

Ninth Circuit Ruling Exposes Challenges to Permitting Large Waste Rock Storage Areas on Federal Lands

Center for Biological Diversity v. U.S. Fish & Wildlife Service
33 F.4th 1202 (9th Cir. 2022)

A recent Ninth Circuit ruling highlights the Mining Law of 1872's shortcomings to accommodate the extraordinarily large-scale operations that often characterize modern open-pit mines.

The lawsuit involved a proposed open pit copper mine in Arizona, on federal land managed by the U.S. Forest Service. The applicant had valid claims to mine the proposed 950-acre pit. The question was whether the Mining Law also conferred a right to permanently store 1.9 billion tons of waste rock on 2,447 acres of adjacent federal land. While the applicant held mining claims for the storage area as well, it was undisputed that the land held no valuable minerals.

The Forest Service approved the storage area on the ground that Section 612 of the Multiple Use Act allows the use of federal land for waste storage that is "reasonably incident" to a mining operation, and in reliance on various provisions of the Mining Law. In court, however, the Service abandoned its Section 612 argument and defended its approval solely under the Mining Law, advancing two main points:

First, the Service asserted that the applicant had valid mining claims to the 2,447-acre storage area. The Ninth Circuit observed, however, that a mining claim is valid – and a right of occupancy therefore exists – only if valuable minerals are found on the claim. It was undisputed that no valuable minerals were likely to be found in the storage area. As such, the court held that the claims were invalid and could not support a right of occupancy.

Second, the Service argued that the storage area was permitted by Section 22 of the Mining Law, which the Supreme Court has interpreted as giving a temporary right of occupancy for mining exploration. The Service asserted that the waste rock was only "temporary" because it will eventually be reclaimed in place. The Ninth Circuit was dismissive, observing that there was nothing temporary about a new, permanent landform. Accordingly, the court invalidated the Service's project approval.

The Ninth Circuit also took the opportunity to note that mill sites provide a right of occupancy and need not hold valuable minerals, but that because mill sites are limited in size to five acres each, the available mill sites were insufficient: "the amount of waste rock produced by modern pit mines is much greater than can typically be accommodated on the mill site land available to a mine operator."

*Sean Hungerford is a Partner at
Harrison, Temblador, Hungerford & Guernsey LLP in Sacramento, California.*