United States House of Representatives
Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Hearing to Receive Testimony on Pending Legislation
H.R. 2925, H.R. 6862, H.R. 7003, and H.R. 7004

January 31, 2024, 2:00 PM

Statement of Rich Haddock
Senior Advisor
Barrick Gold Corporation

Chairman Stauber, Ranking Member Ocasio-Cortez, and Members of the Subcommittee, thank you for inviting me to appear before you on behalf of Barrick Gold Corporation and give testimony on H.R. 2925, the Mining Regulatory Clarity Act of 2023, and H.R. 6862, to amend the FAST Act. We are pleased to support both bills, which in different ways address the problem of persistent and intractable permitting delays that keep the domestic mining industry from moving forward to meet national mineral needs. H.R. 2925, introduced by Nevada Congressman Mark Amodei, and cosponsored by Congresswoman Mary Peltola, would resolve severe permitting uncertainty and litigation delays caused by a 2019 outlier court decision known as the "*Rosemont*" decision. Congressman Doug Lamborn's H.R. 6862 would block an ill-considered proposal by the Federal Permitting Improvement Steering Council to keep mining operations from accessing Fast 41's expedited permitting tools.

The House Natural Resources Committee and this Subcommittee have been leaders in investigating the reasons for permitting delays, and in proposing solutions, all with the goal of strengthening the United States' capacity to supply its own mineral needs. Your hearings have identified the need for expanded domestic mineral production, including mineral processing, so that the U.S. is not dependent on supply chains based in countries that may not remain reliable partners. The Committee has devoted significant time and attention to important permitting reform legislation, including Chairman Stauber's H.R. 209, the Permitting for Mining Needs Act of 2023, which includes the provisions of H.R. 2925. Barrick is grateful for your attention to these issues.

Barrick Gold Corporation

Barrick is the second largest gold producing company in the world and biggest gold producer in the United States. Barrick has gold and copper mining operations and projects in 13 countries in North and South America, Africa, Papua New Guinea, and Saudi Arabia.

Most of our U.S. gold production comes from Nevada where we operate Nevada Gold Mines LLC, a joint venture of Barrick and the Newmont Mining Corporation. Nevada Gold Mines is the largest gold-mining complex in the world, with more than 7,000 employees and 4,000 contractors, who employ thousands more people, in Nevada and around the country. These jobs pay average annual wages of $94,000 – higher than any other industry in Nevada.

Most of Nevada Gold Mines' operations take place on unpatented mining claims on public lands managed by the Bureau of Land Management. About 85% of the land in Nevada is owned and managed by the Federal Government, more than any other state. Not all of this federal land in Nevada is open to mining exploration and development. About 22 percent of the federal lands in the State is withdrawn from mineral entry and another five percent has been proposed for withdrawal for Greater Sage Grouse management.

Barrick is proud of the progress it is making globally on its sustainability objectives and practices. It is a process of continuous improvement. Of particular note in North America is our now decades-old dialogue with the Native American communities in northern Nevada, Southern Idaho and Western Utah. Our efforts have resulted in improved communications about a range of issues, including our future planned operations, processes for financially supporting community projects, cultural resources and cultural understanding. We have increased Native American employment. But I am proudest of the scholarship foundation we established in 2008 initially with the Western Shoshone tribes, but which with their generous consent has been extended to students from other Native American Tribes. The scholarship program provides financial assistance for university education and/or vocational/technical training for any eligible student. Over $15 million has been donated to the foundation so far, with over 2,760 scholarships awarded. Graduates have moved forward to enter all walks of life. We are also proud of our 278 MW solar array in Nevada and work to decarbonize our mining operations. We are grateful for the letter of support we have received from the Native American tribes.

Before retiring as Barrick's General Counsel in 2022, I worked for Barrick for 25 years and was an in-house lawyer in the gold mining industry for 30 of the 39 years I have been practicing law. I also served as Barrick's global Vice-President of Environment for three years.
I continue to serve as a Senior Advisor to the company.

H.R. 2925 – The Mining Regulatory Clarity Act of 2023

Simply stated, H.R. 2925 is absolutely necessary because of one court's misreading of the Mining Law, federal land management authorities, and regulations implementing those laws. The "*Rosemont*" court vacated a plan of operations for the Rosemont copper mine because the Forest Service failed to confirm the "validity" of mining claims before it approved the mining plan.[1] That decision wreaked havoc on 100+ years of Mining Law interpretation, and 40+ years of federal permitting and land management regulations. The additional permitting burden and additional uncertainty caused by *Rosemont* and its growing progeny threatens to add years of litigation delay to virtually any proposed mining project on federal lands in the U.S., and in the worst case could make some mines unfeasible. This result has to be avoided. It is starkly contrary to Congress' and the Biden Administration's expressed desire to expedite mine permitting and to build up domestic mineral supply chains.

[1] Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738 (D. Ariz. 2019), *aff'd* 33 F.3d 1202 (9th Cir. 2022).

- **Mining Claims and Claim "Validity" Under the Mining Law of 1872**

The Mining Law made lands in the public domain "free and open" to mining and activities reasonably related to mining.[2] Under the Law, a prospector can "locate" a lode mining claim on federal land.[3] The prospector's right in that mining claim is a property right, enforceable against third parties, and subject to diminution or defeasance only by the ultimate title holder: the United States.[4] Relying on the doctrine of *pedis possessio*, courts have recognized these property rights in unpatented mining claims for more than 100 years. Miners can use and occupy those claims for mining operations, subject, of course, to federal permitting requirements. Similar Mining Law provisions also allow use of non-mineral land – called mill sites – in certain circumstances.[5]

However, a person cannot locate a claim under the Mining Law for any purpose other than mining or activities directly relating to mining.[6] Such a location is a nullity, void *ab initio.*

Until 1994, prospectors could go further, obtaining fee title in mining claims by applying for a patent. To obtain a patent, a prospector had to be able to prove the claim contained a valuable mineral "discovery."[7] Discovery requires a showing that the deposit can be mined, removed and marketed at a profit. Proof of such a discovery established the mining claim as "**valid**," justifying the issuance of a patent to a prospector. Applying for patent was never required; the Mining Law allows the miner to stake a claim, work it, and remove and sell minerals from it without ever seeking a patent. The important point here is that proper location and maintenance of a mining claim affords the claimant substantial legal rights to use the land for mining purposes, without regard to whether the claim has undergone a validity examination.

Traditionally, claim "validity" as against the United States had to be proven only in two contexts: (1) patenting, as just described; and (2) withdrawal of federal lands from entry under the Mining Laws. The issue no longer arises in the patenting context because Congress imposed a moratorium on new patent applications in a 1994 appropriations bill,[8] and the moratorium has been extended and reimposed every year since, remaining in place until today.

Claim validity remains relevant when the U.S. withdraws federal lands from mineral entry, either legislatively or administratively. After withdrawal, unpatented mining claims can be extinguished by the U.S. *unless* the claimant can show they contain a discovery, i.e., that they were "valid" as of the date of withdrawal.

---

[2] 30 U.S.C § 22.
[3] *Id.*
[4] Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964).
[5] 30 U.S.C. §42.
[6] U.S. v. Bagwell, 961 F.2d 1450 (9th Cir. 1992) ("good faith" standard limits possession of public lands to locators exploring for and developing minerals as contemplated by the Mining Law of 1872); John D. Leshy, The Mining Law: A Study In Perpetual Motion, (1987), 62 ("entries on the federal lands under the Mining Law must be made for the purpose of engaging in mineral activity, and not for something else.").
[7] 30 U.S.C. § 29; Cole v. Ralph, 252 U.S. 286 (1920).
[8] Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332 §§ 112-113, 108 Stat. 2499, 2519 (Sept. 30, 1994).

- **Permitting Mines on Federal Lands**

For more than forty years, the Bureau of Land Management and U.S. Forest Service have managed hard rock mining on federal lands through permitting regulatory programs that govern mining from initial exploration through mine closure.[9] These similar sets of regulations require that operators submit to the agency a full mine plan of operations for agency review. Both sets of regulations cover mineral activities from initial exploration through production and reclamation, mine closure and post-closure maintenance, compliance with environmental performance standards – including all federal and state environmental laws – and financial assurance at each and every stage of the process for all facilities. The agencies have characterized their programs as "cradle to grave" regulations for mining on federal lands.[10]

Mine plans of operations must include provisions documenting all manner of environmental compliance and protections, including management of waste rock and other mining wastes, as well as placement of haul roads and access roads, power lines, pipelines, truck shops, and other mining-related infrastructure. Mining operations require significant land near the mine site upon which to conduct these mining operations. Some of these facilities can be located on mill sites, but the majority of them are located on mining claims. Throughout the long history of the Mining Law, miners put together land packages of lode claims and mill sites as made sense based on the geology and to support the operations necessary to for the mine. Pre-*Rosemont* the law was clear that a miner could use the surface of any lode claim for mining purposes – prospecting, mining, or processing operations, and uses reasonably incident thereto. Though these latter uses are commonly referred to as "ancillary;" it is a misnomer: without these crucial facilities, mining cannot happen.

Because claim validity is not and never has been a prerequisite to conducting mining activities on mining claims, BLM and Forest Service land management regulations do not require operators to submit information relating to mining claim status as part of a plan of operations, and the agencies have never restricted their review of the mine plan facilities to locations only on "valid" mining claims, or even on claims. Both BLM and Forest Service regulations define mining operations to include all lands of any type that are necessary to implement the approved mine plan.[11]

---

[9] Forest Service regulations were initially adopted in 1979 and are published at 36 C.F.R. Subpart 228A and BLM regulations were initially adopted in 1981 and are published at 43 C.F.R. Subpart 3809. Both sets of regulations have been revised and updated since they initially adopted.

[10] The Biden Administration's Interagency Working Group on Mining Laws, Regulations, and Permitting examined these regulatory programs and affirmed their effectiveness in the final report issued in September 2023: "The U.S. has set a high standard for environmental regulations that apply to today's mining operations." IWG Report at p. 14; "Current mining operations occur under environmental policies and laws designed to manage the impact of mining on people and the environment. Environmental laws such as FLPMA, NEPA [and others] have been in place for approximately 50 years and have improved environmental practices associated with mining in the U.S." Id. at 25; "Current mining operations on Federal land must comply with Interior's and USFS's general and specific performance and environmental protection regulatory standards for mining operations." *Id*. at 28.

[11] 43 C.F.R. § 3809.5; 36 C.F.R. § 228.3(a). Of course, as a practical matter, operators stake claims on all lands included in a proposed plan of operations to hold those claims against third parties.

- **The Origins of the "*Rosemont*" Theory**

The *Rosemont* decision that threatens to upset these norms has its roots in the writings of Mining Law critics, who have sought legislative Mining Law reform since the 1980's. Apparently frustrated with the inability to gain traction for their preferred solution in Congress, a law professor named John Leshy wrote in 1987: "it might even be appropriate for the Interior Department and the courts to **consciously reach results that make [the Mining Law] unworkable."**[12]

Professor Leshy later became Interior Solictor Leshy in the Clinton Administration. His work as Solicitor included two Solicitor's opinions designed to implement the ideas he wrote about in the 1980's. One, the so-called "Ancillary Use" Opinion, concluded a miner could not use the surface of a lode claim for activities that support mining unless that claim was legally "valid," using that legal term as explained above.[13] The other opinion, referred to as the "Mill Site" Opinion, concluded that miners could locate only one 5-acre mill site for each 20-acre mining claim.[14] These opinions, which ignored BLM regulations and decades of practice and precedent under both the Mining Law and the Federal Land Policy Management Act ("FLPMA"), became the blueprint for mining law opponents in attacking the Mining Law administratively and in the courts for the next three decades. Although Solicitors' opinions have no precedential value, they are binding on the Department of Interior while they remain in force, and these opinions clearly were intended to disrupt the administration of rights under the Mining Law. As Professor Leshy suggested a decade before, these legal opinions and related rulemakings were designed to make the Mining Law unworkable, presumably so that Congress would have to take up Mining Law reform as he envisioned it.

Congress did react, but perhaps not in the way Solicitor Leshy expected. In 1999, Congress prohibited the application of the Mill Site Opinion to any mine plan of operations that had been submitted for approval prior to issuance of the Opinion.[15] Subsequent administrations, Republican and Democratic, rejected both Leshy Opinions and restored in rulemakings and policy statements the permitting rules that were in place for decades before Solicitor Leshy set out to disrupt them.

The Leshy opinions represent a short blip in an otherwise uninterrupted decades-long record of interpreting and administering the Mining Law and permitting mining operations on Federal lands. Even though the Department of Interior rejected the Leshy opinion and returned to its prior reading of law and regulations, anti-mining litigants have continued to press Leshy's legal arguments – in lawsuit after lawsuit – to challenge the approval by BLM and the Forest Service of numerous mine plans. Those efforts failed repeatedly and consistently, both in administrative

---

[12] John D. Leshy, REFORMING THE MINING LAW: PROBLEMS AND PROSPECTS, 9 *Pub. L. L. Review*, 1, 11 (1988) and John D. Leshy, THE MINING LAW: A STUDY IN PERPETUAL MOTION, 282 (1987).

[13] Department of Interior, Solicitor's Opinion M-37004, Use of Mining Claims for Purposes Ancillary to Mineral Extraction (Jan. 18, 2001).

[14] Department of Interior, Opinion M-36988, Limitations on Patenting Millsites Under the Mining Law of 1872, (1997).

[15] Consolidated Appropriations Act, 2000, Pub. L. No. 106-31, § 3006, 113 Stat. 57.

and judicial appeals, until 2019, when mining opponents challenged the Rosemont copper mine in the Federal District Court for the District of Arizona.

- **The *Rosemont* Decision**

The Rosemont copper mine was a typical large, open pit copper mine proposed to be located on National Forest lands in Arizona. The open pit was on a mix of private land and unpatented mining claims. The Forest Service reviewed the proposed plan under its mining regulations at 36 C.F.R. pt. 228 and prepared an extensive environmental impact statement ("EIS"). The EIS evaluated five different configurations for the storage of waste rock and tailings. In the decision approving the plan, the Forest Service selected a particular alternative that had the smallest disturbance footprint and avoided an important cultural site. The Forest Service also approved a reclamation plan that would require that the waste rock and tailings storage areas be reclaimed and returned to the prior land uses – wildlife habitat and grazing – after mining was concluded. Consistent with practice since the inception of the Mining Law, the Forest Service did not investigate the status of any of the mining claims in the plan of operations and did not constrain its selection of the preferred alternative based on mining claim status. The Forest Service considered alternative locations for the waste rock and tailings without regard for mining claim boundaries or status.

Mining opponents challenged the Forest Service's approval of the Rosemont plan of operation on numerous grounds, including that the Forest Service inappropriately approved the placement of waste rock and tailings on unpatented mining claims whose "validity" had not been established; in other words, an updated version of the long-abandoned Leshy Ancillary Use Opinion. After many defeats before administrative law judges and the courts, for the first time, a federal court agreed. The *Rosemont* court vacated the plan of operations.

The Forest Service and the *Rosemont* operator appealed to the Ninth Circuit Court of Appeals. Two judges in the three-judge panel affirmed the lower court's decision, but on different reasoning. A third judge dissented, finding that the Forest Service properly reviewed the mining plan of operations under its surface management regulations.

- ***Rosemont* Fallout**

The 9th Circuit *Rosemont* majority's holding is narrow but nevertheless problematic, based as it is on an incorrect reading of the agency administrative record. However, of more concern is the majority's long discourse on the Mining Law. Though much of that narrative is unnecessary *dicta* to the court's holding, it is taking hold in lower courts and at the Department of Interior, imposing new requirements and leaving mining regulation on federal lands incredibly muddled. Further litigation over the meaning of *Rosemont* is guaranteed unless Congress acts to remedy the problem.

    - **The *Thacker Pass* Litigation**

The myriad problems unleashed by the *Rosemont* cases are already on display. In a 2023 decision, the United States District Court for the District of Nevada applied *Rosemont* in a case challenging BLM's approval of the Thacker Pass lithium mine in northern Nevada. The judge

did not vacate the plan approval, but she directed BLM to inquire into the validity of certain mining claims on which the company planned to deposit tailings and waste rock.[16] Opponents appealed that decision to the 9th Circuit. During the appeal, mining opponents argued that the Thacker Pass claims in question must be subjected to a detailed validity determination akin to the mineral examination required to support a patent application. The appeals court denied the appeal, concluding that the district court's remand without vacatur was appropriate, and further finding appellants' validity argument to be premature, ruling that those arguments properly should be raised at the district court level first. To date the *Thacker Pass* opponents have not returned to the Nevada district court, but under the general federal statute of limitations, they have six years to do so. This is just one of many legal questions raised but not resolved by the *Rosemont* decision.

- **The *Mount Hope Mine* Litigation**

A more recent Nevada case illustrates even more dramatically the absurd impacts of *Rosemont* in the 9th Circuit. A Nevada Federal District Court relied on *Rosemont* to vacate BLM's approval of the proposed Mount Hope molybdenum mine.[17] The Mount Hope molybdenum mine has been seeking BLM approval for almost two decades. That deposit is considered one of the largest and highest-grade molybdenum deposits in the world.

The history of the Mount Hope Mine is a case study in permitting delays that can be caused by endless litigation. The proposed plan of operations for the Mount Hope Mine was originally submitted to BLM in June 2006. The notice of intent to prepare an EIS was published in the *Federal Register* in March 2007. The Draft EIS was made available for public comment in December 2011, and the final EIS was published in October 2012. The Record of Decision approving the project was issued one month later.

BLM's decision approving the Mount Hope Mine was challenged by Great Basin Resource Watch and the Western Shoshone Defense Project. The Federal District Court for the District of Nevada upheld BLM's decision in July 2014. Notably, in that appeal, the plaintiffs argued that BLM erred when it did not confirm the validity of the Mount Hope mining claims before approving the plan of operations—the *Rosemont* argument. Consistent with every other decision on mining opponents' ancillary use attacks up to that time, the Nevada court applied established precedent and rejected the argument, finding that the Mining Law did not require that BLM inquire into claim validity.

Plaintiffs appealed the 2014 decision to the Ninth Circuit Court of Appeals raising several environmental claims, but they did not pursue the claim validity argument. In December 2016, the 9th Circuit affirmed most of BLM's decision, but remanded the project back to the agency for additional environmental analysis on two air quality issues, and asked BLM to clarify the legal status of certain springs. BLM completed that work and published a Draft Supplemental EIS ("SEIS") for public review in February 2019, and a final SEIS in July 2019. The Record of Decision approving the project was reinstated the following month. The same plaintiffs challenged BLM's decision ***again***. In April, 2023, following briefing on the impact of the new

[16] Bartell Ranch v. McCullough, 2023 U.S. Dist. LEXIS 19280 (D. Nev. 2023) (the "*Thacker Pass*" case).
[17] Great Basin Resource Watch v. Dep't of the Interior, 2023 WL 2744682 (D. Nev. 2023).

Rosemont decision, the same federal judge who approved the project nine years earlier, vacated the decision and sent the project back to BLM to evaluate the project's mining claims in light of the *Rosemont* decision. Eighteen years after Mount Hope submitted its plan of operations, and two decisions approving the mine plan, the project remains in limbo.

The *Thacker Pass* and *Mount Hope Mine* litigation illustrate just how disruptive and counterproductive the *Rosemont* decision has proven to be, and more litigation is certain. Both cases demonstrate that mining opponents' efforts to pursue "results that make [the Mining Law] unworkable" are bearing fruit. The resulting uncertainty is intolerable for a country that says that it wants to encourage a domestic mining industry. H.R. 2925 is absolutely necessary to fix the *Rosemont* mess.

- **The Department of Interior May 2023 Solicitor's Opinion**

In response to *Rosemont,* the Solicitor of the Department of Interior issued an opinion in May 2023,[18] binding on the agency, that extended the *Rosemont* court's strained reading of the Mining Law beyond the 9th Circuit and applied it to BLM's decision-making nationwide. The Opinion ignored the explicit text of the 3809 regulations and BLM's application of those regulations over the past 40 years. Interior's position is that the Solicitor's Opinion, and perhaps some subsequent guidance that has not yet been made public, can resolve the practical problems created by the *Rosemont* decision, obviating the need for a legislative solution.

Barrick does not agree. Despite Interior's efforts to resolve the many questions raised by *Rosemont,* the Solicitor's Opinion creates more uncertainty, guarantees further legal challenges to mining projects, and undermines the stated policy of this administration and a bipartisan majority of this Congress to encourage domestic mineral exploration and production. Most importantly, the Solicitor's Opinion ensures that mine projects on Federal land will face more permitting hurdles and delays.

The Solicitor's Opinion directs BLM not to approve "plans of operations where the operator proposes to place significant waste or tailings facilities on mining claims where BLM's record lacks evidence of the discovery of valuable mineral deposits underlying those facilities." The Opinion does not advise how BLM should proceed where evidence of validity does not exist. The agency is given no guidance but to reject the proposed plan of operations. In such circumstances, the burden shifts back on to the operators to: 1) submit additional evidence, of the type in a "mineral potential report;" 2) "re-site the ancillary uses on mill sites (as appropriate);" 3) seek a land use authorization under other BLM regulations (i.e., a different permit); or 4) seek to acquire title to the needed land through a land exchange or sale.[19]

The Opinion effectively rewrites the 3809 regulations without any public notice or comment. The current regulations and 40 years of practice are dismissed in a footnote where the Solicitor, giving the "Leshy blip" more weight than its due, "acknowledges that the Department's reading

[18] Department of the Interior, Office of the M 37077, Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057, May 16, 2023.
[19] Solicitor's Opinion at 5-6.

of the Mining Law has not remained static in the last several decades, and that BLM may have approved mining plans that, at least in part, are not strictly consistent with this memorandum."[20]

This Subcommittee should not assume that the new Solicitor's Opinion will more effectively survive legal challenges than other prior opinions. For example, the majority opinion in the *Rosemont* case at the 9th Circuit swept aside in two sentences a 2020 Solicitor's Opinion that comprehensively evaluated the Mining Law and BLM practice and interpretation, according the Opinion no deference because "the Solicitor has taken inconsistent positions" on the issue.[21] The new Opinion is simply another inconsistent position that courts may well ignore.

The *Rosemont* decision left many questions unanswered—targets for further legal challenges. The Solicitor's Opinion attempts to limit the *Rosemont* decision to its facts: an inquiry into claim validity is necessary only where an operator proposes to ***permanently*** occupy land with significant waste rock or tailings facilities. But mining opponents have already challenged that attempt to limit *Rosemont* impacts.

In the *Thacker Pass* litigation, for example, some plaintiffs argued that the *Rosemont* decision applied to every facility in the plan of operations, not just large "permanent" features as suggested by the Solicitor's Opinion. If this argument were adopted by courts, pipelines, transmission lines, roads, stockpiles, processing facilities, and all other such uses could be sited only on valid mining claims. The *Thacker Pass* appeals court refused to entertain these arguments, but only because plaintiffs first raised them on appeal. This expansive interpretation of *Rosemont* remains on the table for further litigation.

The same *Thacker Pass* litigants complained to the 9th Circuit that BLM must conduct a full claim validity examination, like those that used to be conducted for patent applications, for each claim included in a plan of operations, and that the Nevada District Court's decision instructing BLM to search for evidence of validity in its record is inconsistent with the 9th Circuit's *Rosemont* ruling. As noted above, the 9th Circuit concluded that such an argument should be made in the first instance at the court below. Whether *Thacker Pass* opponents eventually challenge the BLM's validity review remains to be seen, but it is certain that the issue will be litigated, whether in *Thacker Pass* or elsewhere.

Thus, despite the Department of Interior's assurances, the Solicitor's Opinion has resolved nothing. Mining opponents are challenging its reasoning and limits, and courts are not likely to be bound or even persuaded by the Opinion. The Opinion does not obviate the need for H.R. 2925.

The alternatives suggested by the Solicitor's Opinion will also result in further uncertainties and delays, frustrating rather than speeding mine approvals. The BLM's 3809 regulatory program was designed to review mining operations holistically. Requiring different permits and/or use authorizations – not to mention land sales or exchanges – for individual mine features will result in an absurd fragmenting of the permitting process, which can only mean more complexity, permitting delay, uncertainty, and metastasizing grounds for litigation. Under BLM's 3809 regulations, mine plans are approved if the BLM finds that those plans include adequate

[20] Solicitor's Opinion at p. 9, n.7.
[21] Center for Biological Diversity, 33 F.4th at 1216.

measures to prevent "unnecessary or undue degradation," the standard imposed by FLPMA and defined in the regulations. Rights-of-way and other permits are intended for different kinds of projects, such as discrete roads, and have different standards; they afford BLM more discretion in making decisions, and litigants more opportunities to challenge. *Rosemont* – and Interior's attempt to address it – requires mine proponents to engage in a guessing game to determine which facilities should be permitted under which regulations. Issuing special use permits or rights-of-way for mining facilities, rather than permitting them through the mining-specific regulations governing plans of operations (as intended under FLPMA and done for decades) is a recipe for gridlock.

- **Criticism of H.R. 2925**

I have reviewed letters and statements – provided to this Subcommittee and also submitted to the Senate Subcommittee on Public Lands, Forests, and Mining – criticizing H.R. 2925 (and its Senate companion S. 1281) and predicting dire consequences, including mines of unlimited size, unlimited land grabs, location of claims for non-mining purposes, and mining in National Parks and wilderness areas. These criticisms are misplaced. H.R. 2925 is a straightforward fix to a mine permitting problem created by a court decision that is an outlier in the jurisprudence. It simply restores the *status quo* that existed for decades before the *Rosemont* decision. It does not replace the Mining Law with a new framework. Rather it is a surgical amendment that restores the original intent of the Mining Law and keeps all other provisions and their relationship with other statutes, like FLPMA, intact. The opposition's arguments are all based on the false premise that *Rosemont* was always the law and that it somehow was the sole governing principle that prevented their list of problems. H.R. 2925's purpose is to cut off the harmful and counterproductive litigation over the meaning and extent of *Rosemont*, which, as I have illustrated above, is already underway. Nothing more, nothing less.

Every mine plan approval from the BLM or the Forest Service includes language disclaiming any decision on mining claim validity, emphasizing the long-established distinction between mining claims and rights, as determined by the Mining Law, and mine permitting as authorized and required by Interior and Forest Service land management statutes and rules. The definition of "operations" in H.R. 2925 tracks the regulatory definitions in the BLM and Forest Service regulations.

Arguments that H.R. 2925 will somehow expand mining into parks and other withdrawn areas are simply incorrect. Areas that are withdrawn from the operation of the mining laws – of which parks and wilderness areas are only two examples – remain unaffected by H.R. 2925 and subject to separate laws and regulations. As I explained at the beginning of this testimony, when land is withdrawn from mineral entry, either legislatively or administratively, existing mining claims can be extinguished by the United States, ***except for claims that were "valid" on the date of withdrawal.***[22] Any activity of any kind on such surviving valid claims would be subject to special rules that are more stringent and more restrictive than the rules that govern mining on lands open to mineral entry.

[22] Lara v. Sec'y of the Interior, 820 F.2d 1535, 1537 (9th Cir. 1987) ("[a] mining claimant has a right to possession [on withdrawn lands] only if he has made a mineral discovery on the claim.").

H.R. 2925 in no way affects – indeed it cannot affect – these surviving valid claims. The whole purpose of H.R. 2925 is to make clear the understanding of the law that existed prior to *Rosemont*: that property rights exist in mining claims even before a mineral discovery is made, and that claim validity need not be established before unpatented mining claims are used for mine-related activities in approved plans of operations. In contrast, any mining claim within a withdrawn area persists ***only because it is valid***, i.e., that its owner has been able to establish a mineral discovery. Any other claim can be contested and extinguished by the United States. Critics make the same mistake as the *Rosemont* court, interpreting rights under the Mining Law as an "all or nothing" approach. In fact, as the Department of Interior and federal courts have recognized since 1872, the Mining Law offers a range of rights: the right to explore open land, the right to exclude rival claimants from properly located claims, the right to use lands to support mining, and, until 1994, the right to patent claims with a proven discovery of valuable minerals. Without the discovery, these rights fall short of the "valid existing right" historically needed to maintain possession of claims in withdrawn areas.

Arguments that H.R. 2925 will somehow make a mine's footprint bigger are likewise incorrect. The miner has a huge economic incentive to minimize the size of its footprint. In the permitting process BLM will evaluate the location of all features, particularly the large features like waste rock dumps and tailings, and choose an alternative that meets the purpose and need of the project, and that is environmentally preferable. Size of waste rock dumps and tailings and their location is always a factor the BLM and the Forest Service consider when they evaluate a proposed mining plan under NEPA and their mining regulations.[23]

Arguments that claims will now be used for non-mining purposes, are likewise spurious. Nothing in H.R. 2925 purports to change the existing law that a mining claim located for a purpose other than exploration and mining purposes is void *ab initio.* Rather the language is clear, tied back to the pre-*Rosemont* law and interpretation, that the surface of a lode claim can only be used for legitimate mining related purposes in an approved mining plan.

In summary, I believe that the intent and language of H.R. 2925 are simple and clear, but acknowledge the concerns that have been expressed. The Committee can easily resolve any such concerns with a belt and braces approach by expanding the savings clause in section 3 of the bill to make clear that H.R. 2925 does not create, change, or expand the rights associated with any mining claim in an area that has been withdrawn or is withdrawn in the future.

H.R. 6862

On September 22, 2023, the Federal Permitting Improvement Steering Council ("FPISC") proposed to amend its existing regulations to limit application of the FAST–41 permitting process to projects that produce or process "critical minerals," as defined by the U.S. Geological

[23] BLM regulations require that an operator "must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence." 43 C.F.R. 3809.420(a)(2).

Survey.[24] Congressman Lamborn's bill, H.R. 6862, would block this unjustified and indefensible step. We support H.R. 6862.

The FPISC's proposal is inconsistent with the Biden Administration's expressed interest in expediting permitting of major projects and promoting the growth of the domestic mining industry. It was only four years ago that the FPISC voted to add mining to FAST 41 eligibility, without limiting access to projects that involve critical minerals. Since then, only a handful of mining projects have sought FAST-41 coverage.[25] Meanwhile, mining projects are compatible with the purposes of FAST-41 to expedite permitting of major infrastructure projects, and especially with FAST-41's "objective" criteria: (1) the project is subject to NEPA review; (2) the project is likely to require a total investment of $200 million or more; and (3) the project does not qualify for abbreviated review under any other law.[26]

The FPISC offers no data that would justify limiting access for the mining industry to FAST-41 benefits. Few mining companies have asked to participate in FAST-41; there is no evidence that the process is being abused, or that FAST-41 is being burdened by too many requests for inclusion. There is simply no rational basis for the proposal.

Indeed, by limiting the type of mining projects eligible for the FAST-41 permitting process to those involving critical minerals identified by the USGS, the Biden administration would be barring projects to recover minerals identified on the Department of Defense's Strategic and Critical Materials List and the Department of Energy's Critical Materials List. Differentiating these high-priority minerals from those listed by USGS is the definition of arbitrary, and is inconsistent with the Administration's national defense and energy security priorities. H.R. 6862 would prevent this exercise of bad policy.

In addition to opposition from the National Mining Association, Barrick, and others in the mining industry, the FPISC proposal is opposed by the National Infrastructure Alliance – a coalition of leading construction unions – and by a large contingent of bipartisan and bicameral Members of Congress. Further, during consideration of H.R. 4664, the FY2024 Financial Services and General Government Appropriations Act before the full House of Representatives, an amendment offered by Rep. Blake Moore (R-Utah) – which is nearly identical to H.R. 6862 – was adopted unanimously by voice vote without opposition.

[24] Revising the Scope of the Mining Sector of Project That Are Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act, 88 Fed. Reg. 65350 (September 22, 2023)
[25] 88 Fed. Reg. at 65352-53.
[26] 88 Fed. Reg. at 65351.

From 9th Cir briefs in Thacker Pass appeal

Bartell – Rosemont applies to everything

A. *Rosemont* Extends to LNC's Water and Power Lines.

To start with, the district court got the scope and reasoning of *Rosemont* wrong. In *Rosemont*, this Court correctly explained that "discovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." 33 F.4th at 1220 (emphasis added). Accordingly, *Rosemont* extends to all project components of a mining project, contrary to the district court's holding.

The Mine includes guard shacks, fencing, water wells, waste rock piles, a tailings stack, lithium processing facility, sulfuric acid plant, water pipelines, transmission lines, and more. 4-ER-613—619. All of these project features will occupy BLM land on Thacker Pass. The FEIS explains that LNC's mining claims on Thacker Pass provide the surface estate necessary to justify this occupancy. 4-ER-612. Yet, LNC did not prove, and BLM did not find, that LNC's mining claims are valid. 1-ER-15. Instead, BLM assumed validity based on the fact that much, though not all, of the Mine is located upon the McDermitt Caldera, which BLM assumed contains valuable lithium deposits. 1-ER-15; 4-ER-621. However, parts of the Mine, in particular the water and transmission lines, are located outside the caldera, which is devoid of known mineralization. *Compare* 4-ER-605 *with* 4-ER-606. Appellants raised this issue with the district court. 3-ER-479—480; 2-ER-254—255.

The district court held that *Rosemont* extended only to the waste rock piles and CTFS associated with the Mine, and not other project features. 1-ER-17. The district court justification was merely that *Rosemont* only addressed legality of the Forest Service's approval of a copper mine's massive waste pile and, thus, the case should be extended no further. 1-ER-17. However, nothing in *Rosemont* supports limiting its holding to only waste rock piles.

This Court explained that "discovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." 33 F.4th at 1220. The cases relied on by this Court in *Rosemont* stand for the same rule of law. *See Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346, 39 S.Ct. 308, 63 L.Ed. 635 (1919) (to "create valid rights ... a discovery of mineral is essential."); *Davis v. Nelson*, 329 F.2d 840, 844–45 (9th Cir. 1964) (the mining law grants two rights: "(1) the right to explore and purchase all valuable mineral deposits in lands belonging to the United States; and (2) the right to occupation and purchase of the lands in which valuable mineral deposits are found."); *see also Barrows v. Hickel*, 447 F.2d 80, 82 (9th Cir. 1971) ("In order for

a mineral claim on public lands to be valid it is necessary that the discovered mineral deposits be 'valuable.'"); *United States v. Rice*, 886 F.2d 334 (9th Cir. 1989) (evidence that claim is not located where actual deposit exists demonstrates lack of valid claim).

This Court's broad holding in *Rosemont* means exactly what it says: that <u>any</u> mine-related occupancy of mineral claims must be preceded by a discovery of valuable minerals on each claim, which is clearly lacking here. Focusing on the water and power lines, BLM approved these project features, which are outside known zones of mineralization, simply because LNC had asserted mining claims over those lands.[30] 4-ER-612; 4-ER-621; 4-ER-746. Pursuant to *Rosemont*, BLM should have first determined whether LNC's claims were valid, before allowing LNC the right of occupation and effectively waiving RMP requirements.

There is no dispute that BLM's approval of the water and power lines as part of the Mine constitutes "occupancy" of BLM's lands. There is also no dispute that a discovery of valuable minerals has not occurred on the mining claims providing the surface estate for the water and power lines. 1-ER-15. Pursuant to *Rosemont*, then, LNC has no right to occupy BLM's lands with its water and power lines pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. until valuable minerals are discovered on the claims underlying the water and power lines. Here, though, such a discovery of valuable minerals is likely impossible because the water and power lines will be located outside the McDermitt Caldera, admittedly beyond zones of lithium mineralization. 4-ER-621; 4-ER-746; *compare* 4-ER-605 *with* 4-ER-606.

This Court should affirm its holding in *Rosemont* that any mine-related occupancy of mineral claims must be preceded by a discovery of valuable minerals *on that claim*. Therefore, the Court should hold that BLM's approval of occupation for the water and power lines was arbitrary and capricious.

[30] Whether the water and power lines were approved under BLM's regulations at 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. is irrelevant. 43 C.F.R. § 3809.420(a)(3) requires that mining plans of operations be operated "[c]onsistent with the mining laws[.]" 43 C.F.R. § 3715.1 explains that any occupancy must be allowable under the mining laws. Therefore, whether approved pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq., the water and power lines must be consistent with the mining law. Because this Court determined that discovery of valuable minerals is a necessary prerequisite of occupancy under the mining law, occupancy approved pursuant to 43 C.F.R. § 3809 et seq. or 43 C.F.R. § 3715 et seq. must be preceded by a discovery of valuable minerals.

GBRW Reply brief – Rosemont requires a full claim validity examination **(like a patent)**

A. BLM's Errors Are Serious and the District Court Abused Its Discretion When it Remanded Without Vacatur.

While this Court reviews the district court's decision to remand without vacatur for abuse of discretion, "[a] misapplication of the correct legal rule constitutes an abuse of discretion." Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California, 813 F.3d 1155, 1163 (9th Cir. 2015). A district court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Inst. of Cetacean

50

Research v. Sea Shepherd Conservation Soc'y., 725 F.3d 940, 944 (9th Cir. 2013).[15]

The district court misapplied the law here when it treated BLM's responsibility to determine whether LNC had discovered valuable minerals on each mining claim it plans to permanently occupy with waste rock and tailings as a simple procedural error that could be easily "fixed." *See* Order, 1-WWPER-61-62. It is "undisputed" that BLM never determined whether LNC had discovered valuable minerals. Order, 1-WWPER-26. This is a serious error because BLM approved the entire Project based on the erroneous assumption that LNC had valid existing rights under the Mining Law, which eliminated BLM's discretion over the Project. Establishing the existence of valuable minerals is a fact-intensive, substantive inquiry that cannot be done on this record.

A locatable mineral, like lithium, is not "valuable" unless it is shown that it can be "extracted, removed, and marketed at a profit." Rosemont, 33 F.4th at 1209, quoting U.S. v. Coleman, 390 U.S. 599, 602 (1968). "[T]he finding of some mineral, or even of a vein or lode, is not enough to constitute discovery – their extent and value are also to be considered." Converse v. Udall, 399 F.2d 616, 619

[15] LNC erroneously asserts that that case stands for the proposition that a "court abuses discretion *only* if ruling rests on clearly erroneous evidentiary assessment." LNC Resp. 104 (emphasis added). That is a mischaracterization of precedent.

(9th Cir. 1968). "[P]rofit over cost must be realizable from the material itself and it is that profit which must attract the reasonable man." Ideal Basic Indus., Inc. v. Morton, 542 F.2d 1364, 1369 (9th Cir. 1976).

The district court held that "some evidence" of general mineralization in the Project area established a "serious possibility" that BLM will be able to "substantiate" its decision on remand. Order, 1-WWPER-61-62. That is not the test under the Mining Law for BLM to determine whether all the claims contain the requisite "discovery of s valuable mineral deposit."

Valuable minerals must be discovered on each claim and "[a] discovery without the limits of the claim, no matter what its proximity, does not suffice." Waskey v. Hammer, 223 U.S. 85, 91 (1912). Evidence of "general mineralization" thus cannot meet the marketability test. "Each lode claim must be independently supported by the discovery of a valuable mineral within the location as it is marked on the ground." Lombardo Turquoise Mining & Milling v. Hemanes, 430 F.Supp. 429, 443 (D. Nev. 1977) *aff'd* 605 F.2d 562 (9th Cir. 1979). *See also* Henault Min. Co. v. Tysk, 419 F.2d 766, 768 (9th Cir. 1969)(valuable mineral deposit requirement cannot be met on one claim by relying on minerals on other claims).[16]

[16] LNC continually, and erroneously, argues that WWP "conceded" that LNC has "discovered a valuable mineral deposit" in the mine pit. LNC Resp. 6, 15, 18. This argument highlights LNC's misreading of what constitutes a "valuable mineral deposit" under controlling law, including Rosemont, as mere "mineralization" does not qualify as a "valuable mineral deposit."

LNC argues this this long-established precedent only applies when a claimant is seeking a patent or proposing to mine in a withdrawn area (like a National Monument). LNC Resp. 102. That is not true. As Rosemont held, to have any right to occupy a mining claim post exploration, a claimant must show they have discovered "valuable minerals" on that claim. These cases all define what qualifies as a "valuable" mineral deposit. Rosemont dealt with the same situation here – requiring that the claimant show that all of its claims are valid before having any rights under the Mining Law and federal public land law to use and occupy those claims. Like here, the Rosemont mine was proposed on non-withdrawn lands open to claiming.

LNC also posits various theories that its claims are valid, or that it may file "millsite claims" that might support its assertions of the "valid rights" it needs to avoid most of the RMP provisions. LNC Resp. 100-101, 125-26. But as BLM concedes, any adjudication or review of the validity of LNC's claims and purported "rights" under the Mining Law is for a future case on a future record.[17]

[17] The National Mining Association (NMA), in its amicus brief, largely argues that this Circuit got it wrong in Rosemont when it found that post-exploration use and occupancy rights on mining claims can only be based on valid claims under the Mining Law. Dkt. 71. But neither BLM nor LNC appeal the district court's application of Rosemont to this record, and thus NMA's arguments are inapplicable to this case.

The question is not, as BLM frames it, whether the evidence "foreclose[s]" existence of valuable minerals on each claim to be occupied by waste rock and tailings, it is whether it *establishes* their existence. BLM Resp. 105. BLM/LNC rely heavily on the fact, that in Rosemont, there was no evidence that valuable minerals had been found on the claims. But as the Circuit recognized, "that is legally irrelevant. The question is whether valuable minerals have been 'found' on the claims, not whether valuable minerals might be found." 33 F.4th at 1222.

Here, just as in Rosemont, "[i]t is undisputed that no valuable minerals have been found." Id.; *see* BLM Ans. ¶119, 1-WWPFER-30 (admitting that BLM has not determined whether waste dump claims contain valuable minerals, as alleged in ¶119 of WWP's Complaint). "[D]iscovery of valuable minerals is essential to the right to any occupancy—temporary or permanent—beyond the occupancy necessary for exploration." Rosemont, 33 F.4th at 1220. The district court thus misapplied Rosemont in its decision not to vacate the illegal ROD.

Indeed, if any minerals exist on the waste dump/tailings claims, they cannot be credibly considered "valuable." LNC made the economic decision to permanently bury them under 190 million tons of waste rock and tailings, essentially eliminating any future potential for mining. *See* LNC SJ Reply at 4, 2-WWPER-103. That was the situation in both Rosemont (Ninth Circuit and district court) and the recent Great Basin Resource Watch decision, 2023 WL 27444682,

as the courts relied on the mining company's plans to bury the waste dump lands as evidence that they did not contain valuable minerals: "As a threshold matter, Rosemont's proposal to bury its 2,477 acres of unpatented mining claims under 1.9 billion tons of its own waste was a powerful indication that there was not a valuable mineral deposit underneath that land." Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F. Supp. 3d 738, 748 (D. Ariz. 2019). *See also* Great Basin Resource Watch, 2023 WL 27444682, at *5 (noting company's plans to dump waste on its mining claims "suggests that the land does not contain the requisite valuable mineral deposits."). On this record, and on these directly-relevant court rulings, LNC cannot rebut the presumption that its claims are invalid under the Mining Law, based on its own plans to forever bury these lands under 190 million tons of waste.

BLM's new and rushed claim validity determination cannot cure BLM's error because BLM does not deny that it was required determine whether LNC held valid existing rights *before* approving the Project. In Rosemont, this Circuit rejected the argument that an agency may determine whether a mining claimant holds valid existing rights *after* authorizing the claimant to occupy federal lands. *See* Rosemont, 33. F.4th at 1221 (rejecting argument that "the court erred in holding that the Service must assess the validity of Rosemont's mining claims before approving Rosemont's mining plan."). Allowing BLM to backfill its ROD

conflicts with Rosemont, and is another way in which the district court abused its discretion when it decided not to vacate the illegal ROD.

Where there is an "absence of analysis," rather than a "flawed analysis," by the agency, "the Court cannot determine whether there exists a serious possibility that the [agency would] be able to substantiate its decision on remand." Wildearth Guardians v. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 897 (D. Mont. 2020) (citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151)(D.C. Cir. 1993)(internal quotation marks omitted).

The existing record does not support claim validity and LNC's "rights," especially due to the presumption that LNC's decision to cover 1,300 acres with 190 million tons of waste shows that the claims do not contain the requisite discovery of valuable minerals. The district court thus abused its discretion when it ignored controlling federal caselaw, and the facts of this case, in believing that BLM could easily substantiate the unlawful ROD.

The district court also failed to recognize the on-the-ground and practical nature of BLM's errors. BLM could not lawfully approve a mine Project with no legally-valid plan for disposing of waste rock and tailings. The ROD's approval of blasting, ground clearing, facility construction and other operations (in addition to the 1,300 acres of the waste and tailings dumps) is premised on approval of a full and complete mine Plan of Operations (PoO) authorized pursuant to rights under

the Mining Law. But, as BLM admits, the ROD was legally invalid. The district court correctly held LNC had no legal right to use or occupy these 1,300 acres. As such, the ROD essentially approved what is now an incomplete and illegal mine.

As the Rosemont district court held, "the Forest Service accepted, without question, that those unpatented mining claims were valid. This was a crucial error as it tainted the Forest Service's evaluation of the Rosemont Mine from the start." Center for Biological Diversity, 409 F. Supp. 3d at 747 (emphasis added). The same is true here, where BLM based its decision not to apply the ARMPA, as well as its overall review of the Project, on its illegal and unsupported assumption that BLM's discretion over the Project was severely limited because LNC held statutory rights to occupy all of public lands at the site. The district court's decision not to vacate the decision was deeply flawed, legally and factually.