Responses of Rich Haddock,
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Questions for the Record
Of the December 12, 2023 Hearing of the
Public Lands, Forests, and Mining Subcommittee,
Senate Energy and Natural Resources Committee

To Receive Testimony on Pending Legislation

January 12, 2024

The following are responses of Rich Haddock, Senior Advisor, Barrick Gold Corporation, to questions posed for the record by Members of the Subcommittee on Public Lands, Forests, and Mining, Senate Energy and Natural Resources Committee, following the Subcommittee's December 12, 2023 hearing to receive testimony on S. 1281 and S. 1742.

I appreciate the opportunity provided by Chairwoman Cortez Masto and Ranking Member Lee to testify at the Subcommittee hearing and to present Barrick's views on legislative changes to the Mining Law. Addressing the disruption caused by the *Rosemont* case is the most urgent priority, and Barrick is grateful for the leadership of Senator Cortez Masto and Senator Risch in introducing S. 1281, which would restore long-understood Mining Law precedents and curtail unnecessary litigation over the meaning and extent of *Rosemont*.

Barrick continues to support changes to the Mining Law, including a reasonable net royalty to compensate the United States, increased claim maintenance fees, and provisions to address abandoned mine lands. As I testified on December 12, Barrick appreciates Senator Heinrich's recognition in S. 1742 of the two most important aspects of the Mining Law: self-initiation and security of tenure. These must be preserved in any Mining Law legislation. We are encouraged by the productive and constructive exchange that occurred during the Subcommittee hearing.

Finally, Barrick also supports "Good Samaritan" legislation – as part of or separate from Mining Law reform – which addresses existing disincentives for mining companies to assist in the cleanup of abandoned mine lands. Barrick and other mining companies have crucial expertise that could be applied to the abandoned mine lands problem. We support S. 2781 – the Good Samaritan Remediation of Abandoned Hardrock Mines Act – introduced by Senator Heinrich and supported by 25 bipartisan cosponsors. The bill would create a pilot program pursuant to which the Environmental Protection Agency could issue up to 15 permits and grant certain liability relief for project participants. S. 2781 is a thoughtful and sensible first step in promoting abandoned mine land cleanups and addressing stakeholder concerns. The pilot program would create a valuable database of experience with mine cleanups and liability relief that can inform further congressional action.

<u>Note:</u> The responses below refer to the following court cases:

- *Center for Biological Diversity v. United States Fish and Wildlife Service*, 409 F. Supp. 3d 738 (D. Ariz. 2019) (the "*Rosemont*" case).
- *Center for Biological Diversity v. United States Fish and Wildlife Service*, 33 F.4th 1202, 1212 (9th Cir. 2022) (the *Rosemont* appeal to the 9th Circuit. The 9th Circuit affirmed the District Court's ruling).
- *Bartell Ranch v. McCullough*, 2023 U.S. Dist. LEXIS 19280 (D. Nev. 2023) (the "*Thacker Pass*" case).
- *Western Watersheds Project v. McCullough*, 2023 U.S. App. LEXIS 18063 (9th Cir. 2023) (the *Thacker Pass* appeal to the 9th Circuit. The 9th Circuit affirmed the District Court's ruling to remand the Thacker Pass plan of operations without vacating BLM's decision).
- *Earthworks v. United States Department of the Interior*, 496 F. Supp. 3d 472 (D. D.C. 2020) ("*Earthworks*").
- *Earthworks v. United States Department of the Interior,* No. 20-5382 (D.C. Cir.) (the *Earthworks* appeal to the D.C. Circuit. The appeal concerns the interpretation of the mill site provision of the Mining Law).

Questions from Chairman Joe Manchin III

<u>Question 1</u>: In your view, what is the intended purpose and what is the effect of the "fair market value" clause of S. 1281 (subparagraph "(2) – Fulfillment of Federal Land Policy Management Act of 1976")?

<u>Response:</u> The purpose and effect of this clause are to discourage further litigation over the "Rosemont" issues that are corrected by S. 1281. In *Earthworks v. U.S. Department of the Interior*, the same plaintiffs and plaintiffs' counsel who participated in the Rosemont and other related litigation challenged the Bureau of Land Management's ability to review and approve mining plans under its 3809 regulations without first determining whether claims were valid. Plaintiffs argued that FLPMA required payment of fair market value for the use of any claims that were not determined to be valid. The District Court rejected that idea in a decision directly at odds with the Ninth Circuit's *Rosemont* decision:

> [T]he Mining Law, its implementing regulations and related case law have never required Interior or BLM to verify the validity of a claim by independently confirming discovery. Additionally, as the Supreme Court has recognized, a claim of unknown or undetermined validity is not a legal nullity. An operator on a claim of unknown validity can have rights against rival claimants under the doctrine of *pedis possessio*, and the government cannot find such a claim invalid without a degree of process."

496 F. Supp. 3d at 492 (*citing Cameron v. U.S.* 252 U.S. 450, 460 (1920)) .

<u>The District Court found that plaintiffs' interpretation of the law would "have quietly upended the current claim system under the Mining Law . . . [and] the Court [would] not strain to read . . . FLPMA as silently working such a fundamental change to longstanding practice under the Mining Law.</u>" *Id.* at 493 (emphasis added).

Plaintiffs appealed the *Earthworks* decision to the D.C. Circuit Court of Appeals, but dropped their appeal of the "fair market value" theory during appellate briefing. The clause in S. 1281 would prevent plaintiffs from shopping for a different judicial forum that might revive that theory.

<u>Question 2</u>: Section 4 of the July 23, 1955 Surface Resources Act says that "any mining claim *hereafter* located … shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonable incident thereto." (30 U.S.C. 612). It is my understanding that approximately 2,700 mining claims pre-date the enactment of that Act.

If S. 1281 were in effect, how would the "right to use, [and] occupy…with or without the discovery of a valuable mineral deposit" interact with these pre-Surface Resources Act claims? Would the statutory right of use and occupation under S. 1281 for a pre-Surface Resources Act claim allow for uses other than mining?

<u>Response:</u> S. 1281 would not allow any claimant to use any claim for uses other than mining. The savings clause of S. 1281 makes it clear that nothing in the act "diminishes any right (including a right of entry, use, or occupancy) of a claimant." Thus, any rights associated with pre-1955 claims would be unaffected. Further, the definition of "operations" in S. 1281 conforms to longstanding interpretation of the appropriate use and

occupancy of mining claims, consistent with the Surface Resources Act and allows for no uses other than mining.

Questions from Senator Martin Heinrich

<u>Question 1 (also posed by Senator John W. Hickenlooper)</u>: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

<u>Response:</u> The goals of S. 1281 cannot be achieved by amending 30 U.S.C. § 42(a) (governing mill sites). Changes to the mill site provisions would not address the problems created by the *Rosemont* decision, as explained in more detail below, and in my response above to Senator Manchin's Question 1. Changing the "non-contiguous, 5 acre and 'non-mineral'" limitations of the existing statute would require a rewrite of the entire mill site provision, creating new legislative language that must be implemented and interpreted by BLM. That entirely new language and BLM's efforts to implement it would surely be tested in litigation by anti-mining litigants, resulting in further uncertainty and delay for mine projects. In contrast, S. 1281 is narrowly drafted (1) to restore the long-settled understanding of the Mining Law that existed before the *Rosemont* decision, and (2) to avoid permitting delays caused by unnecessary litigation over *Rosemont* and its progeny. Rather than creating new legal issues to be resolved in litigation, as amending the mill site provision would do, S. 1281 would restore the *status quo ante*, which has been applied by the regulations, guidance, and practice of BLM for decades.

- **<u>Amending the Mill Site Provision Does Not Solve the Problems Created by the *Rosemont* Case</u>**

Amending the mill site provision would not resolve the central problem created by the *Rosemont* decision: the requirement to establish claim validity before using mining claims for an ancillary use such as tailings or waste rock storage. The decision reversed BLM's regulations and settled interpretations of its authority under the Mining Law, and decades of established practice in the hardrock mining industry in complying with those regulations.

Addressing the issue via changes to the mill site provision of the Mining Law would encourage further litigation. The requirement to show claim validity applies with equal force to mill sites and lode claims. As discussed above in response to Senator Manchin's Question 1, the Mining Law and BLM regulations do not routinely require validity determinations for lode claims that are mined. The *Rosemont* case creates a great deal of uncertainty – which inevitably will be litigated – on numerous remaining issues, including whether mill sites under existing or amended law would still require some kind of validity determination.

Other *Rosemont* issues similarly remain unresolved. In the *Rosemont* case, the court ruled for the first time that tailings and waste rock cannot be placed on lode claims unless the miner first demonstrates that the claims are "valid," i.e., that each claim contains a discovery of a valuable mineral. The administrative record in *Rosemont* was clear that the claims in question did not contain valuable minerals. In the *Thacker Pass* litigation, in contrast, the Nevada district court noted that the administrative record contained *some* evidence that claims intended for tailings and waste rock storage were mineralized, and remanded to BLM to conduct an "analysis"

to determine whether the record demonstrated that "Lithium Nevada has discovered valuable minerals." In May 2023, BLM responded, affirming its earlier approval of the Thacker Pass plan of operations and concluding that 99 out of 107 lode claims intended for tailings and waste rock storage contained valuable minerals. *See* Thacker Pass Project, Plan of Operations and Reclamation Permit Record of Decision, NVN098586 (May 16, 2023).

Importantly, BLM clarified that its decision about Thacker Pass claims was not based on a formal mining claim validity determination, and that such a determination was not required by the District Court or by the *Rosemont* court. At the same time, the Interior Solicitor published an opinion concluding that no formal validity determination is required when approving the use of mining claims for ancillary uses; "it is enough for plan approval that there is some evidence of discovery." *See* Solicitor's Opinion M-37077, *Use of Mining Claims for Mine Waste Deposition, and Recission of M-37012 and M-37057* at 2, 5-6 (May 16, 2023).

The plaintiffs in the *Thacker Pass* case made it clear in their 9th Circuit filings that they reject the May 2023 Solicitor's Opinion insofar as it allows a lower quantum of proof than a full claim validity determination for patenting. *See* Attachment A (excerpts of *Thacker Pass* environmental plaintiffs' reply brief in *Western Watersheds Project v. McCullough*). The *Thacker Pass* appeal before the 9th Circuit related only to whether the District Court had erred by refusing to vacate the BLM approval. The Court of Appeals concluded that the remand without vacatur was appropriate. It further ruled that arguments about the sufficiency of BLM's claim analysis were premature and could only be raised after BLM concluded its analysis of Thacker Pass claims. The *Thacker Pass* plaintiffs have not yet appealed BLM's validity determination; whether they will do so remains to be seen – they have six years to decide. However, it is clear that this issue is not resolved, and remains for future litigation.

Accordingly, based on the above discussion, in the case of mill sites, mining opponents are likely to argue that a formal showing is required that mill sites are non-mineral in character before a plan of operations including them can be approved.

The foregoing examples make clear that addressing the *Rosemont* decision by amending the mill site provision will not suffice to resolve uncertainties and limit litigation. The only way to eliminate the uncertainty created by *Rosemont* is to directly reverse the decision, which S. 1281 does.

- **<u>Mill Sites Are Not Practical or Appropriate for Placement of Tailings and Waste Rock</u>**

Using only mill sites for locating waste rock and tailings is impracticable because that would ignore geologic reality. A mill site has to be located on ground that is "nonmineral land." 30 U.S.C. § 42(a). Locatable mineral deposits generally do not exist along bright lines where one side of the line is mineral in character and the other side of the line is non-mineral in character. Rather, they usually exist where there is an "economic" mineral deposit – minerals in form and concentration that can be recovered economically – surrounded by areas that, though mineralized, are non-economic. The distinction between economic and non-economic mineral deposits can change based on mineral prices, the development of more efficient or cheaper recovery technologies, and other factors. Only at a distance from the economic part of the mineralization does the ground finally become definitively "nonmineral land" as required by 30 U.S.C. § 42(a).

For example, porphyry copper deposits such as those in Arizona, New Mexico, and Utah are typically surrounded by a large mineralized area that can extend for miles in every direction from the deposit itself. *See* David A. John, ed., 2010, *Porphyry Copper Deposit Model*, United States Geological Survey, Scientific

Investigations Report 2010-5070-B. The following figure from the USGS report illustrates a porphyry deposit surrounded by a "skarn" of mineralized sedimentary material, and associated mineralized fragments of the porphyry deposit that extend several miles from the deposit itself.

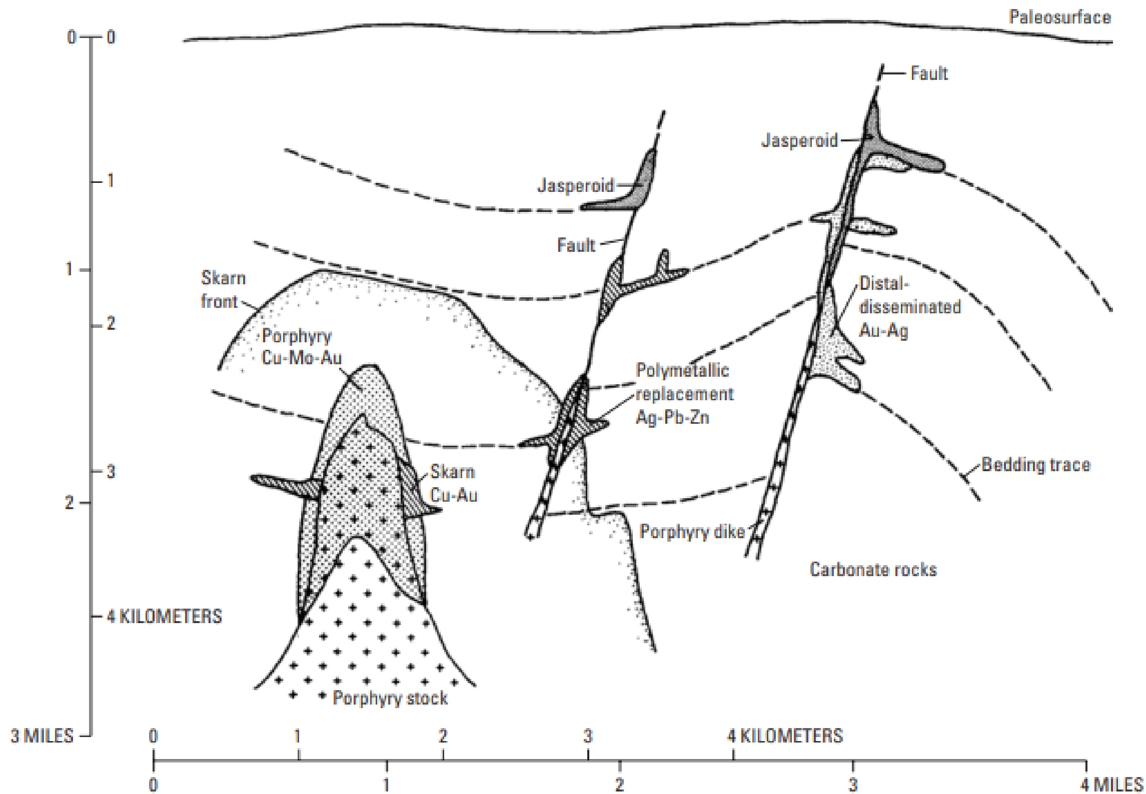

Figure B1. General setting of porphyry copper and associated deposit types (modified from Sillitoe and Bonham, 1990).

Disseminated gold deposits such as those in Nevada are similarly frequently surrounded by a mineralized, though subeconomic halo. Finally, as the *Thacker Pass* litigation has illustrated (addressed in the next section of this response), lithium deposits similarly do not have bright line cut-offs between the target deposit and surrounding mineralized lands.

Relying only on mill sites would mean that tailings and waste rock would need to be deposited at some distance from the actual economic ore body. This would have at least two undesirable outcomes. First, the tailings and mined overburden and waste rock would have to be transported miles from the economic deposit, which adds significant costs to the operation. Added costs have the effect of shrinking or eliminating the economic ore body, a result that is contrary to federal policy promoting domestic mining. Second, use of mill sites in this way would result in significantly greater and more dispersed land disturbance instead of more compact mine operations, with attendant greater environmental impacts and land use conflicts with recreation and other surface uses of the public lands.

- **<u>Other Infrastructure Cannot Be Located Solely on Mill Sites</u>**

Anti-mining litigants have made it clear that they also intend to challenge the use of the surface of lode claims for other mine infrastructure beyond placement of waste rock and tailings. Other mine infrastructure includes such things as roads, power distribution lines, truck shops, crushers, conveyors, and pipelines. Even if it

somehow made sense to site waste rock and tailings facilities far away from the mine itself (and most of the time it does not), roads, conveyers, and other kinds of mine infrastructure by their nature must be at or near the mine and the ore body that is being actively mined. Those facilities could never be located entirely on mill sites.

The *Thacker Pass* plaintiffs attempted to challenge the use of lode claims for mine infrastructure during their appeal of the District Court decision to the 9th Circuit Court of Appeals. *See* Attachment B (excerpts of Bartell plaintiffs' opening brief in *Western Watersheds Project v. McCullough*). The court did not consider the challenge, but only because plaintiffs did not raise it in a timely fashion. This remains an issue that will be used in future litigation brought to oppose mine projects, and amending the mill site provision would not fully resolve it, at least without the specter of more litigation and years of legal uncertainty. S. 1281 resolves the issue, by narrowly restoring the pre-*Rosemont* status of the law allowing ancillary uses to be sited on lode claims without requiring a validity determination. The simplest and most targeted way to address such support infrastructure is to restore "ancillary use" as it has been understood and implemented under the Mining Law for more than a century before the *Rosemont* decision, which is what S. 1281 does.

Question 2: Under current law, when a claimant in an area withdrawn subject to "valid existing rights" wants to permit a mining project, current regulations require the agency to determine if a valid right exists at the time of application and at the time of withdrawal.

How would S. 1281's right to "use, occupy, and conduct operations on public land, with or without the discovery of a valuable mineral deposit", including "any… reasonably incident… activity, regardless of whether that incidental activity is carried out on a mining claim…" change the requirements for activity in the case of a mining claim in an area previously withdrawn "subject to valid existing rights", such as wilderness or a National Park?

Would the answer be different for future withdrawals because it would affect what "valid existing rights" applied at the time of withdrawal?

Response: Current practices and regulations, including 43 C.F.R. 3809.100 (relating to operations on withdrawn or segregated land) would be unaffected by S. 1281. That regulatory provision requires a formal validity determination before approving a plan of operation for mining claims within segregated or withdrawn areas. Other statutes and regulations addressing specific areas withdrawn from location, including 36 C.F.R. Part 6 (mining in the Parks), 36 C.F.R. § 228.15 (mining in Forest Service Wilderness areas); 43 C.F.R. Subpart 3809 (mining on lands in BLM Wilderness review), and 43 C.F.R. 6304 (mining in BLM Wilderness areas), would also be unaffected. No change in management of claims in areas withdrawn from location is intended or expected.

Future withdrawals would be unaffected by S. 1281. S. 1281 does not create new "valid existing rights," but restores the law prior to the *Rosemont* decision.

If appropriate, simple language could be added to the savings clause of S. 1281 to confirm that withdrawn lands are unaffected.

Questions from Senator John W. Hickenlooper

<u>Question 1</u>: Would it be possible to achieve the goals of S. 1281, and alleviate concerns around the bills "without the discovery of a valuable discovery of a valuable mineral deposit" provision, by instead amending the mill site provision of the Mining Law to clarify and codify the use of multiple mill sites in connection with a valid mining claim, while changing the non-contiguous, 5 acre and "non-mineral" limitations to make mill sites useable? Would other changes be necessary as well?

<u>Response:</u> See response above to Senator Martin Heinrich's Question 1.

ATTACHMENT A to
Barrick Responses to Questions for the Record of December 12, 2023 Hearing

Excerpt, Reply Brief of Appellants Great Basin Resource Watch, Basin and Range Watch, Wildlands Defense, and Western Watersheds Project in *Western Watersheds Project v. McCullough* (9th Cir. 2023), filed May 26, 2023

pp. 50-57

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

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

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[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]

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[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]

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[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.

ATTACHMENT B to
Barrick Responses to Questions for the Record of December 12, 2023 Hearing

Excerpt, Opening Brief of Appellants Bartell Ranch, LLC and Edward Bartell in *Western Watersheds Project v. McCullough* (9th Cir. 2023), filed March 24, 2023

pp. 54-57

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 <u>any occupancy</u>—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 *any* 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

[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.

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.