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9th Circuit judges now weighing arguments over Rosemont Mine

Tony Davis

Feb 15, 2021 Updated 6 hrs ago

It doesn't matter legally whether the land where the Rosemont Mine's tailings and waste rock would go has valid mining claims, say attorneys for the mining company and for the U.S. government.

They say that anywhere on the mine site in the Santa Rita Mountains is OK to put the wastes as long as that land is otherwise legally "open" to mining.

But mine opponents say federal law and past court cases make it clear that valid mining claims and valuable minerals must be present on land where mine wastes would go.

To make their case, they cite the 1872 Mining Law, which opens federal lands to mining — if a miner or prospector has a valid claim.

Now, a federal three-judge panel in the 9th Circuit Court of Appeals must decide who is right. The case's outcome could set a national precedent, legal experts have said.

The judges asked plenty of questions at a recent hearing via Zoom transmission.

Hudbay Minerals Inc. and the U.S. Justice Department want the 9th Circuit to overturn a July 2019 ruling by a U.S. district judge in Tucson who stopped mine construction the evening before it was supposed to begin.

District Judge James Soto faulted the U.S. Forest Service for failing to show that Hudbay had valid mining claims or valuable mineral deposits on 2,447 acres slated for waste disposal in the Coronado National Forest.

Judge William Fletcher, an appointee of former President Bill Clinton, grilled attorneys for Hudbay and the government at the hearing, often expressing skepticism of their views.

Judge Danielle Hunsaker, an appointee of just-departed President Donald Trump, used equal skepticism in questioning attorneys for tribes and environmental groups suing to stop the mine.

The third judge on the panel, Eric Miller, also a Trump appointee, said relatively little compared to the other judges.

The precedent-setting nature of this case was underscored by the fact that neither side's attorneys, under questioning from judges, could cite an instance in which an individual mine was either required or not required to put wastes on land with valid claims and valuable minerals.

The judges did not indicate when they will rule.

Hudbay's and government's side

Soto ruled the Forest Service had accepted without question the validity of mining claims where Hudbay plans to put 1.9 billion tons of waste in the Santa Ritas southeast of Tucson.

Despite the 1872 law's requirements for valuable mineral deposits and valid mining claims, Soto wrote that Forest Service records reflect no location of a valuable mineral deposit on those 2,447 acres.

But at this month's hearing, Hudbay and Justice Department attorneys argued that all that's needed is for valid mining claims and mineral deposits to exist on the entire mine site — not on the waste disposal area.

They argued that mine opponents were trying to get this land barred to mineral entry, after Congress has repeatedly refused to do that.

The claims don't have be on "the particular particles of soil or square inches of soil directly under where waste rock and tailings are to be stored," Hudbay attorney Julian Poon said. "As long as the lands, writ large, as long as they generally qualify as mineral lands other than agricultural lands, that's sufficient."

He used the legal term "writ large" to refer to historical decisions leading to the creation of the Rosemont and Helvetia Mining Districts in the Santa Ritas in the 19th century.

Poon noted that the U.S. Bureau of Land Management, which makes final decisions on claim validity, has said a validity exam for a mining claim costs anywhere from $12,000 to $80,000 per claim.

The BLM wrote in 2007 that the cost of conducting validity exams for all 250,000 mining claims filed in the U.S. would exceed the bureau's annual operating budget "many times over."

Environmentalists' and tribes' side

Attorneys representing opponents — including six environmental groups and three tribes — said the 1872 law makes it clear that a valid mineral deposit has to lie on federal land for someone to occupy it for mining purposes, including putting wastes there.

Numerous federal court rulings have reached the same conclusion, they said.

Environmentalist attorney Roger Flynn also cited the 1955 U.S. Common Varieties Act, which he said barred companies from filing mining claims on land containing ordinary rock and stone.

Soto's ruling said geological studies and geological maps in the record "indicate there is primarily common sand, stone, and gravel beneath the land at issue."

"The problem is that the Rosemont's mine's ... proposal to put tailings and waste on federal property doesn't respect limits of the general mining law," said Heidi McIntosh, representing the Tohono O'Odham Nation and the Pascua Yaqui and Hopi tribes.

"The Forest Service ignored the plain meaning and terms in the statute that requires a valuable mineral deposit," she said.

"What we are talking about here are lands where tribes have a 10,000-year history. Their ancestors are buried on this site," McIntosh said. "There are sacred springs and other sites that are important to their cultural tradition. There are village sites and other cultural sites that will be obliterated if the plan goes forward as Rosemont would like to do."

Judge's questions for company

Fletcher questioned the company and government view that valid claims aren't needed.

"For the government to say that these are invalid claims but that nonetheless we will allow the operator to deposit an enormous amount of waste rock and tailings on them, I don't see how the government can get there," Fletcher told the Justice Department's Amelia Yowell.

Yowell replied that since these lands are open to anyone to explore under the 1872 law, for the feds to investigate the claims' validity would be an empty exercise. If one claimant's claims were found invalid, someone else could come back and file another claim, she said.

It's undisputed that Rosemont has a large, valuable copper deposit, and that Rosemont has the right to mine it, Yowell said. "It's also an undisputed fact they have got to have a place to store waste rock and tailings.

"If they couldn't store waste rock and tailings there, that would in effect prohibit Rosemont from exercising its right under the mining law to mine this valuable deposit."

Judges' questions for mine opponents

On the other side, Hunsaker told McIntosh that she's struggling with opponents' arguments, saying, "If our purpose and our policy is to explore and utilize valuable minerals, why would we make a system where you have to pile waste right on top of something that could be valuable?"

Each mining claim that's staked on the ground is about 15 football fields big, McIntosh replied.

That’s plenty of room to accommodate both mineral extraction and for other purposes like the disposal of mine wastes, she said.

McIntosh and Flynn also said the company has alternatives to dumping wastes on federal land lacking valid mining claims. It could file what’s known as “millsite claims” to occupy land without valuable minerals, they said.

The company could also propose a land exchange to get land legally suitable for mine wastes. Or, Hudbay could purchase land elsewhere for that, McIntosh said.