One issue that has come up in recent permitting reform proposals, including the Bipartisan Problem Solvers Caucus proposal that I discussed recently, is how we regulate mining on federal lands. Much of the minerals production in the United States occurs on federal lands, and that includes much of the critical minerals such as rare earths that are required for sophisticated computing technology, batteries, and renewable energy production.

The issue is that hard rock mining on federal land is governed by a hybrid of two kinds of law. First, there is a 19th century law, the Hard Rock Mining Act, that grants broad rights for individuals or corporations to go on the public lands, explore, identify, and develop mineral deposits. Second, there are 20th century laws that seek to manage the environmental impacts of activities on federal lands, including the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and public lands laws for the Bureau of Land Management (BLM) and the Forest Service. Even within those categories there are contradictions. The Hard Rock Mining Act is, on the one hand, very generous to mining activities, since it imposes minimal fees and allows broad access for exploration and development. On the other hand, the Mining Act is also a relic from a very different era of mining, and is not well designed to manage the large-scale processing of millions of tons of rock that are essential to modern mining. The interaction of the Mining Act and the ESA, NEPA, and other environmental laws is contentious, with significant issues still to be fully resolved by the courts – such as whether the BLM has the ability to reject a proposal for a mining operation on its lands because of its environmental impacts.

One particular question that has been a flashpoint recently has been the extent to which mining companies operating on federal lands can use public lands for the disposal of the massive amounts of rock waste that are the inevitable byproduct of contemporary mining operations. Under the Mining Act, mining operators can locate a mining claim on federal land by paying a minimal fee and filing the appropriate paperwork – in theory, that claim is only valid if it is connected with the discovery of valuable minerals on the relevant federal lands. But that requirement is infrequently enforced by the federal land management agencies. And in practice, mining operators have used mining claims as a way to dispose of their massive amounts of rock waste – essentially using public lands as waste disposal sites for minimal costs – without demonstrating the validity of the claims.

In Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 33 F.4th 1202 (9th Cir. 2022), frequently called the Rosemont decision after the mine that was at issue in

the case, the Ninth Circuit held that a company cannot use mining claims federal lands for mine waste disposal (or other operations) where there is evidence that there are no valuable minerals on the mining claim that can make the claim valid. Detailed analysis of the opinion is here. The result puts into question the legality of a significant number of mining operations across the western US, and the mining industry has called for changing the law to authorize historical practice. A bill passed the House this year (HR 3495) that would do just that, and the Problem Solvers Caucus legislation calls for doing the same thing.

There are good arguments, even environmental ones, for some level of federal support for mining activities on federal lands. Decarbonization requires development and large-scale deployment of a range of clean energy technologies that depend on a range of minerals, including rare earths. Reliance on imports from other countries – especially China – for those minerals leaves the US vulnerable to external political pressure (as China has done multiple times in constraining rare earth exports).

But it is also true that the mining industry in the United States has a history of significant environmental damage. And while it may well be the case that modern mining in the US will be less environmentally damaging than mining in other parts of the world, we still may wish to ensure that mining here achieves high environmental standards.

There's a deal to be done here. Modern mining cannot be performed without large areas for disposal of waste rock. Creating a legally secure pathway for allowing for that disposal is an important step to helping advance domestic minerals production. But the public – the owners of these lands – should get both guarantees that the overall mining production that is the basis of that waste is meeting high environmental standards, and that the public is getting some of the value of the mineral production activity that is based on the public lands. (Right now, mining operations pay minimal amounts for their use of the public lands.) Any fix to the Rosemont case should thus include (a) providing land management agencies with the clear power to reject individual mine proposals, and setting lands aside from mining production where other resource values from those lands are high; (b) establishing appropriate fees paid for by mining operations to ensure that clean-up from mining operations meets high environmental standards; (c) a fee for use of the lands for waste disposal that reflects a reasonable share of the value of the overall mining operation (taking into account the necessary risks and uncertainties of mining). (The second component is also in the Problem Solvers Caucus proposal.)

The goal here – as should be the case in any discussion of permitting reform – is, as far is possible, to set rigorous standards, but provide clarity and certainty about those standards and their applications. The former helps us achieve environmental goals; the latter will make it easier for regulated parties to meet those standards, and in many cases advance activities that are essential to achieving important environmental objectives.