
20 mining activities on Forest Service land are permitted only as specifically authorized by
21 the Mining Law of 1872. As Rosemont has no rights under the Mining Law as to the land
22 at issue, it follows that the regulations certainly do not create independent rights that do
23 not exist under the Mining Law.

24 As referenced above, the issues summarized in Part Two of this Order are discussed
25 in extensive detail below.

26 **PART THREE: DETAILED ANALYSIS OF THE DISPOSITIVE ISSUES**

27 **I. Patented and Unpatented Mining Claims, the Location of Minerals, and the** 28 **Administrative Process with the Forest Service Leading to Approval of the Mine**

Rosemont owns 132 patented mining claims within the boundaries of the Coronado

1 National Forest. *See* Conrad Huss, NI 43-101 Technical Report, 1 (2009). Rosemont owns
2 these claims in fee simple and they do not belong or attach to the National Forest land.
3 Additionally, Rosemont owns 949 unpatented claims located upon Forest Service land. *Id.*
4 The parties dispute the legal rights as to this land as described in the Forest Service’s FEIS.

5 As referenced above, to access and develop the copper ore within its claims,
6 Rosemont plans to dig an open-pit mine that will unearth 1.2 billion tons of waste rock and
7 700 million tons of tailings. The FEIS defined waste rock as rock that “contains no ore
8 metals or contains ore metals at levels below the economic cutoff value and must be
9 removed to recover the ore.” FEIS at 1344. Additionally, the FEIS described the amount
10 of waste rock removed by rock type and the formation in which it lay. *Id.* at 173 (Table
11 15). Rosemont proposed to dump this 1.9 billion tons of waste to the east and southeast of
12 the mine pit on Forest Service lands. *Id.* at 81 (Figure 17); ROD at 31.

13 Several rock formations underlie the areas Rosemont proposes to use for ore
14 processing, and tailings and waste rock storage. Beneath the ore processing facilities area
15 lies mainly Willow Canyon Formation as well as a strip of Mafic Lava. FEIS at 157.
16 Beneath the tailings pile lies mainly Willow Canyon Formation and Apache Canyon
17 Formation as well as some Gila Conglomerate, Mount Fagan Rhyolite and Schellenberger
18 Formation to the east. *Id.* at 159. Finally, beneath the waste rock pile area lies mainly Gila
19 Conglomerate with a strip of Older Alluvium that runs through the tailings pile area as
20 well. *Id.* at 157.

21 Rosemont purports to maintain an interest in copper sulfide and copper oxide within
22 their claims. *Id.* at 155-56. The sulfide ores exist “in potentially economic concentrations”
23 as “Horquilla Limestone, Colina Limestone, quartz monzonite porphyry, and the Earp
24 Formation.” *Id.* (relative percentages and citation omitted). The copper oxide appears “in
25 potentially economic concentrations” within “Willow Canyon arkose, quartz monzonite
26 porphyry, and quartz latite porphyry and andesite. *Id.* at 156 (relative percentages omitted).
27 Rosemont intends to extract over 641 million tons of copper oxide located primarily within
28 the Willow Canyon Formation and 156 million tons of “Tertiary Gravels.” *Id.* at 156, 166,

1 173 (Table 15). The FEIS alternatively described this copper oxide as existing in
2 “potentially economic concentrations” and then later as “waste rock.” *Id.* Moreover,
3 within the Willow Canyon Formation, “[p]rimary copper mineralization is confined to rare
4 localized areas of weak quartz veining that contain sparse very-fine grained bornite and
5 chalcopyrite.” William J. Daffron et. al., Arizona Geological Society, Rosemont Mine
6 Tour, 6 (2007).

7 Regarding the tertiary gravels, under a subsection entitled “Rosemont Deposit
8 Geology,” the FEIS describes four rock formations as pertaining to the tertiary period.
9 FEIS at 156. Among these it describes the Gila Conglomerate as “[l]ight brown,
10 medium- to thick-bedded, conglomerate, pebbly sandstone, and sandstone with a
11 calcareous matrix.” *Id.* This section also acknowledges the conglomerate contains clasts
12 of limestone, along with four other minerals. *Id.* The abundance of these clasts “varies,
13 depending on the composition of nearby upslope areas.” *Id.* The administrative record
14 contains no information regarding whether the limestone within the Gila Conglomerate
15 exists at economic concentrations.

16 Mount Fagan Rhyolite and Schellenberger Canyon Formation underlie the Gila
17 Conglomerate to the east of the tailings pile. *Id.* at 159. Neither formation lists any of the
18 host rocks purported to contain copper sulfide or oxide in potentially economic quantities.
19 *Id.* at 160-01. The Schellenberger Formation contains a thin layer of “Mural limestone”
20 less than 20 feet thick. *Id.* at 160. This limestone exists in the lower half of a formation
21 that runs 2,500 feet deep, and which underlies two other layers that run at least 1000 ft.
22 deep. *Id.* at 159-61. Rosemont does not contend that this limestone appears in potentially
23 economic quantities. *Id.* at 155-56.

24 Likewise, the Apache Canyon Formation does not contain any of the minerals
25 Rosemont contends host copper sulfide or oxide in potentially economic quantities. *Id.*
26 at 161. The FEIS describes the formation as “dominated by mudstone and arkosic-lithic
27 sandstone” and “distinguished by its . . . dark, typically laminated, nonfossiliferous, fetid,
28 micritic limestone.” *Id.* The FEIS does not posit that any mineralization appears within

1 this formation. *Id.* Neither do the Defendants contend that this limestone hosts any
2 economically viable mineralization. *Id.* at 155-56.

3 The administrative record shows no evidence of any mineralization within the Mafic
4 Lava, nor the Older Alluvium. *Id.* at 156, 161. The Mafic Lava “are calcite and quartz and
5 typically very fine grained.” *Id.* at 161. Whereas the Older Alluvium contains “medium- to
6 thick-bedded, sandy, pebble-cobble gravel with rare boulders, deried from upslope or
7 upstream units.” *Id.* at 156. Again, the Defendants do not contend that these formations
8 host any economically viable mineralization. *Id.* at 155-56.

9 In addition to the Rosemont deposit, located at the site of the proposed mine pit,
10 Rosemont claims two other “identified deposits or potential deposits at Peach-Elgin and
11 Broadtop Butte.” Rosemont Resp. ¶ 60. The Broadtop Butte deposits lies to the north of
12 the Rosemont deposit while the Peach-Elgin deposit lies to the north west. *See* Rosemont
13 Mine Tour at Claim Map, Sec. 4(c). Both deposits lie in patented land owned in fee simple
14 by Rosemont. *Id.* The Willow Canyon and Gila Conglomerate Formations lie to the east
15 and southeast. FEIS at 158.

16 In February of 2008, Rosemont submitted to the Forest Service a Mining Plan of
17 Operations (“MPO”). ROD at 3. n. 4. In October of 2011, the Forest Service published a
18 Draft Environmental Impact Statement (“DEIS”). *See* FEIS at i. From October 11, 2011
19 to January 31, 2012, the Forest Service received 24,845 public comments in connection
20 with the DEIS. *Id.* at G-3. In December of 2013, the Forest Service published the FEIS.
21 *See* ROD at 1. In June of 2017, the Forest Service issued a final ROD approving one of
22 the alternatives considered in the FEIS. *See* ROD at 33-37.

23 **II. Relevant Statutory and Regulatory Law**

24 As referenced above, numerous statutes and regulations are relevant to
25 understanding the dispute in this case; this authority is discussed below.

26 **A. The Administrative Procedures Act (“APA”)**

27 The APA provides that “a person suffering legal wrong because of agency action,
28 or adversely affected or aggrieved by agency action within the meaning of a relevant

1 statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. The APA requires the Court
2 to “hold unlawful and set aside agency action, findings, and conclusions found to be
3 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”
4 *Id.* § 706(2)(A). Furthermore, the APA grants the Court authority to “decide all relevant
5 questions of law, interpret constitutional and statutory provisions, and determine the
6 meaning or applicability of the terms of an agency action.” *Id.* § 706

7 A court may invalidate agency action as arbitrary and capricious if the agency: 1)
8 bases its decision “on factors which Congress has not intended it to consider”; 2) entirely
9 ignored or “failed to consider an important aspect of the problem”; 3) proffers “an
10 explanation for its decision that runs counter to the evidence” considered; or 4) proffers an
11 explanation “so implausible that it could not be ascribed to a difference in view or the
12 product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto*
13 *Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).⁹

14 Generally, the Court must treat agency decisions with deference, particularly “when
15 the agency is making predictions, within its special expertise, at the frontiers of science . .
16 .” *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1099 (9th Cir. 2003). However,
17 when an agency’s actions are inconsistent with its own policies, the Court will examine
18 first “whether the agency has actually departed from its policy,” and second, “whether the
19 agency has offered a reasoned explanation for such departure.” *Bahr v. EPA*, 836 F.3d
20 1218, 1229 (9th Cir. 2016). Furthermore, the Court cannot sustain an agency action
21 founded upon “an erroneous view of the law” rather than “the agency’s own judgment . .
22 .” *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985), *see also SEC v. Chenery Corp.*, 318
23 U.S. 80, 94 (1943) (declaring “an order may not stand if the agency has misconceived the
24 law”).

25 Moreover, before deferring to an agency’s interpretation of its own regulations, a
26 “court must carefully consider the text, structure, history, and purpose of a regulation” as
27 this practice “will resolve many seeming ambiguities out of the box” without a need for

28 ⁹ Unless otherwise noted by the Court, internal quotes and citations have been omitted
when citing case law throughout this Order.

1 deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). These inquiries “establish
2 the outer bounds of permissible interpretation” and help cabin any question as to the
3 interpretation’s reasonableness. *Id.* at 2416. Additionally, the Court must consider
4 whether the “character and context of the agency interpretation entitles it to controlling
5 weight” as well as whether the interpretation “in some way implicate[s] its substantive
6 expertise.” *Id.* Lastly, courts need not defer to an agency interpretation when “an agency
7 interprets a rule that parrots the statutory text.” *Id.* at 2417 n. 5.

8 **B. The National Environmental Policy Act (“NEPA”)**

9 NEPA mandates federal agencies prepare an environmental impact statement before
10 engaging in a “major Federal action[.]” that will “significantly affect[.] the quality of the
11 human environment.” 42 U.S.C. § 4332(2)(C). NEPA instructs the Forest Service to
12 “inform decisionmakers and the public of the reasonable alternatives which would avoid
13 or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R.
14 § 1502.1. Under NEPA, an agency must take a “hard look” at the environmental
15 consequences of a proposed action. *Nat. Res. Def. Council v. U.S. Forest Service*, 421 F.3d
16 797, 813-14 (9th Cir. 2005).

17 As part of this procedural duty, an agency must “study, develop, and describe
18 appropriate alternatives” to any proposed action. 42 U.S.C. § 4332(2)(E). In doing so, an
19 agency should “rigorously explore and objectively evaluate all reasonable alternatives.”
20 40 C.F.R. § 1502.14(a). Among these, an agency must include a “no action” alternative.
21 *Id.* § 1502.14(d). These considerations comprise “the heart of the environmental impact
22 statement.” *Id.* § 1502.14. Through this process, an agency decisionmaker will “have
23 before them and take into proper account all possible approaches to a particular project
24 (*including total abandonment of the project*) which would alter the environmental impact
25 and the cost-benefit balance” before issuing a final decision. *Bob Marshall All. v. Hodel*,
26 852 F.2d 1223, 1228 (9th Cir. 1988) (emphasis in the original) (alternations omitted).

27 In discussing these alternatives, the Forest Service must state how the alternatives
28 “will or will not achieve the requirements of . . . other environmental laws and policies.”

1 40 C.F.R. § 1502.2(d). A failure to consider viable alternatives or “present complete and
2 accurate information to decision makers and to the public” regarding these alternatives will
3 not meet the requirements of the NEPA. *See Nat. Res. Def. Council*, 421 F.3d at 813-14.

4 **C. Mining Law of 1872**

5 The Mining Law of 1872 granted citizens the right to enter upon public land to
6 prospect and, upon discovery, locate a mining claim. *See* 30 U.S.C. §§ 22, 23; *Davis v.*
7 *Nelson*, 329 F.2d 840, 844-45 (9th Cir. 1964). A mining claim “is a parcel of land
8 containing precious metal in its soil or rock.” *St. Louis Smelting & Ref. Co. v. Kemp*, 104
9 U.S. 636, 649 (1881). Such a claim grants a claimant an alienable property interest. *See*
10 *U.S. v. Shumway*, 199 F.3d 1093, 1099 (9th Cir. 1999). Furthermore, a valid mining claim
11 grants its locator with an “exclusive right of possession and enjoyment of all the surface
12 *included within the lines of their locations.*” 30 U.S.C. § 26 (emphasis added). These
13 rights “are not *conferred* by agency action; they are acquired by the miner’s own actions
14 of location and discovery.” *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162 (9th Cir.
15 2018) (emphasis in original).

16 **i. Discovery and Location**

17 A claimant must first discover a valuable mineral deposit to assert a mining claim.
18 *See* 30 U.S.C. §§ 22, 23 (no location of a mining claim shall be made until discovery of the
19 vein or lode); *Davis*, 329 F.2d at 845 (explaining “discovery of [a] valuable mineral is the
20 *sine qua non* of an entry to initiate vested rights against the United States”). This statutory
21 prerequisite arose out of unregulated mining customs in the early to mid-1800s where “the
22 finder of valuable minerals on government land [was] entitled to exclusive possession of
23 the land for purposes of mining and to all the minerals he extracts.” *Shumway*, 199 F.3d at
24 1097-99.

25 To determine whether a claim contains valuable minerals, courts use a
26 “prudent-man test” and complimentary “marketability test.” *U.S. v. Coleman*, 390 U.S.
27 599, 602 (1968). The prudent-man test asks whether “a person of ordinary prudence would
28 be justified in the further expenditure of his labor and means, with a reasonable prospect

1 of success, in developing a valuable mine . . .” *Castle v. Womble*, 19 L.D. 455, 457 (1894).
2 The marketability test helps refine this question by asking whether the minerals may be
3 “extracted, removed and marketed at a profit.” *Coleman*, 390 U.S. at 600.

4 Discoveries of “common varieties of sand, stone, gravel, pumice, pumicite, or
5 cinders” do not qualify as valuable mineral deposits and therefore do not confer validity
6 upon a mining claim. *See* 30 U.S.C. § 611. Through section 611, Congress intended to
7 remove the disposition of lands containing only common minerals from the Mining Laws.
8 *See Coleman*, 390 U.S. at 604. As Senator Clair Engle explained:

9 The reason we have done that is because sand, stone, gravel, pumice, and
10 pumicite are really building materials, and are not the type of material
11 contemplated to be handled under the mining laws, and that is precisely
12 where we have had so much abuse of the mining laws, because people can
13 go out and file mining claims on sand, stone, gravel, pumice, and pumicite
taking in recreational sites and even taking invaluable stands of commercial
timber in the national forests and on the public domain.

14 *See* 101 Cong.Rec. 8743.

15 After discovery, a claimant must locate their claim. *See* 30 U.S.C. § 23. The act of
16 location entails “staking the corners of the claim, posting a notice of location thereon and
17 complying with the state laws concerning the filing or recording of the claim in the
18 appropriate office.” *United States v. Curtis-Nev. Mines, Inc.*, 611 F.2d 1277, 1281 (9th
19 Cir. 1980). An individual claim may run “one thousand five hundred feet in length along
20 the vein or lode” and extend no more than “three hundred feet on each side of the middle
21 of the vein at the surface, . . .” 30 U.S.C. § 23. While a claimant may “locate, mark and
22 record the boundaries of the claim,” before discovery, their rights are good against only a
23 “forcible, fraudulent or clandestine intrusion upon” the location. *See Davis*, 329 F.2d at
24 455. The Government treats such locators as licensees or tenants at will. *See id.*

25 A claimant may not use the deposit present in one location to lend validity to an
26 adjacent location. *See Waskey v. Hammer*, 223 U.S. 85, 91 (1912) (“A discovery without
27 the limits of the claim, no matter what its proximity, does not suffice.”); *Lombardo*
28 *Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977).

1 Likewise, a claimant may not draw the lines of their claim so large as to encompass both
2 the deposit and land beyond the acreage allowable by statute. *See Walton v. Wild Goose*
3 *Min. & Trading Co.*, 123 F. 209, 218 (9th Cir. 1903) (approving a jury instruction that
4 excised land from mining claim larger than 20 acres); *Belk v. Meagher*, 104 U.S. 279, 284
5 (1881) (“The right of location upon the mineral lands of the United States is a privilege
6 granted by Congress, but it can only be exercised within the limits prescribed by the
7 grant.”)

8 **ii. Unpatented and Patented Claims**

9 Possessory rights to an unpatented mining claim vest with a claimant upon
10 discovery and completion of the minimum requirements of location. *See Davis*, 329 F.2d
11 at 845. An unpatented claim confers upon the locator a unique possessory interest in which
12 the United States may hold title to the land while the locator retains a right to the minerals
13 beneath. *See Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 335-36 (1963). So long as
14 a claimant complies with the mining laws, “their right to the unpatented claim . . . is vested
15 even though the Department of the Interior has as yet taken no action at all on their
16 application for a patent.” *Shumway*, 199 F.3d at 1103. The Government does not retain
17 plenary power over such a claim, even in the absence of an application for patent. *See id.*
18 However, “no right arises from an invalid claim of any kind.” *Best*, 371 U.S. at 337.
19 Therefore, discovery and location of a mining claim entitles the claimant to a possessory
20 right “unless their claim was a sham or otherwise invalid or they failed to observe Forest
21 Service regulations in such a way as to invalidate their claim.” *Shumway*, 199 F.3d at 1103.

22 Subject to the 1955 Multiple Use Act, the United States retains the right “to manage
23 surface resources and for the Government and whomever it permits to do so to use the
24 surface, so long as they do not endanger or materially interfere with prospecting, mining,
25 or processing.” *Shumway*, 199 F.3d at 1101; *see* 30 U.S.C. § 612. Thus, mining law limits
26 a claimant’s use of an unpatented mining claim to “activities that are reasonably incident
27 to prospecting, mining and processing operations, and subject to the right of the United
28 States to manage surface resources.” *U.S. v. Backlund*, 689 F.3d 986, 991 (9th Cir. 2012).

1 In enacting the Multiple Use Act, Congress “did not intend to change the basic
2 principles of the mining laws.” *Curtis-Nevada Mines, Inc.*, 611 F.2d at 1280. Before
3 enacting the Multiple Use Act, Congress emphasized that the United States “would be
4 authorized to manage and dispose of surface resources, or to use the surface for access to
5 adjacent lands, so long as and to the extent that these activities do[] not endanger or
6 materially interfere with mining, or related operations or activities *on the mining claim.*”
7 H.R. Rep. No. 730, 84th Cong., 1st Sess. 1955, Reprinted in 1955 U.S.C.C.A.N. 2474,
8 2483 (emphasis added).

9 Upon discovery and location, a claimant may prove the validity of their claim
10 through an application with the Department of the Interior and subsequent administrative
11 procedures. *See* 30 U.S.C. § 29; *Swanson v. Babbitt*, 3 F.3d 1348, 1350 (9th Cir. 1993). If
12 approved, the claimant holds a fee simple interest (i.e., a patented mining claim) in both
13 the surface of the claim and the minerals beneath. *See McMaster v. U.S.*, 731 F.3d 881,
14 885 (9th Cir. 2013).

15 **D. Organic Act of 1897**

16 The Organic Act of 1897 delegates to the Secretary of Agriculture the ability to
17 “make provisions for the protection against destruction by fire and depredations upon the
18 public forests and national forest.” 16 U.S.C. § 551. In exercising this power, the Secretary
19 may “make such rules and regulations and establish such service as will insure the objects
20 of such reservations, namely, to regulate their occupancy and use and to preserve the forests
21 thereon from destruction.” *Id.* Congress limited this power by proscribing the Secretary
22 from prohibiting “any person from entering upon such national forests for all proper and
23 lawful purposes, including that of prospecting, locating, and developing the mineral
24 resources thereof.” *Id.* § 478. Therefore, “the Secretary may adopt reasonable rules and
25 regulations which do not impermissibly encroach upon the right to the use and enjoyment”
26 of valid mining claims. *U.S. v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). However,
27 “prospecting, locating, and developing of mineral resources in the national forests may not
28 be prohibited nor so unreasonably circumscribed as to amount to a prohibition.” *Id.*

1 **E. Forest Service Mining and Special Use Regulations**

2 **i. Part 228 - Mining Regulations**

3 In its Part 228 regulations, the Forest Service “set forth rules and procedures through
4 which use of the surface of National Forest System lands *in connection with operations*
5 *authorized by the United States mining laws (30 U.S.C. 21–54[Mining Law of 1872]), . . .*
6 shall be conducted so as to minimize adverse environmental impacts on National Forest
7 System surface resources.” 36 C.F.R. § 228.1 (emphasis added). The Forest Service
8 emphasized that “[t]hese regulations apply to *operations* hereafter conducted under the
9 *United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 et seq.)*, as they
10 affect surface resources on all National Forest System lands . . .” *Id.* § 228.2 (emphasis
11 added). The Forest Service defined “operations” as “[a]ll functions, work, and activities
12 in connection with prospecting, exploration, development, mining or processing of mineral
13 resources and *all uses reasonably incident thereto*, including roads and other means of
14 access on lands subject to the regulations in this part, *regardless of whether said operations*
15 *take place on or off mining claims.*” *Id.* § 228.3(a) (emphasis added). The regulations
16 further define a “mining claim” as “any unpatented mining claim or unpatented millsite
17 *authorized by the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22*
18 *et seq.)*.” *Id.* § 228.3(d) (emphasis added).

19 Save for a few exceptions, the Forest Service must approve a plan of operations
20 before a claimant may dispose of surface resources upon an unpatented mining claim in
21 National Forest lands. *See U.S. v. Doremus*, 888 F.2d 630, 633 (9th Cir. 1981); 36 C.F.R.
22 § 228.4(a). The Forest Service may prohibit conduct not reasonably necessary to mining,
23 even assuming a claimant conducts their operation on a valid mining claim. *See Backlund*,
24 689 F.3d at 996; *U.S. v. Richardson*, 599 F.2d 290, 295 (9th Cir. 1979).

25 Ordinarily, the Forest Service need not inquire into the validity of a mining claim
26 before considering a plan of operations. *See Solicitor’s Opinion*, M-37012, Legal
27 Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of
28 Operations, 2005 WL 7139266, *1-2 (Nov. 14 2005). The Forest Service does not make

1 determinations; it merely expresses “statements of belief” regarding validity. *See* Forest
2 Service Manual, § 2819 – “Mining Claim Contests”. However, the Forest Service requires
3 a claimant “meet the requirements as specified or implied by the mining laws” to “use a
4 claim for prospecting and mining.” *See* Forest Service Manual, § 2813.2 – “Obligations”.
5 Forest service policy and mining law “require a claimant . . . [d]iscover a valuable mineral
6 deposit” and “[b]e prepared to show evidence of mineral discovery.” *Id.* Additionally, the
7 Forest Service acknowledges an “obligation to ensure that unauthorized uses of mining
8 claims are eliminated.” *Id.* § 2814.23 – “Prevent Violations of Laws and Regulations”.
9 This obligation includes the “unlawful use of buildings and other structures and the taking
10 of common varieties of mineral materials.” *Id.*

11 Operations on National Forest lands must comply with all Federal and State air and
12 water quality standards. *See* 36 C.F.R. § 228.8(a), (b). Furthermore, “[a]ll tailings,
13 dumpage, deleterious materials, or substances and other waste produced by operations shall
14 be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the
15 environment and forest surface resources.” *Id.* § 228.8(c). The regulations further provide,
16 where practicable, for the protection of scenic values, fisheries, and wildlife habitat. *See*
17 *id.* § 228.8(d), (e).

18 Finally, and “at the earliest practicable time,” the Forest Service requires that, where
19 practicable, an operator must “reclaim the surface disturbed in operations by taking such
20 measures as will prevent or control onsite and offsite damage to the environment and forest
21 surface resources.” *Id.* § 228.8(g). Unless otherwise agreed to, this includes the removal
22 of “all structures, equipment and other facilities and clean up [of] the site of operations.”
23 *Id.* at § 228.10

24 **ii. Part 251 - Special Use Regulations**

25 Restrictions on operations are not limited to Part 228 of the Forest Service
26 regulations merely because they relate to the extraction and development of minerals. *See*
27 *Doremus*, 888 F.2d at 631-633. While the Part 228 regulations exclusively apply to mining
28 operations, Part 261 prohibitions (which list prohibited activities on Forest Service land,

1 and when a “special use” permit may authorize such activities) apply to all surface uses,
 2 including mining operations. *See id.*; 36 C.F.R. § 261.10. Moreover, “all uses of National
 3 Forest System lands, improvements, and resources, except those *authorized* by the
 4 regulations governing . . . minerals (part 228) are designated ‘special uses’” and require a
 5 “special use authorization.” 36 C.F.R. § 251.50(a) (emphasis added); § 251.53(a) (permits
 6 governing occupancy and use).¹⁰

7 Initial screening of a special use request for use and occupancy of Forest System
 8 Lands must meet several minimum requirements including: that “the proposed use is
 9 consistent . . . with other applicable Federal law, and with applicable State and local health
 10 and sanitation laws; that the use must not “pose a serious or substantial risk to public health
 11 or safety”; that it must not “create an exclusive or perpetual right of use or occupancy”;
 12 and that it must not “involve disposal” of “other hazardous substances.” *Id.*
 13 § 251.54(e)(1)(i), (iii), (iv), (ix). Should any proposed use not meet these minimum
 14 requirements, it “shall not receive further evaluation and processing.” *Id.* § 251.54(e)(2).

15 After initial screening, the Forest Supervisor must conduct a second level of
 16 screening in which they “shall reject any proposal, including a proposal for commercial
 17 group uses, if . . . the proposed use would not be in the public interest.” *Id.*
 18 § 251.54(e)(5)(ii). Any proposed use which cannot meet this standard “does not require
 19 environmental analysis and documentation.” *Id.* § 251.54(e)(6).

20 **III. Discussion of the Dispositive Errors Made by the Forest Service**

21 **A. The Forest Service Abdicated Its Duty to Protect the Coronado National** 22 **Forest from Depredation and Preserve the Forest from Destruction when It Failed to** 23 **Consider Whether Rosemont Held Valid Unpatented Mining Claims**

24 The Organic Act imposes upon the Forest Service a duty to “make provisions for
 25 the protection against . . . depredations upon the public forests and national forests.” 16
 26 U.S.C. § 551. The Forest Service cannot protect the forest from depredation without first
 27 determining who may, as a right, use the surface. Any determination of a claimant’s

28 ¹⁰ The Court notes that there are other uses (i.e., grazing, etc.) that are also excepted from special uses, but have been omitted, as they are not relevant to this dispute.

1 surface rights upon Forest Service land must begin with a discussion of the validity of their
2 claims. *See Best*, 371 U.S. at 337 (“[N]o right arises from an invalid [mining] claim of any
3 kind. All must conform to the law under which they are initiated; otherwise they work an
4 unlawful private appropriation in derogation of the rights of the public.”); *Cameron v.*
5 *United States*, 252 U.S. 450, 412 (1920) (same); *Waskey*, 223 U.S. at 90-91 (“The [Mining
6 Law of 1872] make the discovery of mineral within the limits of the claim a prerequisite
7 to the location of a claim . . . the purpose being to reward the discoverer and to prevent the
8 location of land not found to be mineral. A discovery without the limits of the claim, no
9 matter what its proximity, does not suffice.”); *Lara v. Secretary of the Interior*, 820 F.2d
10 1535, 1537 (9th Cir. 1987) (“A mining claimant has the right to possession of a claim only
11 if he has made a mineral discovery on the claim.”). This discussion necessarily must
12 include whether the claimant discovered a valuable mineral deposit within the boundaries
13 of their claim. *See Best*, 371 U.S. at 337; *Waskey*, 223 U.S. at 91; *Lara*, 820 F.2d at 1537;
14 *see also Davis*, 329 F.2d at 845.¹¹ Any decision made without first establishing a factual
15 basis upon which the Forest Service could form an opinion on surface rights would entirely
16 ignore an important aspect of this problem. *See State Farm*, 463 U.S. at 43. Likewise, a
17 grant to use the surface when the administrative record shows such a right does not exist
18 would contravene the Forest Service’s duty to protect the forest from depredations and
19 offer an opinion that runs contrary to the evidence. *See id.*

20 The Mining Law of 1872 explicitly authorizes several federal land uses pursuant to
21 a valid claim. These rights may be grouped according to where they may occur. For ease
22 of reference, the Court uses the term “intralimital” rights to refer to those activities the
23 Mining Law authorizes within the boundaries of a claim and uses the term “extralimital”

24 _____
25 ¹¹ As previously referenced, while the Forest Service’s 1897 Organic Act directs the Forest
26 service to protect the forest from depredations, it also recognizes that the Forest Service
27 cannot prohibit preexisting mining rights created by the Mining Law of 1897. *See* 16
28 U.S.C. § 478 (“Nor shall anything in [the Organic Act] *prohibit* . . . entering upon such
national forests for . . . prospecting, locating, and developing the mineral resources
thereof.”); 16 U.S.C. § 482 (“[A]ny mineral lands in any national forest . . . subject to entry
under the existing mining laws [i.e., the Mining Law of 1872] . . . shall continue to be
subject to such location and entry . . .”). The Organic Act did not create new mining rights
outside of the Mining Law of 1872.

1 rights to refer to actions a claimant may take outside the boundaries of a mining claim.

2 Surface rights pursuant to the Mining Law of 1872 begin with exploration and
3 prospecting on public lands not withdrawn. *See* 30 U.S.C. § 22. Upon discovery of a
4 valuable mineral deposit, the Mining Law authorizes the occupation and purchase of
5 federal land. *See id.* A claimant may then stake out 1500 feet along the length of the vein
6 or lode and 300 feet on either side from the center of the same, an amount equal to about
7 20 acres. *See id.* § 23. After a claimant sets the boundaries of their location, they may
8 claim “possession and enjoyment of all the surface included *within the lines of their*
9 *locations.*” *Id.* § 26 (emphasis added). Additionally, a claimant may locate and patent five
10 acres of “nonmineral land not contiguous to the vein or lode” which they may use or occupy
11 “for mining or milling purposes.” *Id.* § 42. Furthermore, in connection with the Forest
12 Service’s Organic Act, a claimant retains a right of ingress to and egress from their mining
13 claim. *See* 16 U.S.C. § 478.

14 Intralimital rights include the right to exclusive possession and enjoyment of the
15 surface of a valid mining claim. *See* 30 U.S.C. § 26. Pursuant to this right, a claimant may
16 use the surface of their claim to access the mineral deposit located beneath. This right must
17 include the ability to perform reasonably necessary mining activities upon the surface.

18 The Multiple Use Act makes this point abundantly clear. In enacting the Multiple
19 Use Act, Congress meant to clarify the types of uses it intended to permit upon unpatented
20 mining claims. *See Curtis-Nevada Mines, Inc.*, 611 F.2d at 1280. As explained in
21 *Curtis-Nevada Mines, Inc.*, “Congress did not intend to change the basic principles of the
22 mining laws when it enacted the Multiple Use Act.” *Id.*

23 The plain language of the Multiple Use Act illustrates that Congress did not intend
24 to expand reasonably incidental uses beyond the boundaries of a claim. First, it clarifies
25 “[a]ny *mining claim* . . . shall not be used, prior to issuance of patent therefor, for any
26 purposes other than prospecting, mining or processing operations and uses reasonably
27 incident thereto.” 30 U.S.C. § 612(a) (emphasis added). Nothing in this subsection
28 expands the right of occupancy and enjoyment of the surface to lands beyond the claim

1 boundaries. This subsection references only the mining claim itself.

2 Moreover, pursuant to the Multiple Use Act, “[r]ights under any mining claim . . .
3 shall be subject, prior to issuance of patent therefor, to the right of the United States to
4 manage and dispose of the *vegetative surface resources thereof* and to manage *other*
5 *surfaces resources thereof.*” *Id.* § 612(b) (emphasis added). Here, “thereof” refers to the
6 surface resources upon a mining claim. This language appears again in subjecting “[a]ny
7 such mining claim . . . to the right of the United States, its permittees, and licensees, to use
8 so much of the *surface thereof* as may be necessary for such purposes or for access to
9 adjacent land.” *Id.* (emphasis added). Once again, “thereof” refers only to the surface of
10 the mining claim. Finally, the Multiple Use Act provides “any use of the surface of any
11 such mining claim by the United States, its permittees or licensees, shall be such as not to
12 endanger or materially interfere with prospecting, mining or processing operations or uses
13 reasonably incident thereto.” *Id.* Again, the act refers explicitly to “the surface of any such
14 mining claim.” *Id.* Nothing within the Multiple Use Act grants an implied right to use the
15 surface outside of a claim. It merely clarifies allowable uses of the surface of an unpatented
16 mining claim and balances competing uses of the same.¹²

17 ¹² As referenced above, the Multiple Use Act was passed to curb abuses of the Mining Law
18 of 1872. *See Curtis-Nevada Mines*, 611 F.2d at 1280-1282 (“The Multiple Use Act was
19 corrective legislation, which attempted . . . to alleviate abuses that occurred under the
20 [Mining Law of 1872]. . . . As a practical matter, mining claimants could remain in
21 exclusive possession of [mining] claim[s] without ever proving a valid [mineral] discovery
22 . . . It was to correct this deficiency in the mining law that Congress in 1955 enacted the
23 Multiple Use Act.”). Examples of these abuses included purported mining claimants
24 staking fraudulent mining claims on federal land, asserting exclusive possession by posting
25 “no trespassing” signs to their claims, and using the area to obtain free timber, or a free
26 private fishing or hunting camp. *See id.* at 1282. Reports from the Department of
27 Agriculture (which encompasses the Forest Service) when the Multiple Use Act legislation
28 was being considered by Congress highlighted the rampant level of abuse of the Mining
Law of 1872. *See id.* at 1286 n. 7 (“A report from the Department of Agriculture. . .
concerning the proposed [Multiple Use Act] stated that as of January 1, 1952 there were
84,000 unpatented claims, covering 2.2 million acres of national forest . . . [P]robably no
more than 40% [of these unpatented mining claims] could be considered valid. As of
January 1, 1955 there were an estimated 166,000 claims covering 4 million acres [i.e., the
number of unpatented mining claims and acres covered thereby nearly doubled in three
years presumably due to the looming passage of the Multiple Use Act which was meant to
curb Mining Law abuses.”). Defendants’ position that the Multiple Use Act gives
Rosemont the right to dump 1.9 billion tons of their waste on 2,447 acres of the Coronado
National Forest is unpersuasive; the record indicates that Rosemont’s unpatented claims
on that land are invalid as there is no valuable mineral deposits beneath that land.
Accepting Defendants’ position would make an end-run around the requirements of the

1 The Mining Law of 1872 specifies the parameters of extralimital rights. Section 26
2 allows a claimant to pursue a vein downward past the side lines of a location, but not past
3 the end lines. *See* 30 U.S.C. § 26. Additionally, a claimant may locate and patent five
4 acres of “nonmineral land not contiguous to the vein or load . . . for mining or milling
5 purposes.” *Id.* § 42. However, as already shown, extralimital rights extend no further.

6 The Forest Service predicated its decision regarding Rosemont’s entitlement to
7 process ore and dump waste rock and tailings on federal land upon the validity of
8 Rosemont’s unpatented mining claims. *See* FEIS at 101. Under this presumption, the
9 Forest Service believed that “Rosemont . . . has a possessory interest for mining purposes
10 in unpatented mining claims on the land where the project is proposed.” *See id.*; *see also*
11 ROD at 31 (“[The Forest Service] cannot select the no action alternative . . . because
12 Federal law provides the right for [Rosemont] . . . to use the surface of its unpatented
13 mining claims for mining and processing operations and reasonably incidental uses . . .
14 [The Forest Service] cannot reject outright the proposed project”); FEIS at 94 (“The [Forest
15 Service] may impose reasonable conditions to protect surface resources but cannot
16 materially interfere with reasonably necessary activities *under the General Mining Law [of*
17 *1872]* that are otherwise lawful.”) (emphasis added); FEIS at 10 (“The Forest Supervisor’s
18 decision space is constrained . . . the Forest Service cannot categorically prohibit mining
19 or deny reasonable and legal mineral operations under the law.”); ROD at 32 (“[The Forest
20 Service] determined that modifying [Rosemont’s Mining Plan] to comply with the current
21 Coronado [Forest Plan] would materially interfere with [Rosemont’s] mineral operations .
22 . . [therefore, the Forest Service amended the Forest Plan] contemporaneously with the
23 approval of [Rosemont’s Mining Plan] so that [Rosemont’s mining] project or activity will
24 be consistent with the [Forest Plan] as amended.”). These statements could accurately
25 reflect the Mining Law of 1872 if the administrative record before the Forest Service
26 reflected that Rosemont held valid unpatented mining claims in these areas.

27 However, the administrative record shows no basis upon which the Forest Service
28

Mining Law of 1872, and would encourage abuses of the Mining Law of 1872 that the
Multiple Use Act of 1955 was designed to abolish.

1 could find Rosemont discovered a valuable mineral deposit within the facilities, tailings,
2 and waste rock areas. In fact, the evidence in the FEIS shows the absence of any such
3 deposit within those lands.

4 Regarding the Willow Canyon Formation, which underlies the facilities and tailings
5 areas, the Forest Service offers contradictory information. First, the Forest Service states
6 that the Willow Canyon Formation contains copper oxide ore in “potentially economic
7 concentrations.” *Id.* at 156. Rosemont intends to unearth more than 600 million tons of
8 copper oxide, all of which the FEIS describes several pages later as “waste rock.” *Id.* at
9 173 (Table 15). By the FEIS’s own definition, waste rock either “contains no ore metals
10 or contains ore metals at levels below the economic cutoff value.” *Id.* at 1344.
11 Furthermore, the Arizona Geological Society review of Rosemont’s plan and property, in
12 which Rosemont actively participated, states that “copper mineralization is confined to rare
13 localized areas.” *See* Rosemont Mine Tour at 6.

14 Considering this factual basis, the Forest Service could not determine that the
15 Willow Canyon Formation contained an economically viable amount of copper oxide
16 which would lend validity to Rosemont’s mining claims. Rosemont’s own geological
17 survey purported to find only “rare localized areas” of copper mineralization within this
18 formation. *See id.* The evidence within the FEIS that lends support to claim validity in
19 this formation amounts to two sentences: one sentence claims the formation as a host rock
20 and then describes it as “predominately arkosic siltstone, sandstone, and conglomerate”;
21 and another sentence claims it contains “mafic or andesitic flows, which host minor
22 mineralization.” *See* FEIS at 155. The Forest Service’s own description and Rosemont’s
23 proposed treatment of over 600 million tons of this copper oxide as “waste rock” belie
24 these assertions.

25 Likewise, the administrative record provides, at best, internally inconsistent
26 evidence of a valuable mineral deposit within the Gila Conglomerate beneath the waste
27 rock area. The FEIS described the Gila Conglomerate as containing “conglomerate, pebbly
28 sandstone, and sandstone with a calcareous matrix.” *Id.* at 156. It noted, among several

1 other minerals, the presence of limestone clasts within this conglomerate the abundance of
2 which, “varies, depending on the composition of nearby upslope areas.” *Id.* However,
3 none of the host rocks which the Defendants purport may exist in potentially economic
4 quantities appear within this formation. Rosemont proposed to excavate over 150 million
5 tons of tertiary gravel, the group to which the Gila Conglomerate pertains. *Id.* at 173. In
6 fact, Rosemont must remove a layer of Gila Conglomerate to access the copper sulfide
7 within the mine pit. *Id.* at 159. The Forest Service classified the entirety of this excavated
8 tertiary gravel as waste rock. *See id.* at 173.

9 Furthermore, according to the maps provided in the FEIS, Mount Fagan Rhyolite
10 and Schellenberger Canyon Formation underlie the Gila Conglomerate east of the tailings
11 pile. *See id.* at 159. The FEIS gives a passing description of these formations and none of
12 the minerals purported to appear in potentially economic quantities appear within these
13 descriptions. *See id.* at 160-61. The lower portion of the Schellenberger Canyon Formation
14 does contain a layer of “Mural limestone.” *Id.* at 160. However, this limestone exists
15 within the lower portion of a formation that runs 2,500 feet deep. *See id.* at 160-61.
16 Moreover, two other formations overlie the Schellenberger Canyon Formation, which run
17 at least 1000 feet deep themselves. *Id.* at 159. Finally, in its discussion of copper sulfide
18 host rock, the FEIS names several limestone formations, but does not name the Mural
19 limestone among them. *Id.* at 155.

20 The Apache Canyon Formation suffers from the same inadequacies. The formation
21 contains limestone of which Defendants do not purport to host mineralization. *Id.* at
22 155-56, 161. Likewise, the administrative record shows no evidence of potentially
23 economic concentrations of copper sulfide or copper oxide within the Mafic Lava or Older
24 Alluvium. Moreover, Rosemont’s intention to bury the Apache Canyon Formation and
25 Older Alluvium beneath tons of waste rock and tailings provides further evidence that they
26 host no economically viable mineralization.

27 The unauthorized dumping of over 1.2 billion tons of waste rock, as well as about
28 700 million tons of tailings, and the establishment of an ore processing facility no doubt

1 constitutes a depredation upon Forest Service land. The administrative record shows no
2 basis upon which the Forest Service could find the Mining Laws would authorize this
3 activity. The Mining Law authorizes occupation of the surface only within a claim. The
4 record contains no information to show Rosemont discovered a valuable mineral deposit
5 within the ore processing, or tailings and waste rock pile areas. Therefore, despite the
6 location of these areas as a mining claim, the Forest Service could determine at best that
7 Rosemont maintained status as a tenant at will of the United States upon these lands. In
8 the absence of any statutory right on the part of Rosemont, the Forest Service could deny
9 Rosemont's off claim activities as part of the Forest Service's Organic Act obligations.

10 The Forest Service argues that it is not required to conduct a validity determination
11 before approving a mining plan of operations. However, a validity determination differs
12 significantly from establishing a factual basis upon which the Forest Service can determine
13 rights. A validity determination invokes a separate administrative procedure carried out
14 by the BLM (which is within the Department of the Interior). In contrast, the Forest Service
15 (which is within the Department of Agriculture) merely needed a factual basis to support
16 Rosemont's assertion of rights. Such a finding would not preclude another individual from
17 bringing an adverse proceeding to determine mineral rights, or the Government from
18 initiating a validity determination. As referenced above, the fact that Rosemont proposed
19 to dump 1.9 billion tons of waste on its unpatented claims on 2,447 acres of the Coronado
20 National Forest was a potent indication that Rosemont's unpatented claims on the land in
21 question were invalid (i.e., if Rosemont was voluntarily proposing to bury its unpatented
22 claims under 1.9 billion tons of its own waste, there is a strong inference that there is no
23 valuable mineral deposit lying below the waste site). Furthermore, Forest Service
24 regulations and the Forest Service Manual indicate that such matters should be evaluated,
25 and otherwise empower the Forest Service to gather facts to make an informed decision as
26 to surface rights stemming from mining claims; in fact, there is case law from the Ninth
27 Circuit reflecting that the Forest Service has successfully pursued such matters in the past.
28 *See, e.g.*, 36 C.F.R. § 228.5(d) (in reviewing mining operation plans, "the Forest Service

1 will arrange for consultation with appropriate agencies of the Department of the Interior .
2 . . . with respect to mineral values, mineral resources, and mineral reserves.”); Forest Service
3 Manual § 2813.2(2) and (7) (a mining “claimant must meet the requirements as specified
4 or implied by the mining laws . . . these require a claimant to: . . . Discover a valuable
5 mineral deposit . . . Be prepared to show evidence of mineral discovery.”); § 2819.1(1)
6 (“When administrative problems of a mineral nature arise or unauthorized use of a mining
7 claim is believed to exist . . . A Forest Service mineral examiner . . . may go on an
8 unpatented mining claim to make a mineral investigation.”); *Clouser*, 42 F.3d at 1525
9 (“[T]he Forest Service conducted a mineral examination [of mining claims on Forest
10 Service land] . . . and initiated contest proceedings in the Department of the Interior to have
11 the claims declared void, on the ground that no valuable mineral deposits had been
12 discovered [prior to withdrawal of the land from mineral entry] . . . An Interior Department
13 (“ALJ”) held the claims null and void.”); *Lara*, 820 F.2d at 1537-1538 (“[A] Forest Service
14 mining engineer [(“Boswell”)] took samples from [defendant’s mining claims on Forest
15 service land] . . . On the basis of Boswell’s [] tests the Forest Service filed administrative
16 complaints contesting the validity of the [mining] claims”; administrative proceedings
17 before the Department of Interior found that the claims were invalid based on Boswell’s
18 testimony, and these decisions were affirmed on appeal such that defendant was ordered to
19 vacate the claims).

20 Defendants also argue that the Forest Service must allow these extralimital activities
21 because Rosemont owns valid claims in the mine pit area. However, as explained, a
22 separate discovery must support each claim. *See Best*, 371 U.S. at 337; *Waskey*, 223 U.S.
23 at 91; *Lara*, 820 F.2d at 1537. Discovery in one claim cannot lend validity to an adjacent
24 claim in which no valuable mineral deposit exists. *See id.* Rosemont’s extralimital rights
25 springing from its valid claims in the mine pit do not permit surface occupancy outside the
26 boundaries of these claims. *See* 30 U.S.C. § 26. No limiting principle would conscript
27 surface use under the Forest Service’s interpretation of the Mining Law. This interpretation
28 would render the act of location moot – an individual would need only discover a deposit

1 before gaining a right to all the surface of public lands not withdrawn. This simply does
2 not comport with the plain language of the Mining Law.

3 In the Mining Law of 1872, Congress anticipated that claimants would need more
4 than the land directly above a deposit to extract minerals. *See* 30 U.S.C. §§ 23, 42. Where
5 Congress anticipated such use, it provided for such use. *See id.*¹³ Some present-day mining
6 operations may exceed the rights granted, and limitations imposed, by the Mining Law of
7 1872; the Forest Service’s application of its regulations to mining operations cannot grant
8 rights outside the bounds of the Mining Law of 1872. Defendants’ remedy lies with
9 Congress, not the courts.

10 **B. The Forest Service Implemented the Wrong Regulations, Misinformed the**
11 **Public and Failed to Adequately Consider Reasonable Alternatives**

12 The Forest Service’s Part 228 regulations do not allow for denial of an otherwise
13 reasonable mining operation unless it violates some other substantive environmental law.
14 These regulations further define “operation” to encompass essentially any mining activity,
15 even those “reasonably incidental” to mining, regardless of whether they occur on or off a
16 mining claim. *See* 36 C.F.R. § 228.3(a). This definition does not, on its face, run afoul of
17 the Mining Law.

18 In fact, defining operation so broadly as to encompass mining activity regardless of

19 ¹³ For example, as referenced above, § 42 of the Mining Law of 1872 specifically provides
20 for the use of non-contiguous, non-mineral land to be used in support of mining operations
21 that are extracting valuable minerals on a wholly separate piece of land. *See* 30 U.S.C.
22 § 42(a) (“Where *nonmineral* land not contiguous to the vein or lode [containing valuable
23 minerals] is *used or occupied* by the proprietor of such vein or lode *for mining or milling*
24 *purposes*, such nonadjacent surface ground may be embraced and included in an
25 application for a patent for such vein or lode, and the same may be patented therewith . . .
26 but no location . . . of such nonadjacent land shall exceed five acres.”) (emphasis added).
27 A very simplified example illustrates this point: (1) A mining claimant (“Smith”) has five
28 separate and valid mining claims containing silver; (2) Each of Smith’s five valid mining
claims is approximately 20 acres (i.e., § 23 limits the maximum size of mineral veins to
1500 feet by 600 feet which is about 20 acres) for a total of 100 acres; (3) Smith has the
ability to patent up to 5 acres of non-contiguous, non-mineral land in conjunction with each
valid mineral claim which can be up to 20 acres (*see* § 42(a)); (4) After showing that the
five separate 20 acre mining claims are valid, Smith pays \$5 per acre to the United States
to obtain fee title to the mineral land containing the silver, and Smith pays an additional \$5
per acre to the United States to obtain fee title to the non-mineral land which will be used
to support extraction from the mineral land (*see* §§ 29, 42); (5) Smith has fee title to use
25 acres of separate non-mineral land to support extraction of silver from his 100 acres of
mineral land (*see* §§ 42, 23, 29).

1 its location on or off a claim makes sense. The Mining Law of 1872 authorizes activities
2 which necessarily must occur off a mining claim. These activities - exploration,
3 prospecting, ingress to and egress from a claim – will generally occur outside the
4 boundaries of a claim. Defining operation to only apply to activities that occur on a claim
5 would limit the Forest Service’s ability to regulate these activities. *See Clouser v. Espy*,
6 42 F.3d at 1525-26; *Richardson*, 599 F.2d at 290-91.

7 The definition’s inclusion of reasonably incidental mining activities maintains a
8 certain amount of logic as well. The construction of a stable for pack animals does not
9 itself constitute a mining activity, but when the Forest Service prescribes that a mine must
10 use pack animals as a means of transport through the forest, it may then qualify as
11 reasonably incidental to the mining. *See Clouser*, 42 F.3d at 1525-26. It does not require
12 much imagination to conceive of other activities which themselves do not involve the
13 extraction or processing of ore, but which may become ancillary to that work. This
14 definition allows the Forest Service to reach all those activities which relate to mining and
15 may occur on a claim.

16 However, it does not follow that the Forest Service must use these Part 228
17 regulations merely because an action falls within the regulation’s definition of operations.
18 The Forest Service’s reliance on its definition of operations ignores the purpose of its own
19 regulations. Part 228 regulates “use of the surface of National Forest System lands in
20 connection with operations *authorized* by the United States mining laws (30 U.S.C. 21-54
21 [Mining Law of 1872]).” 36 C.F.R. § 228.1. Therefore, authorization under the Mining
22 Law of 1872 acts as a precursor to any regulation through Part 228.

23 As discussed above, the Mining Law of 1872 explicitly authorizes several land uses.
24 The Forest Service may regulate exploration and prospecting anywhere upon the surface
25 of its lands because the Mining Law authorizes these activities. It may also regulate the
26 possession and use of a mining claim as, again, the Mining Law authorizes them. However,
27 the Forest Service attempts to circumvent the statutory law by applying its regulations
28 through its definition of “operations” to unauthorized activities. The facilities area, tailings

1 pile, and waste rock pile would all fall under the Part 228 regulations if they occurred on a
2 valid mining claim. However, the Forest Service approved these activities on lands the
3 administrative record showed did not contain a valuable mineral deposit. Therefore, the
4 Mining Law does not authorize these activities as they would occur outside the boundaries
5 of Rosemont’s mining claims. The Forest Service could not apply its Part 228 regulations
6 to these activities because the Mining Law did not authorize them.

7 In contrast, the Forest Service’s Part 251 regulations apply to “all uses of National
8 Forest System lands, improvements, and resources.” 36 C.F.R. § 251.50. Any use not
9 regulated under the Part 228, or several other groups of Forest Service regulations, falls
10 into the Part 251 special use regulations. *See id.* These regulations provide a dual screening
11 process in which the Forest Service may deny any activity that does not meet several
12 standards or otherwise comport with the public interest. *See id.* § 251.54(e). The Part 251
13 regulations provide significant authority and discretion to prohibit activity on Forest
14 Service lands, whereas the Part 228 regulations merely balance competing interests.

15 Turning to the FEIS and appended public comments, the Forest Service repeatedly
16 states that it “cannot categorically prohibit mining or deny reasonable and legal mineral
17 operations under the law.” FEIS at 10. The Forest Service emphasized that its “decision
18 space is constrained by Forest Service regulations that govern locatable mineral activities
19 on NFS lands.” *Id.* Based on the administrative record, the Forest Service improperly
20 applied its Part 228 regulations to actions not authorized under the Mining Law of 1872.
21 This mistake infected the FEIS and led to the Forest Service misinforming the public and
22 failing to consider reasonable alternatives within the scope of its duties under the Organic
23 Act.

24 For example, in response to a public comment requesting the Forest Service “give
25 true consideration to selection of the No Action Alternative”, the Forest Service responded:
26 “The Forest Service may reject an unreasonable Mine Plan of Operation but cannot
27 categorically prohibit mining or deny reasonable and legal mineral operations under the
28 mining laws.” *Id.* at G-10. In response to a comment requesting the Forest Service

1 “consider other locations for copper mining”, the Forest Service responded: “The Forest
2 Service lacks the authority to deny Rosemont Copper’s proposal if it can be legally
3 permitted.” *Id.* at G-12. And in response to a comment that the Forest Service “should
4 scale down the size of the project or limit it to private lands only”, the Forest Service
5 repeated: “The Forest Service may reject an unreasonable Mine Plan of Operation but
6 cannot categorically prohibit mining or deny reasonable and legal mineral operations under
7 the mining laws.” *Id.* These examples did not occur in isolation. Rather, they illustrate
8 how heavily the Forest Service relied upon this rationale¹⁴ in its decision-making process.¹⁵

9 ¹⁴ In light of its flawed assumptions, the Forest Service primarily evaluated only five
10 “action” alternatives, and all of these action alternatives were largely the same. *See* ROD
11 at 16 (“Because there were relatively few significant differences between the overall
12 impacts of the action alternatives, [the Forest Service’s] decision came down to a few
13 substantive differences or factors . . .”); ROD at 64 (discussing the numerous common
14 features of the action alternatives); ROD at 69-70 and FEIS at 100-114 (discussing
15 alternatives that were considered, but eliminated from detailed study).

16 ¹⁵ This improperly constrained consideration and analysis of alternatives was evident when
17 the Forest rejected the fee simple alternative. *See* Forest Service Record, Bates #0282389
18 (Table 3) (“Limited project – limit to fee simple and patented mining claims . . . The largest
19 contiguous parcel of land consists of a combination of patented land and BLM administered
20 land and is located north and west of the pit area. After evaluating storage volume of this
21 area, it would fit, at the most, 852 million cubic yards. This is insufficient for this operation
22 [which requires an estimated 1.1 billion cubic yards] . . . This is *technically and financially*
23 *infeasible.*”) (emphasis added); *Id.* at Bates #0149259 (Rosemont’s response to the fee
24 simple option reflecting the estimates as to 852 million and 1.1 billion). As discussed
25 throughout this Order, the administrative record before the Forest Service reflects that
26 Rosemont did not have valid surface rights for thousands of acres of its unpatented mining
27 claims. Thus, rather than summarily rejecting this claim as “technically and financially
28 infeasible,” further consideration and evaluation of this alternative was warranted as it
greatly reduced the impacts to the Coronado National Forest. Furthermore, the Court notes
that numerous cases have affirmed the Forest Service’s authority and discretion to closely
regulate mining related operations even if particular mining activities are prohibited and
rendered technically and financially infeasible. *See Clouser*, 42 F.3d at 1530 (“Virtually
all forms of Forest Service regulation of mining claims - for instance, limiting the
permissible methods of mining and prospecting in order to reduce incidental environmental
damage - will result in increased operating costs, and thereby will affect claim validity [in
terms of whether minerals can be profitably extracted] . . . However, [it is] clear that such
matters may be regulated by the Forest Service”; affirming the Forest Service’s authority
to bar motorized access to mining claims, and to limit transportation to the claims via pack
mules); *Public Lands for the People v. United States Department of Agriculture*, 697 F.3d
1192, 1197 (9th Cir. 2012) (“We have upheld Forest Service decisions restricting the
holders of mining claims . . . [to using] non-motorized means to access their claims . . . No
statutory provision gives the Miners an unfettered right to access their mining claims . . .”);
Bohmker v. Oregon, 903 F.3d 1029, 1041 (9th Cir. 2018) (in the context of finding that an
Oregon law, that prohibited motorized means to extract gold on valid unpatented claims on
Forest Service land, from the bottom of streams and rivers containing endangered salmon,
did not conflict with federal laws in an as-applied preemption challenge, the court
emphasized that “[b]ecause [v]irtually all forms of . . . regulation of mining claims . . . will
result in increased operating costs . . . virtually every environmental regulation will render

1 Under the Part 251 regulations, the Forest Service could limit the mine to any of the
2 above options if it found they ran afoul of the public interest. The Forest Service failed to
3 take the requisite hard look at these alternatives by informing the public that it could not
4 truly consider any alternative that rejected the MPO or substantially modified it as to make
5 the mine economically unfeasible. See *Nat. Res. Def. Council*, 421 F.3d at 813-14. A
6 “thorough discussion of the significant aspects of the probable environmental
7 consequences” will include the regulatory framework in which the Forest Service analyzes
8 those consequences. See *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). No
9 amount of alternatives or depth of discussion could “foster[] informed decision-making
10 and informed public participation” when the Forest Service bases its choice of alternatives
11 on an erroneous view of the law. See *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376
12 F.3d 853, 868 (9th Cir. 2004).

13 **IV. Conclusion**

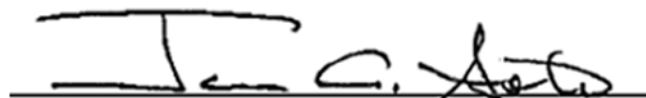
14 Throughout the administrative process, the Forest Service improperly evaluated and
15 misapplied: 1) Rosemont’s right to surface use; 2) the regulatory framework in which the
16 Forest Service needed to analyze those surface rights; and 3) to what extent the Forest
17 Service could regulate activities upon Forest Service land in association with those surface
18 rights. These defects pervaded throughout the FEIS and ROD, and led to an inherently
19 flawed analysis from the inception of the proposed Rosemont Mine. The Court grants
20 summary judgment in favor of SSSR and the Tribes in Cases 2 and 3, vacates and remands
21 the Forest Service’s FEIS and ROD, and denies Defendants’ cross-motions for summary

22 at least some mining claims commercially impracticable, and virtually every
23 environmental regulation would therefore be preempted under a commercial
24 impracticability test . . . A commercial impracticability theory, moreover, would require
25 the preemption analysis to turn on each miner’s individual financial circumstances: the law
26 would be preempted as to some miners but not as to others. Indeed, a commercial
27 impracticability test would give the greatest protection to the least profitable mining
28 operations, and it would handcuff regulators from restricting even the most
environmentally destructive mining methods. So long as a particularly destructive method
of mining – such as blasting – presented the only commercially practicable means of
extracting minerals, regulators would be barred from restricting that practice. We do not
read [the Supreme Court’s decision in] *Granite Rock* as supporting that result . . . [F]ederal
law does not show that Congress viewed mining as the highest and best use of federal land
wherever minerals were found.”)

1 judgment in cases 2 and 3.¹⁶ See 5 U.S.C. § 706(2)(A) (“[t]he reviewing court shall . . .
2 hold unlawful and set aside” unlawful agency actions).¹⁷ The Clerk of the Court shall enter
3 judgment.

4 In light of this Order, there are no exigent circumstances necessitating emergency
5 injunctive relief; as such, all of Plaintiffs’ motions seeking a preliminary injunction in
6 Consolidated Cases A and B¹⁸ are denied without prejudice.

7 Dated this 31st day of July, 2019.

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11 Honorable James A. Soto
12 United States District Judge
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26 ¹⁶ As these issues are dispositive, the Court declines to address the other arguments made
27 by Plaintiffs and Defendants in Cases 2 and 3. On a later date, the Court will issue a
28 separate Order as to the remaining case (i.e., Case 1) and the corresponding summary
judgment motions (which primarily address the ESA) still pending in Case 1.

¹⁷ Given the magnitude of the errors discussed herein, allowing the Rosemont Mine to
proceed while the Forest Service conducts further proceedings on remand is unwarranted.

¹⁸ The Court will issue a separate Order to this effect in Consolidated Case B.

ATTACHMENT 2

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Save the Scenic Santa Ritas, et al.,

Plaintiffs,

v.

United States Army Corps of Engineers, et al.,

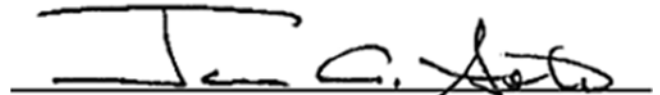
Defendants.

No. CV-19-00177-TUC-JAS (L)
No. CV-19-00205-TUC-JAS (C)
CONSOLIDATED

ORDER

In light of the Order vacating and remanding the Forest Service’s FEIS and ROD as to the Rosemont Mine in CV 17-475-TUC-JAS (*Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*) (consolidated with CV 17-576-TUC-JAS, CV 18-189-TUC-JAS), there are no exigent circumstances necessitating emergency injunctive relief; as such, all of Plaintiffs’ motions seeking a preliminary injunction (Docs. 41, 44) are denied without prejudice.

Dated this 31st day of July, 2019.



Honorable James A. Soto
United States District Judge

ATTACHMENT 3



COUNTY ADMINISTRATOR'S OFFICE

PIMA COUNTY GOVERNMENTAL CENTER
130 W. CONGRESS, TUCSON, AZ 85701-1317
(520) 740-8661 FAX (520) 740-8171

C. H. HUCKELBERRY
County Administrator

December 19, 2006

Janine Derby, Forest Supervisor
Coronado National Forest
300 West Congress
Tucson, Arizona 85701

Re: Rosemont Mine Validity of Claims

Dear Ms. Derby:

I wrote to you on October 6, 2006 regarding Pima County's concerns with the July 31, 2006 Rosemont mining plan of operations submitted by Augusta. It was my understanding that the Forest Service had found the draft to be insufficient and in need of more detail. Since then, in a letter dated November 28, 2006 to the Pima County Board of Supervisors, Jaime Sturgess stated that Augusta is working on a Comprehensive Plan of Operations that is scheduled for completion during the first quarter of 2007.

I am writing to you today because of statements that have been made questioning the validity of Augusta's unpatented mining claims on Forest Service land. It is my understanding that for a claim to be valid, the claim must be valuable. In order to prove that the claim is valuable, the claimant must be able to show that the mineral can be extracted, removed and marketed at a profit, after accounting for costs of compliance with all applicable Federal, State and local laws.

Per Augusta's July 31st Plan of Operations, and in previous mining plans regarding this property, the claimants have proposed using the unpatented Forest Service claims to dump waste rock created after extracting valuable copper and other minerals on adjacent private lands (patented mining claims). Claimants do not propose to extract, remove, or market the minerals associated with the Forest Service claims. In my opinion, this brings up the very obvious question of whether the Forest Service claims are valuable if claimants do not propose to improve them, but instead propose to use them as a dumping ground.

Janine Derby
Rosemont Mine Validity of Claims
December 19, 2006
Page 2

It would seem to me that the Forest Service could save itself, tax payers, interested parties and the claimant much time and money by requiring claimant to submit information proving the validity of the mining claims prior to accepting the next draft Plan of Operations for review. If claimant cannot prove these claims are valuable, then the Forest Service should refuse to accept and review the Plan of Operations and request that the Department of Interior and Bureau of Land Management initiate a mineral contest action. Such a request by the Forest Service is well within the agency's authority.

Thank you for your continued assistance in this matter.

Sincerely,



C.H. Huckelberry
County Administrator

CHH/dr

c: The Honorable Chairman and Members, Pima County Board of Supervisors
The Honorable Congressman Raul Grijalva, United States Congress
The Honorable Congresswoman Gabrielle Giffords, United States Congress
Patrick Madigan, Tucson Field Office Manager, Bureau of Land Management
Jamie Struggess, Augusta Resource Company

ATTACHMENT 4



United States
Department of
Agriculture

Forest
Service

Coronado National Forest
Supervisor's Office

300 W. Congress
Tucson, Arizona 85701
Phone (520) 388-8300
FAX (520) 388-8305
TTY (520) 388-8304

File Code: 2810

Date: February 11, 2007

C. H. Huckelberry
Pima County Administrator
Pima County Administrator's Office
130 W. Congress
Tucson, AZ 85701-1317

Dear Mr. Huckelberry;

This is in response to your December 19, 2006 inquiry regarding the proposed Augusta Resource Corporation copper and molybdenum mine at Rosemont Junction. You suggested that the Coronado National Forest could challenge the validity of the corporation's mining claims. Your argument for claim validity challenge was based primarily on the fact that the company intends to use many of the claims for mill tailings and waste rock placement. I have received opinions on this topic from our Office of General Counsel and also from our Regional Geologist in Albuquerque.

Both opinions state that it is not common practice, nor is it Forest Service policy, to challenge mining claim validity, except when a) proposed operations are within an area withdrawn from mineral entry, b) when a patent application is filed, and c) when the agency deems that the proposed uses are not incidental to prospecting, mining, or processing operations. This last category includes such management concerns as illegal occupancy or use of mining claims for non-mining or non-mineral processing purposes. For operations proposed in accordance with our regulations, and where the above situations do not exist, there is no basis for pursuing a validity exam. The placement of waste rock and mill tailings on the Forest are considered to be activities connected to the mining and mineral processing per regulation 36CFR228 subpart A, and as such they are authorized activities regardless of whether they are on or off mining claims.

I appreciate your interest in protecting the environment. I have the same interest and will be giving particular attention to having an effective design for mine reclamation when we address the mine operating plan. Please feel free to contact Forest Geologist Beverley Everson at 388-8428 if you have further questions.

JEANINE A. DERBY
Forest Supervisor

