



PIMA COUNTY
BOARD OF SUPERVISORS

Adelita S. Grijalva, District 5

MEMORANDUM

DATE: January 28, 2021
TO: Julie Castañeda, Clerk of the Board
FROM: Adelita Grijalva, District Five Supervisor
REGARDING: Item for the February 2, 2021 agenda addendum

Please add the following to the February 2, 2021 agenda addendum

Board of Supervisors

Discussion/action. The previous Pima County Board of Supervisors on July 7, 2020, approved a motion to file a Pima County amicus brief in the Ninth U.S. Circuit of Appeals Case Nos. 19-7585 and 19-17586, in support of the Center for Biological Diversity, et al., in opposition to the appeal of Rosemont Copper Company and others. This is an appeal of the U.S. District Court's ruling in D.C. Nos. 4: 17-cv-00475-JAS, 4: 17-cv-00576-JAS, and 4: 18-cv-00189-JAS in favor of the Center and other plaintiffs, which overturned certain administrative rulings by the U/S. Forest Service. It is proposed that the new Board of Supervisors affirm Pima County's support for this amicus brief. (District 5)

Thank you

JAN 28 2021 10:49:10 AM KCFB

Nos. 19-17585, 19-17586

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Defendants-Appellants,

v.

ROSEMONT COPPER COMPANY, *et al.*,
Intervenor-Defendant-Appellant.

On Appeal from United States District Court for the District of Arizona
Case Nos. 4:17-cv-00475-JAS, 4:17-cv-00576-JAS, 4:18-cv-00189-JAS
The Honorable James A. Soto

CORRECTED

**AMICUS CURIAE BRIEF OF PIMA COUNTY AND PIMA COUNTY
REGIONAL FLOOD CONTROL DISTRICT
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF
DISTRICT COURT RULING**

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TABLE OF CONTENTS

INTRODUCTORY STATEMENT	4
INTERESTS OF THE AMICI	4
ARGUMENT	6
1. Rosemont's interpretation of the law forces the public to bear the economic consequences of its mining operation.....	6
2. The public costs of Rosemont's proposed operations are not offset by shorter-term economic benefits.	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994)8

Statutes

A.R.S. § 11-251(17)4

A.R.S. § 11-251(30).....4

A.R.S. § 11-251(31).....4

A.R.S. § 11-254.04.....5

A.R.S. § 48-3602.....5

A.R.S. § 48-3603(A).....5

A.R.S. § 48-3603(C)(1).....5

Federal Statutes

Forest Service Organic Administration Act of 1897 ("Organic Act of 1897")
16 U.S.C. §§ 478, 482, and 551.....7

Mining Law of 1872
30 U.S.C. §§ 22, 23, 26, 29, and 42.....6

National Environmental Policy Act
42 U.S.C. § 4331 *et seq.*.....7

INTRODUCTORY STATEMENT

This brief is filed on behalf of Pima County, a political subdivision of the State of Arizona (“**County**”), and the Pima County Regional Flood Control District, a tax-levying public-improvement district and a political subdivision of the State of Arizona (“**District**”), in support of the position of Plaintiffs/Appellees, Center for Biological Diversity, *et al.* All parties have consented to the filing of this brief. No other entity provided financial resources for the preparation of this brief, which was not authored in whole or in part by any party to the appeal.

INTERESTS OF THE AMICI

Pima County is a body politic and corporate of the State of Arizona. It is the governmental entity for the area that includes the proposed Rosemont Mine (“**Mine**”). Pima County owns or manages properties in the vicinity of the Mine that will be impacted by the proposed Mine’s construction and operation. The Pima County Board of Supervisors is empowered to, among other things: “[a]dopt provisions necessary to preserve the health of the county” (A.R.S § 11-251(17)); “[d]o and perform all other acts and things necessary to the full discharge of its duties as the legislative authority of the county” (§ 11-251(30)); [m]ake and enforce all local, police, sanitary and other regulations not in conflict with general law” (§ 11-251(31)); and engage in activities that “will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the

county” (§ 11-254.04). Thus, it has a general duty to protect the safety, welfare, and economic wellbeing of Pima County residents impacted by the proposed Mine.

The Pima County Flood Control District is an Arizona special taxing district organized pursuant to A.R.S. § 48-3602. It is a “taxing subdivision of this state and has all the powers, privileges and immunities granted generally to municipal corporations by the constitution and laws of this state.” A.R.S. § 48-3603(A). Among other powers and duties, the District has the authority to “[a]cquire by eminent domain, purchase, donation, dedication, exchange or other lawful means rights-of-way for and construct, operate and maintain flood control works and storm drainage facilities within or without the district for the benefit of the district.” A.R.S. § 48-3603(C)(1).

The District owns the Cienega Creek Natural Preserve (the “**Preserve**”), which was acquired to preserve riparian habitat, reduce peak storm water flows, and facilitate groundwater discharge. The Preserve is located downgradient of the Mine and will be impacted by Mine runoff and Mine-caused changes to the hydrology of the area. Pima County owns and operates Bar V Ranch (the “**Ranch**”), which was acquired to preserve wildlife habitat, protect water quality along a tributary to Cienega Creek, and maintain ranching heritage and recreation opportunities. The Ranch is located downgradient of the Mine, and its principal drainage would be the

receiving water body for any spills along the transportation routes used by the mine, as well as Mine runoff. Both the Ranch and the Preserve are public parks.

The County and District therefore have a significant interest in the outcome of this case. The district court permitted the County and District to file an amicus brief regarding the plaintiffs' application for a preliminary injunction. ASER1. Amici respectfully ask this Court to consider the potential impact of its ruling on them and their residents, as it considers how to proceed.

ARGUMENT

1. Rosemont's interpretation of the law forces the public to bear the economic consequences of its mining operation.

The Mining Law of 1872¹ encourages the economic exploitation of mineral resources on public land. The basic concept is relatively simple. A private party may enter federal land, put up stakes, and publicly proclaim that the staked land contains valuable minerals - meaning minerals that have economic value that outweighs the cost of recovering, processing, and marketing them. The prospective miner can then exclude others from this unpatented claim, including the surface, and can use 5 acres of public land contiguous to the claim for purposes incidental to the mining operation (including, presumably, for disposal of waste rock). The miner can also access the claim through surrounding federal lands.

¹30 U.S.C. §§ 22, 23, 26, 29, and 42.

But, as a statutory prerequisite, in order to assert a legal right to the unpatented claim, the claimed land must in fact contain valuable mineral deposits.

Under the Organic Act of 1897² and the National Environmental Policy Act,³ and related regulations, federal agencies must rigorously review proposed mining operations to ensure that the planned use appropriately balances the interest of commercial exploitation of mineral resources with the public's economic, environmental, and cultural interests. Approval, by definition, can be conditioned on restrictions and requirements that add to operation costs — after all, there is no need to mandate the *cheapest* mode of operation — and the federal agency's approval can be withheld altogether.

The position asserted by Rosemont Copper Company (“**Rosemont**”) and the Forest Service departs from that scheme in two fundamental ways. First, it bypasses the Mining Law's requirement that the claimed land actually contains valuable minerals.

Rosemont asserted a legal right use 2,447 acres of public land as a permanent dumping ground for 1.9 billion tons of waste material to support its mining operations. The administrative record before the Forest Service indicated that the land in question does not contain valuable minerals. The fact that Rosemont intends

² 16 U.S.C. §§ 478, 482, and 551.

³ 42 U.S.C. § 4331 *et seq.*

to use the 2,447 acres as a permanent dumping ground for nearly 2 billion tons of waste belies any assertion that the land contains valuable minerals. Yet, the Forest Service assumed that Rosemont was correct and, without any rational basis, agreed that the Mine had a legal right to use the public land to support its mining operations.

Under this approach, any Forest Service land not already closed to mining use could be permanently appropriated and occupied without regard for the statutory prerequisite that, in order to be a legally valid claim, it must contain valuable minerals.

Second, having assumed that Rosemont had a legal right to use the public land as a dumping ground, the Forest Service determined that it could not prohibit any mining-related use, or even require mitigation measures for that use, if doing so would make the Mine's proposed operation economically unfeasible. In effect, once Rosemont decided to use federal land for the permanent disposal of its waste, the Forest Service assumed its only role was to require Rosemont to mitigate the impact of that use, but only to the extent economically feasible for the Mine. Prohibiting the use is not, according to Rosemont and the Forest Service, an option.

This renders public oversight of activities on public lands a sham and is a radical abdication of the Forest Service's duties. It is clear, for example, that the Forest Service is within its rights to permit only nonmotorized means of accessing a mining claim. *Clouser v. Espy*, 42 F.3d 1522, 1529 (9th Cir. 1994). Yet under the

approach espoused by Rosemont and the Forest Service, if a mining company decided to bulldoze a mining road through the heart of pristine forest for vehicular access to its mining claim, the Forest Service could only impose very limited requirements on things like the location and width of the road (and only in a manner that doesn't unduly increase the company's cost!).

So Rosemont must point to some other source of authority for its claimed right to use the land as a dumping ground, and there simply is none. It tries to infer such a right from Forest Service regulations that apply to mining activities both on *and off* mining claims, and statutory provisions prohibiting material interference with mining and mining-related activities on federal lands. But those provisions concern the regulation of legally permitted activities; they do not themselves grant the legal right to conduct such activities.

This approach shifts the cost of private mining operations to the public. In this case, it means permanently sacrificing public cultural, environmental, and economic resources in exchange for a 25-year mining operation.

2. The public costs of Rosemont's proposed operations are not offset by shorter-term economic benefits.

Rosemont has touted the positive impact that its proposed 25-year Mine operation will have on the local economy. But it ignores the substantial costs to the public that must be considered as part of the public-interest analysis, costs that will be paid not just for 25 years, but in perpetuity.

The Santa Rita Mountains (the “**Santa Ritas**”) are known for their beauty and the diversity of the native plants and wildlife found there; they are a national treasure and an important resource for the local tourism economy. Tourism will be impacted during the Mine’s operation by the unsightly mess and the restrictions placed on the public lands surrounding the mine pit. Heavy truck traffic on SR83 from the Mine will disrupt that road’s status as a designated Scenic State Highway and affect tourist traffic flow to the Las Cienegas national conservation area. And the Mine will forever disturb the beauty of the Santa Ritas. Plant and animal habitats will be permanently disrupted and the contaminated runoff from the dumping ground and spills along the transportation route are likely to impact jurisdictional waters within public parks and recreational areas, including those owned by the County and the District. The damage done will disrupt local plant and animal life as well as surface and groundwater flows in the area for hundreds of years after the Mine has ceased its operations.

While these “generalized” environmental impacts are not as economically quantifiable as the Mine operation’s fleeting contribution to the local economy, they are devastating to the people of this region—and permanent. Permanent desecration of the Santa Ritas is not in the public interest.

And there is a very real economic cost, however difficult to compute with certainty. Direct travel spending in Pima County in 2017 was \$3.911 billion. (Exhibit

A, at 2:23.) In Santa Cruz County, direct travel spending for the same period was \$239.1 million for a total of slightly more than \$4.15 billion. (Exhibit A, at 3:1.) Between the two counties, combined travel-related employment is estimated at 27,600. (Exhibit A, at 3:13.) It is difficult to predict or calculate exactly how much tourism-related employment and spending would be lost as a result of the Mine, but even a small percentage reduction would have a substantial impact. Even a one-percent reduction in tourism would result in \$41 million in lost spending per year and 276 fewer jobs. And that impact will last long after the mine has ceased operating.

CONCLUSION

By assuming, without any rational basis, that Rosemont had a legal right to use the 2,447 acres, the Forest Service ignored the basic requirement of the Mining Law that the land at issue contain valuable mineral deposits. The Forest Service thus improperly refused to consider whether it was appropriate to use culturally, economically, and environmentally valuable public land for a toxic waste dump. In bypassing the statutory framework, the Forest Service acted arbitrarily and capriciously and in essence, shifted to the public costs that should be borne by Rosemont. Pima County and the Pima County Flood Control District urge this Court to affirm the District Court's ruling.

RESPECTFULLY SUBMITTED this 21ST day of September, 2020.

BARBARA LA WALL
PIMA COUNTY ATTORNEY

By /s/ Regina L. Nassen
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Certificate of Compliance for Briefs
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CERTIFICATE OF SERVICE

I certify that I electronically filed this Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on 9/21/2020.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system

Dated September 21, 2020

/s/ Marilee B. Weston

Marilee B. Weston